COMCAST V. NETFLIX: WHY THE FCC SHOULD REDEFINE MULTI-CHANNEL VIDEO PROGRAMMING DISTRIBUTORS TO INCLUDE OVER-THE-TOP VIDEO PROVIDERS

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INTRODUCTION

In May 2012, Internet powerhouses Hulu, Netflix, YouTube, AOL, Microsoft, and Yahoo hosted the Digital Content NewFronts.[1] The Digital Content Newfronts was launched "to create a marketplace to showcase and sell high-value original video content and adjacent advertising opportunities in digital media."[2] The event was an attempt to show that online content has more to offer than cat videos and "Call Me Maybe" covers.[3] These content providers hope that advertisers will realize that traditional distinctions between cable and broadcast television and Internet content are fading in the face of changing television-watching patterns. Hence the NewFronts, meant to mirror traditional spring "upfronts," which give advertisers a preview of

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1. Dawn C. Chmielewski, *Online video distributors gather to court advertisers*, L.A. TIMES (May 1, 2012), *available at* http://articles.latimes.com/2012/may/01/business/la-fi-ct-newfront-20120501.

2. Press Release, Interactive Advertising Bureau, Second Annual Digital Content NewFronts Announced for April 29 – May 3, 2013 (Nov. 26, 2013) (on file with author), *available at* http://www.iab.net/about_the_iab/recent_press_releases/press_release_archive/press_release/pr-112612 (last visited Jan. 10, 2013).

3. Chmielewski, *supra* note 1.

upcoming shows on broadcast and cable networks like CBS, HBO, and NBC.[4] Original online content is blossoming—online video distributors like Hulu and Netflix are beginning to produce their own shows, rather than relying solely on a business model based on licensing the content made by broadcast or cable networks.[5] Netflix made its original political drama *House of Cards* available in February of 2013, and produced new episodes of FOX's canceled series *Arrested Development,* which were available exclusively through the service in May of 2013.[6] As of January 2013, Hulu had nine original or exclusive series in the works.[7] Sky Angel is an innovative service that provides essentially a cable package via broadband. This original content, and over-the-top video services in general, present a threat to established cable networks who are belatedly trying to take control of online video content delivery through programs like Comcast's "TV Everywhere."[8]

As original content no longer comes solely from broadcast and cable networks, the established distinction between online video distributors (OVDs) and multi-channel video providers (MVPDs) becomes irrelevant. OVDs are online providers such as Hulu and Netflix that compete with cable video offerings, and MVPDs are traditional channel providers, such as broadcast and cable networks. The emergence of online original content draws attention to the confusing regulatory structure existing around television.[9] The Federal Communication Commission (FCC) recently requested comments addressing their interpretation of "multi-channel video programming distributer" in the Communications Act. The current interpretation requires that a channel

4. *TV Upfronts 2012: NBC, ABC, CBS, Fox, and the CW Announce Schedules*, THE DAILY BEAST (May 17, 2012), http://www.thedailybeast.com/articles/2012/05/09/tv-upfronts-2012-nbc-abc-cbs-fox-and-the-cw-announce-schedules.html.

5. Geoff Duncan, *Amazon Joins Netflix, Hulu, Google with Original TV Programming*, DIGITAL TRENDS (May 3, 2012), http://www.digitaltrends.com/home-theater/amazon-joins-netflix-hulu-google-with-original-tv-programming; Nick Summers, *What Hulu's Original Programming Means for TV,* THE DAILY BEAST (May 22, 2012), http://www.thedailybeast.com/articles/2012/05/22/what-hulu-s-original-programming-means-for-tv.html.

6. Alex Ben Block, *Netflix's Ted Sarandos Explains Original Content Strategy,* THE HOLLYWOOD REPORTER (Apr. 7, 2012, 11:26 AM PST), http://www.hollywoodreporter.com/news/netflix-ted-sarandos-original-content-309275.

7. Sarah Perez, *Hulu Debuts Previews of Its 2013 Original Programing and Exclusive Series*, TECH CRUNCH (Jan. 8, 2013), http://techcrunch.com/2013/01/08/hulu-debuts-previews-of-its-2013-original-programming-and-exclusive-series.

8. Matthew Lasar, *TV Everywhere: gift to consumers or plot to kill online TV?,* ARS TECHNICA (Jan. 6, 2010, 9:01 AM MST), http://arstechnica.com/tech-policy/2010/01/tv-everywhere-causing-controversy-everywhere; Richard Lawler, *CBS boss reveals why the company is 'against joining apple TV' (or Hulu),* ENGADGET (Nov. 3, 2011, 10:39 PM), http://www.engadget.com/2011/11/03/cbs-boss-reveals-why-the-company-was-against-joining-apple-tv; Comcast Corp. v. FCC, 600 F.3d 642 (2010).

9. 47 U.S.C. § 151 *et seq*. (1934) [hereinafter *Communications Act*].

provide a transmission path as well as content. This interpretation excludes OVDs, who provide content via the Internet. One possible new interpretation would result in the reclassification of OVDs as multi-channel video distributors.[10] This change would grant OVDs a number of rights that would enable them to compete more effectively with traditional MVPDs and is a step in the right direction for the growth of the industry. Including online content providers in the definition of "multi-channel video programming distributer" is the first step towards a regulatory framework for the digital age.

The future of online content as a viable competitor to broadcast and cable is limited by transmission distinctions that survive from the 1930s, when wireless radio was the pinnacle of technology.[11] In an age where ubiquitous mobile devices offer voice, text, and Internet access, preserving the traditional distinctions of an earlier, simpler time is inefficient. The current system is broken in a way that incentivizes entrenched market participants to exert their power in an anticompetitive manner, stifling innovation and directly countering the public's interest in access to a variety of programming on a variety of platforms. Expanding the definition of MVPDs to include OVDs would mitigate some of the market and regulatory factors currently hindering competition among content providers, and encourage innovation in the field.

Part I of this note will discuss MVPDs and the current television regulatory system. Part II will examine the emerging market for online-only content on platforms such as Hulu, YouTube, and Netflix as a threat to traditional MVPDs. This part will also discuss *Sky Angel*, a seminal case regarding OVDs and MVPDs, as well as cable's response. Part III will argue that the reclassification could solve some of the current market conditions stifling online video content without unduly harming other types of content providers.

I: CURRENT REGULATORY STRUCTURE AND MVPDS

The Communications Act of 1934 created the FCC as an independent expert body to oversee telecommunications, which at the time meant the emerging field of telephony. The FCC's stated purpose was to:

> [R]egulate[. . .] interstate and foreign commerce in communication

10. *Media Bureau Seeks Comment on Interpretation of "MVPD" and "Channel"*, FCC, (Mar. 30, 2012), http://www.fcc.gov/document/media-bureau-seeks-comment-interpretation-mvpd-and-channel.

11. *Communications Act*, *supra* note 9.

> by wire and radio so as to make available, so far as possible, to all people of the United States. . .a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense. . .and for the purpose of securing a more effective execution of this policy by centralizing authority theretofore granted by law to several agencies and by granting additional authority. . .with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "'Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.[12]

Today the FCC's authority to regulate telecommunications encompasses wireless communication, broadcast networks, cable and satellite MVPDs, OVDs, and cable networks, in addition to telephony and radio. The Act divided the FCC's authority into the three silos that still endure, despite advances in telecommunications that were beyond imagination in the 1930s.[13] Title I is a grant of general authority, Title II gives the FCC authority to regulate common carriers, and Title III gives it the authority to regulate provisions related to radio.[14] In 1984, the Cable Communications Act added Title IV, which gives the FCC authority over cable.[15] These three groups constitute the extent of the congressionally mandated authority the FCC exercises today, despite the fact that telecommunications capabilities have expanded dramatically.[16]

The potential for OVDs to be viable competitors to broadcast and cable is limited by archaic distinctions with no basis in current technological realities.[17] The Telecommunications Act defines an MVPD as: "[A] person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming."[18] The FCC has held that an entity need not operate transmission facilities to be considered an MVPD, but may use a third party's facilities to provide access to customers.[19] OVDs

12. 47 U.S.C. § 151.

13. *Communications Act*, *supra* note 9.

14. *Id.*

15. 47 U.S.C. § 551 (2001).

16. Joan Engebretson, *USTA Asks FCC To End Outdated Telecom Rules,* TELECOMPETITOR (Feb. 22, 2012, 11:27 AM), http://www.telecompetitor.com/usta-asks-fcc-to-end-outdated-telecom-rules/.

17. *Communications Act*, *supra* note 9.

18. 47 U.S.C. § 522(13) (1996).

19. *See OVS Second Order on Recon.*, 11 FCC Rcd. 20227, 20301, ¶ 171 (1996) ("[W]e

make multiple channels of video programming available across an existing transmission path—the Internet, rather than through a dedicated cable or satellite path. From a practical standpoint, this could allow OVDs who partner with broadband ISPs to fall under the MVPD umbrella. But many ISPs also provide cable content, and therefore have no incentive to partner with an OVD.[20] It would also be a circuitous way of arriving at a more logical and technologically sound result: remove the archaic language requiring MVPDs to provide a transmission path. This action would not be without precedent; the language in the 1984 Cable Act defining channel refers specifically to cable systems, which are no longer the only systems considered MVPDs.[21]

Historically, MVPD classification has been limited to cable and satellite providers. When cable companies, and later satellite, began providing access to multiple channels, the FCC developed rules for how the channel providers would interact with the existing broadcast networks—the channel content providers.[22] These program access rules were intended to prevent anticompetitive behavior between MVPDs, and required programming networks affiliated with MVPDs to act in good faith when dealing with rival MVPDs.[23] Originally, a channel was a path provided over a cable line, but the advent of satellite required a broader definition. Satellite was eventually designated an MVPD because it did have a method of distribution, even though it was not over a cable line.[24] The FCC also considers AT&T and Verizon's Internet Protocol Television (IPT) MVPDs, despite the lack of transmission path.[25] Broadcast networks are required to license content to any MVPD who wants it, though the MVPDs must obtain consent to retransmit the content.[26] Competition between MVPDs is encouraged and protected by the FCC, though they must pay a number of fees and meet certain standards.

find Rainbow's argument that video programming providers cannot qualify as MVPDs because they may not operate the vehicle for distribution to be unsupported by the plain language of Section 602(13), which imposes no such requirement.").

20. *E.g.*, Comcast, Time Warner Cable.

21. *See* 47 U.S.C. § 522(4) (defining a "channel" as "a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel (as television channel is defined by the FCC by regulation)").

22. Cable Communications Policy Act of 1984, Pub. L. No. 94 98-549, 98 Stat. 2780.

23. *Still No Online Cable System – Sky Angel vs. Discovery Channel*, CARL KANDUTSCH LAW OFFICE (Jan/Feb 2012), http://www.kandutsch.com/articles/still-no-online-cable-system-sky-angel-vs-discovery-channel.

24. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

25. *What the Sky Angel and Discovery Battle Could Mean for Apple*, TASEL'S RAMBLINGS (June 4, 2012), http://tasel.wordpress.com/2012/06/04/what-the-sky-angel-and-discovery-battle-could-mean-for-apple.

26. 47 U.S.C. § 325(b)(1) (2010).

II: ORIGINAL CONTENT ONLINE, THE SKY ANGEL CASE, AND CABLE'S RESPONSE

As a new approach to television programming, original online content occupies a unique place in the morass of federal regulations applying to content and media. The Telecommunications Act of 1996 only mentions the Internet once, but to the extent that it does so, the FCC regulates the Internet as a whole under its ancillary authority to regulate information systems.[27]

The advent of online only content unleashes a storm of regulatory unease due to its existence outside of the existing regulatory framework that applies to cable and broadcast network programming. Broadcast as used here is defined as "to transmit a program or some information by radio or television."[28] Cable is defined as a system of providing television to consumers via radio frequency signals transmitted to televisions through fixed coaxial cables or light pulses through fiber-optic cables.[29] As a result of the historical evolution of the technology and statutory updates, the only intrinsic distinction between cable and broadcast is the medium through which they are conveyed. On the other hand, broadband is defined as signals over a wide range of frequencies in high-capacity telecommunications, especially as used for access to the Internet.[30] Broadband provides access to any number of websites and services, including those like Sky Angel and Netflix.

Original online content exists in a nebulous half-zone, neither broadcast nor cable, but programming nonetheless. Like cable, online content can be available through any number of paid subscriptions, and is not subject to content restrictions or compulsory licensing. However, unlike a cable subscription, which guarantees a certain quality of picture and live viewing, streaming video is only as good as your Internet connection.

Change is necessary to prevent the stagnation of these emerging content providers. The FCC has taken steps to protect the public interest in access to a variety of programming available through different means. In its approval of the proposed merger between Comcast and NBCUniversal in 2011, the FCC imposed conditions on the companies requiring them to ensure reasonable access to programming for

27. Telecommunications Act, *supra* note 24; American Library Ass'n v. FCC, 406 F.3d 689, 692 (D.C. Cir. 2005).

28. *See* broadcast, DICTIONARY.COM, http://dictionary.reference.com/browse/broadcast (last visited Aug. 31, 2014).

29. *See* cable television, DICTIONARY.COM, http://dictionary.reference.com/browse/cable?s=t (last visited Aug. 31, 2013).

30. Broadband, DICTIONARY.COM, http://dictionary.reference.com/browse/broadband?s=t (last visited Jan. 10, 2013).

multichannel distribution, protect the development of online competition, and provide access to Comcast's distribution systems to competitors.[31] These conditions were preemptive attempts to prevent predicted anticompetitive strategies, particularly in the restriction or blocking of online video content.[32] The FCC also forced NBCUniversal to relinquish any executive control over Hulu, although it did allow them to retain their ownership interest.[33] Steps like these mitigate anticompetitive behavior as a result of these types of large mergers, but cannot stop the unequal position held by online video providers under the current scheme.

This battle is being waged primarily between cable and broadcast giants and the larger OVDs like Netflix.[34] As services like Netflix move into territory originally inhabited by their cable competitors they threaten entrenched interests. The revival of *Arrested Development* on Netflix is an example of this. *Arrested Development* aired on FOX Network from 2003 until 2006, when it was unceremoniously canceled due to low ratings, to the dismay of its very small, but very loyal fan-base.[35] The half hour comedy was about a wealthy family "who lost everything and the one son who had no choice but to keep them all together."[36] *Arrested Development* told the story of the Bluth family after their patriarch was arrested for fraud and later accused of terrorism. But *Arrested Development* was more than the story of a dysfunctional family; it is the story of a smart, fast paced show that was canceled before its time,[37] but whose sacrifice helped pave the way for other smart, fast-paced shows.[38]

31. Kristin Hamill, *U.S. approves Comcast-NBC merger,* CNN MONEY (Jan. 18, 2011, 6:06 PM ET), http://money.cnn.com/2011/01/18/technology/fcc_comcast_nbc/index.htm.

32. *Id.*

33. Press Release, Department of Justice, Justice Department Allows Comcast-NBCU Joint Venture to Proceed with Conditions (Jan. 18, 2011), *available at* http://www.justice.gov/atr/public/press_releases/2011/266149.htm.

34. *The 2012 Big Broadcast Survey: Big Broadcast Industry Global Trend Index showed that launching new channels, the only comparable metric, was seventh on a list of budget priority implementation*, DEVONCROFT (Aug. 8, 2012), http://blog.devoncroft.com/2012/08/08/analyzing-where-is-money-being-spent-in-the-broadcast-industry-the-2012-bbs-broadcast-industry-global-project-index/.

35. *Arrested Development,* IMDB.COM, http://www.imdb.com/title/tt0367279 (last visited Aug. 31, 2014).

36. *Arrested Development Taglines,* IMDB.COM, http://www.imdb.com/title/tt0367279/taglines (last visited Aug. 31, 2014).

37. The fast-paced narrative, nested and repeating jokes, unlikeable characters, and lack of a laugh track are just some differences between the show and contemporaries like *Will and Grace*, *Everybody Loves Raymond*, and *Frasier*. *See 25 Best Cult TV Shows from the Past 25 Years*, IMDB PICKS (Aug. 3, 2012),

http://www.imdb.com/list/ls058863262; Bradford Evans, *53 Arrested Development Jokes You Probably Missed,* (Aug. 20, 2012), http://splitsider.com/2012/08/53-arrested-development-jokes-you-probably-missed/.

38. Meredith Blake, *'30 Rock' survives and should endure,* L.A. TIMES (Oct. 4, 2012),

The catch-22 of *Arrested Development* is that it failed to find an audience in many ways because of the television environment in which it debuted. However, it was debuting in this environment that made the show such a departure and creative—if not commercial—success.[39] The show's use of subtle gags, recurring themes that rewarded rewatching, and complicated plots with multiple arcs, was like nothing else on television at the time. *Arrested Development* refused to stop pushing boundaries, or writing jokes that referred to split second moments from episodes months earlier. For this and other reasons, it was a critical darling but a commercial flop, and FOX cancelled the series during its abbreviated third season.[40]

What doomed the show on FOX was in part what made it a perfect fit for Netflix. In May of 2013, Netflix made thirteen new episodes available for streaming.[41] All the episodes were made available at the same time, allowing "binge-viewing." This method of delivery is a departure from the broadcast and cable tradition, which adheres to a television season, typically consisting of 22-24 weekly episodes airing from September until May. Netflix has already seen a positive response to an immediate release model for their original show *House of Cards*.[42] For a number of reasons, *Arrested Development's* online resurrection is reflective of a massive shift in our cultural connection to television.[43]

The reason behind this shift towards more original content creation is primarily monetary.[44] Companies like Hulu, Netflix, Amazon, and YouTube are no longer satisfied with providing access to—and

http://articles.latimes.com/2012/oct/04/entertainment/la-et-st-30-rock-20121004.

39. Alison Powell, *A family affair,* THE GUARDIAN (Mar. 11, 2005), http://www.guardian.co.uk/culture/2005/mar/12/comedy.television ("As Hollywood agents worry about the demise of the town's lowing cash cow, the multi-camera, staged sitcom, here to save the day is Arrested Development [sic], a farce of such blazing wit and originality, that it must surely usher in a new era in comedy.").

40. Tim Goodman, *R.I.P., 'Arrested Development' – critics' fave not given room to grow,* SFGATE.COM (Mar. 28, 2006), http://www.sfgate.com/entertainment/article/R-I-P-Arrested-Development-critics-fave-2500890.php.

41. Lauren Indvik, *New Arrested Development Episodes Coming to Netflix in 2013,* MASHABLE (Nov. 18, 2011), http://mashable.com/2011/11/18/arrested-development-netflix.

42. James Poniewozik, *House of Cards Watch: I Ate the Whole Thing,* TIME ENTM'T (Feb. 8, 2013) http://entertainment.time.com/2013/02/08/house-of-cards-watch-i-ate-the-whole-thing.

43. *See* Kyle Buchanan, *How the Return of* Arrested Development *Will Rewrite the New Rules of TV Watching*, VULTURE (Apr. 18, 2012, 12:15 PM) http://www.vulture.com/2012/04/how-arrested-development-will-rewrite-tvs-rules.html (highlighting the effect presenting all ten episodes at once will have on traditional norms of television, such as whether to watch all the episodes in one sitting, and how to discuss the show on Twitter).

44. Jeremy Scott, *The Original Content Wars Have Begun, But They're Bigger Than Hulu vs. Netflix*, REELSEO (Jan. 18, 2012, 2:58 PM), http://www.reelseo.com/original-content-wars-begun-hulu-series-battleground-premieres-february/.

purchasing expensive licenses to stream—existing content.[45] As more programming content eventually makes its way online, the companies who own distribution rights see the value in creating their own delivery services to compete with the larger streaming websites like Hulu and Netflix.[46] This leaves those streaming companies without the guarantee of available programming content to fuel their subscription-based service and satisfy users who can cancel a subscription at any time.[47] Most of these OVDs, like Hulu and Netflix, are turning to production of original content to fill the gap left by a shrinking licensing operation.[48] Although it does not require purchasing an expensive license, this content does not have a built-in audience the way that streamed broadcast or cable shows do, and OVDs must bear all production and development costs. But the rewards or projected rewards are sufficient that this is becoming increasingly common. In many ways, this was the next logical step for Netflix and Hulu, probably precipitated only slightly by increasingly hostile licensing prospects with major networks.[49]

An example of a hostile licensing situation can be seen in *Sky Angel v. Discovery*. The case is also part of the reason that the FCC is reexamining the definition of MVPD.[50] Sky Angel is a service that provides access to television content but is not considered an MPVD.[51] It contracts with channels to provide access to content, and customers receive the content via a set-top box connected to their TV.[52] The only difference between Sky Angel's service and a traditional cable provider like Comcast is that customers pay Sky Angel for the TV channels and also pay an Internet Service Provider (ISP) for the broadband over which the channels are relayed.[53] The dispute arose when the Discovery Network tried to break its contract with Sky Angel, citing concerns with how its content was transmitted.[54]

Sky Angel, in its program access complaint to the FCC, alleged that Discovery, which is affiliated with DIRECTV, terminated its affiliation

45. Summers, *supra* note 5.
46. *Id.*
47. *Id.*
48. *Id.*
49. Anna Heim, *Why Amazon, Hulu, and Netflix's move to original content is game-changing,* TNW (Feb. 19, 2012, 11:21 PM), http://thenextweb.com/media/2012/02/19/why-amazon-hulu-and-netflixs-move-to-original-content-is-game-changing.
50. Sky Angel v. Discovery, Order Adopting Protective Order, DA 12-644 (Apr. 25, 2012), *available at* http://www.fcc.gov/document/sky-angel-v-discovery-order-adopting-protective-order.
51. *What the Sky Angel Battle Could Mean for Apple TV*, *supra* note 25.
52. *Id.*
53. *Id.*
54. *Id.*

because DIRECTV did not want to compete with an OVD for viewers.[55] Program access rules prohibit such behavior between MVPDs.[56] Sky Angel argued that it should be considered an MVPD, which would require Discovery to allow Sky Angel to carry its content,[57] because they "make available for purchase, by subscribers or customers, many channels of video programming."[58] The Media Bureau initially dismissed the complaint, because only MVPDs have standing to bring program access complaints, and because Sky Angel did not provide a physical transmission path for the content, and was therefore not an MVPD.[59] The FCC sought comments on the implications of expanding the definition of MVPD to include providers like Sky Angel.[60] This licensing disagreement has potentially huge implications for the way the television industry operates.

The industry is already in flux, and original online content is only in its infancy. OVDs are pouring money into original content. In the upcoming year, Hulu's budget for original programming is 500 million dollars.[61] To compare, *Game of Thrones*, HBO's high-concept, big-budget reimagining of George R.R. Martin's series of novels *"A Song of Ice and Fire*," had a first season budget of approximately $50-60 million, and FX's half hour hit *"It's Always Sunny in Philadelphia*" films an episode for around $400,000, a quarter of the industry average.[62]

Streaming online content—whether originally aired on television or not—has undoubtedly changed the structure of the television industry.[63] A 2011 Nielson report revealed that the percentage of the population who watch video online at least once per month exceeded the percentage that watches TV at least once a month in 2013.[64] Same day cable ratings

55. *Still No Online Cable System*, *supra* note 23.

56. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

57. *What the Sky Angel Battle Could Mean for Apple TV*, *supra* note 25.

58. Communications Act of 1934, 47 U.S.C.A § 602, *repealed by* Telecommunications Act of 1996, 47 U.S.C. § 548(d).

59. *Still No Online Cable System*, *supra* note 23.

60. *Media Bureau Seeks Comment on Interpretation of "MVPD" and "Channel"*, *supra* note 10.

61. Summers*, supra* note 5.

62. Lesley Goldberg, '*Game of Thrones': By the Numbers,* THE HOLLYWOOD REPORTER (Apr. 14, 2011, 12:23 PM), http://www.hollywoodreporter.com/news/game-thrones-by-numbers-178659; Meg James, '*It's Always's Sunny in Philadelphia': A low-budget hit,* L.A. TIMES (Sept. 25, 2010), http://articles.latimes.com/2010/sep/25/business/la-fi-ct-sunny-20100926.

63. Dr. Nicola Searle, *Changing Business Models in the Creative Industries: The Cases of Television, Computer Games and Music*, INTELLECTUAL PROPERTY OFFICE (Oct. 2011), *available at* http://www.ipo.gov.uk/ipresearch-creativeind-full-201110.pdf.

64. 84 percent to 83 percent, respectively, but 83 percent for TV represents an 8.5 percent drop from 2011. Jim Edwards, *UH OH: New Neilson Data Suggest People Aren't Watching TV Anymore,* BUSINESS INSIDER (June 2, 2012, 11:30 AM),

are down almost 11 percent from 2012, and subscribers have declined sharply as well.[65] Television ratings for scripted dramas are declining every year.[66] Conversely, the Internet Advertising Revenue Report found that interactive video raised more than $1 billion in advertising revenue in the first half of 2012, an 18 percent increase.[67]

The business model for OVDs' original online content varies. Amazon, through Amazon Studios, has launched the "Get Your Series Made" project, which solicits ideas for 22-minute comedies or children's programming from the general public.[68] People can submit their ideas publicly or privately, and receive $10,000 if their idea is chosen for the "Development Slate."[69] The program also offers paid directing opportunities and $55,000 if your series is eventually created, as well as a percentage of the merchandising profits.[70] YouTube recently launched over 100 original channels with made-for-web content, allowing celebrities such as Amy Poehler[71] and Wil Wheaton to make original online programming.[72] The most popular YouTube channel has over five million subscribers; viewership numbers that outpace many traditionally broadcast television shows.[73] These are just some of the ways that traditional business models are evolving in an age where online content is edging its way into the mainstream.

In most cases, these companies are taking advantage of certain elements of their pre-content creation businesses. Netflix alone has years of data collected through user ratings to shape its content production plans.[74] The algorithms that Netflix uses to predict how popular a streaming movie or television series will be can also be applied to the

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http://www.businessinsider.com/uh-oh-new-nielsen-data-says-people-are-turning-away-from-tv-2012-6.

65. *Id.*

66. Jace Lacob, *Desperate Times for TV Networks,* THE DAILY BEAST (Aug. 8, 2011), http://www.thedailybeast.com/articles/2011/08/08/with-desperate-housewives-ending-tv-networks-ponder-future-without-massive-hits.html.

67. Interactive Advertising Bureau, *supra* note 2.

68. *Submitting a Series Idea*, AMAZON STUDIOS, http://studios.amazon.com/help/submitting-a-series-idea (last visited Aug. 31, 2014).

69. *Amazon Studios Frequently Asked Questions*, AMAZON STUDIOS, http://studios.amazon.com/faq#storybuilder (last visited Aug. 31, 2014).

70. *Id.*

71. SMART GIRLS AT THE PARTY, http://sgatp.net (last visited Aug. 31, 2014).

72. TABLETOP, http://tabletop.geekandsundry.com (last visited Aug. 31, 2014).

73. Alyssa Rosenberg, *How Many People Are Actually Watching Web Television?,* THINK PROGRESS (May 30, 2012, 12:43 PM), http://thinkprogress.org/alyssa/2012/05/30/491926/how-many-people-are-actually-watching-web-television/?mobile=nc.

74. Nick Summers, *Ted Sarandos' High-Stakes Gamble to Save Netflix,* NEWSWEEK (May 14, 2012, 1:00 AM), http://www.thedailybeast.com/newsweek/2012/05/13/ted-sarandos-high-stakes-gamble-to-save-netflix.html.

creation of new shows, giving it a more mathematically driven way to replace focus groups in new product development.[75] Hulu has similar troves of watching pattern information to guide it as it develops new projects. And YouTube has hundreds of millions of visitors who it can hope to lure to its premium content.

As more and more people choose to watch video online, the television industry will be forced to adapt. Today, live sporting events are among the only programming with same-day ratings anything like ten years ago.[76] Cable companies might feel confident that whatever happens, viewers will still tune in to Monday Night Football and March Madness, but they should be wary of complacency: more than 8 million people watched Felix Baumgartner skydive from the edge of space live.[77] They watched it on YouTube.[78]

But original online content, and online streaming generally, threatens the entrenched interests of cable and broadcast networks. The availability of content online allows viewers who no longer wish to pay for an expensive cable package to "cut the cord." This in turn incentivizes providers like Comcast, who also offer broadband services, to throttle or cap data usage in an attempt to retain cable subscriptions.

Just as these emerging content platforms threaten entrenched interests, those players have the power to act anti-competitively and hinder the development of these new services. Online content streaming whenever, wherever, is increasingly attractive to a society that places a premium on mobility and instant gratification.[79] Time Warner and Comcast announced plans for "TV-Everywhere" in early 2011, in what public interest groups considered an obvious attempt to stifle competition from providers like Hulu and Netflix.[80] With "TV Everywhere," Comcast and Time Warner will make their subscription plans available online for their subscribers.[81] The plan would undoubtedly bolster falling

75. *Id.*

76. Bill Carter, *Prime-Time Ratings Bring Speculation of a Shift in Habits,* N.Y. TIMES (Apr. 22, 2012), http://www.nytimes.com/2012/04/23/business/media/tv-viewers-are-missing-in-action.html?pagewanted=all&_r=0.

77. Scott Sterling, *One Small Step for Baumgartner, One Giant Pitfall for All TV Networks,* DIGITAL TRENDS (Oct. 17, 2012), http://www.digitaltrends.com/opinion/one-small-step-for-baumgartner-one-giant-pitfall-for-tv-networks.

78. *Id.*

79. Henry Blodget, *Don't Mean To Be Alarmist, But The TV Business May Be Starting To Collapse,* BUSINESS INSIDER (June 3, 2012, 7:51 AM), http://www.businessinsider.com/tv-business-collapse-2012-6.

80. Marvin Ammori, *TV Competition Nowhere: How the Cable Industry is Colluding to Kill Online TV,* FREE PRESS (Jan. 2010), http://www.freepress.net/sites/default/files/fp-legacy/TV-Nowhere.pdf.

81. Press Release, Comast, Comcast and Time Warner Announce Long-Term TV Everywhere Agreement for Xfinity Customers (Feb. 1, 2011), available at

subscription numbers for these cable companies, and has the additional benefit of cutting the legs out from under providers like Hulu and Netflix. Viewers might end up without a legal means of accessing online content without purchasing expensive cable subscriptions. Most importantly, these practices entrench incumbent entities at a time when the nature and method of the television industry is changing rapidly.[82] This has the potential to harm the public interest by reducing access to content that consumers want.

The ad-based business model that drove the expansion of cable and broadcast networks has been dying since the advent of the DVR.[83] New devices like Dish Network's Hopper allow users to automatically skip commercials on ABC, CBS, FOX, and NBC.[84] With advanced devices like these, or even standard issue DVRs, advertisers can no longer feel confident that their expensive ads are even viewed. In addition to a shift away from valuable television ads, the growth of online piracy takes billions annually from the television networks.[85] This hurts the ad-based business model by destroying that half of the profit margin.

While the alarmists insisting that television as we know it will soon cease to exist may be over-exaggerating, it is worth noting that the state of the industry is unlikely to be recognizable in the next ten years. Ten years ago, amidst concerns over online music piracy, the Recording Industry Association of America ("RIAA") predicted that the music industry would cease to exist unless piracy was eradicated.[86] The music industry endures, but the recording labels' place in that industry has been dramatically diminished.[87] It is reasonable for television content producers and access providers to worry that the market may evolve and move on without them, but the FCC must ensure that market entrants and emerging media are able to compete without discrimination, for the best interest of the public.

The FCC is aware that the current regulatory structure does not promote competition from OVDs: "[w]ithout access to online content on

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http://corporate.comcast.com/news-information/news-feed/comcast-and-time-warner-announce-long-term-tv-everywhere-agreement-for-xfinity-customers.

82. Ammori, *supra* note 8080.

83. John Osborn, *Three Important T/V (Television/Video) Advances Of 2013,* TV- THE NEXT GENERATION (SM) BLOG (Dec. 11, 2013), http://tv-thenextgeneration.com/blog/2013/12/11/three-important-tv-televisionvideo-advances-of-2013-2.

84. *Hopper*, DISH, http://www.dish.com/technology/hopper/ (last visited Aug. 31, 2014).

85. Lamar Smith, *Why we need a law against online piracy,* CNN OPINION (Jan. 20, 2012, 3:21 PM), http://www.cnn.com/2012/01/20/opinion/smith-sopa-support.

86. *See generally* STEVE KNOPPER, APPETITE FOR SELF DESTRUCTION: THE SPECTACULAR CRASH OF THE MUSIC INDUSTRY IN THE DIGITAL AGE 136 (2009).

87. *See id.*

competitive terms, an MVPD would suffer a distinct competitive disadvantage compared to Comcast, to the detriment of competition and consumers."[88] The FCC acknowledges the value of original online content: OVDs "offer a tangible opportunity to bring customers substantial benefits" and they "can provide and promote more programming choices, viewing flexibility, technological innovation and lower prices."[89] The FCC has also concluded that OVDs pose a "potential competitive threat" and that they "must have a similar array of programming" if they are to "fully compete against a traditional MVPD."[90]

Antiquated compulsory licenses and retransmission consent requirements also burden OVDs. The Copyright Act of 1976 defined the retransmission of copyrighted broadcast content by a cable operator as infringement.[91] The statute altered the common law regime that had developed, which considered that when retransmitting, the cable company acted more as a passive viewer, rather than an active infringer, so that retransmission was not a copyright violation.[92] Under the Copyright Act, home television viewers remained free from liability, but cable companies could no longer retransmit broadcast content without permission.[93] In order to avoid the innumerable licensing negotiations inevitable under the new regulatory scheme, the Act also established a system of compulsory licenses enabling cable operators to retransmit broadcast content.[94] So long as the cable companies satisfy the terms of the licenses, copyright owners are required to authorize retransmission.[95] The fundamental policy consideration underlying these statutory requirements was the understanding that the broadcast content was very popular programming, whose availability on cable networks was desirable to consumers.[96] The Cable Act sought to balance the power between broadcast networks and cable companies by allowing broadcasters to negotiate compensation for their signals.[97] The likelihood that broadcast station owners would act as rights aggregators by

88. *See* Comcast Corp., General Electric Company & NBC Universal, Inc., *Memorandum Opinion and Order*, 26 FCC Rcd. 4238, 4266, ¶ 70 (2011).

89. *See id* at 4268–69, ¶ 78.

90. *See id* at 4269, ¶ 79, 4272–73, ¶ 86.

91. 17 U.S.C. § 101 (2010).

92. Teleprompter Corp. v. CBS, Inc., 415 U.S. 394, 408 (1974).

93. 17 U.S.C. § 111 (2010).

94. *Id.*

95. *Id.*

96. Amendment of the Commission's Rules Related to Retransmission Consent, *Notice of Proposed Rulemaking*, 26 FCC Rcd. 2718, 2719 (2011).

97. Cable Television Consumer Protection and Competition Act, 42 U.S.C.A. § 609 (West 2014).

assembling the licenses to the programs produced by the station or licensed from other sources and then offering them to cable companies as one single entity—as cable providers currently do—seems not to have been considered.[98]

The FCC, in an attempt to simplify matters between cable companies and broadcast networks, gave broadcasters two choices for their retransmission consent requirements:

> Pursuant to the statutory provisions enacted in 1992, television broadcasters elect every three years whether to proceed under the retransmission consent requirement of Section 325 of the Act, or the mandatory carriage ("must carry") requirements of Section 338 and 614 of the Act. . . . [A] broadcaster electing must carry status is guaranteed carriage on cable systems in its market, and the cable operator is generally prohibited from accepting or requesting compensation for carriage, whereas a broadcaster who elects carriage under the retransmission consent rules may insist on compensation. . . . As an alternative to seeking mandatory carriage, a broadcaster may elect carriage under the retransmission consent rules, which allow for negotiations with cable operators and other MVPDs [multichannel video programming distributors] for carriage.[99]

Retransmission consent fees are currently a major source of revenue for broadcast networks.

But online-only content is not subject to the same compulsory licensing and retransmission consent regulations that attach to every broadcast program. The United States is a member of several international treaties preventing compulsory licensing for online programming content.[100] Additionally, due to the existence of compulsory licenses, local stations contracting with networks for programming don't bother to get the right to sub-license to re-transmitters, which prevents OVDs from retransmitting local broadcast stations. This prevents OVDs from airing broadcast content for a certain period of time after the original airdate, which puts them at a

98. Preston Padden, Senior Fellow, Silicon Flatirons Center, Testimony before the U.S. Senate Committee on Commerce, Science and Transportation (July 2012), *available at* http://siliconflatirons.com/documents/publications/policy/PaddenTestimony.pdf .

99. 26 FCC Rcd. 2718, 2721 (2011).

100. "[N]either Party may permit the retransmission of television signals (whether terrestrial, cable, or satellite) on the Internet without the authorisation of the right holder or right holders…." Australia FTA, U.S.-Austl., Art. 17.4.10(b), Jan. 1, 2005; *See also*, Dominican Republic-Central America-U.S. FTA, U.S.-Costa Rica-Dom. Rep.-El Sal.-Guat.-Hond.-Nicar. FTA, Art. 15.5.10(b), Aug. 5, 2004; U.S.- Bahrain FTA, U.S.-Bahr., Art. 14.4.10(b), Sept. 14, 2004; Morocco FTA, U.S.-Morocco, Art. 15.5.11(b), June 15, 2004.

fundamental competitive disadvantage and contravenes the stated purpose of the Communications Act to foster competition in the telecommunications market. Although the retransmission consent and must-carry regimes are fundamentally flawed, reclassifying OVDs as MVPDs in certain circumstances would mitigate some of the competitive harms those regimes cause.

III: CLASSIFYING OVDS AS MVPDS WOULD SOLVE SOME OF THESE PROBLEMS

The distinction between OVDs and MVPDs is shrinking rapidly. The invisibility of these issues to consumers is one reason why the FCC should interpret the definition of MVPD to include OVDs like Sky Angel, Netflix, and Hulu, whose function is the equivalent of a cable provider or production of original content, highlights the logical disconnect involved in distinguishing them from Comcast or Time Warner. The average television watcher often has no idea whether they are watching a cable or broadcast channel, and as the distinctions between the two become even less relevant to consumers, it is illogical to maintain a regulatory distinction, especially given the other factors. In this case, the extant regulatory structure is choking emerging media. Consumers who want to access their favorite cable programs online, as they are used to doing with their broadcast shows, are increasingly prevented without expensive mobile subscription costs.

Expanding the definition of MVPD to include online video distributors would force networks to allow online access to their content, and extend to OVDs the same protection that cable and satellite companies enjoy.[101] For example, if a channel distributer is considered an MVPD, channels cannot refuse fair value to have their channel made available on the distributer.[102] This would resolve a number of licensing difficulties currently facing OVDs.

MVPDs like Comcast and Time Warner are increasingly providing their own over-the-top service, further highlighting the disconnect between the statutory definition and the technological reality.[103] Additionally, cable providers have not always provided a complete transmission path, so requiring that a video provider offer an end-to-end path for their content might actually exclude entities currently considered MVPDs.[104]

101. *What the Sky Angel Decision Could Mean for Apple TV*, *supra* note 25.

102. 47 U.S.C. § 325(b)(1) (2010).

103. *See, e.g.*, Lasar, *supra* note 8.

104. Reply Comments of Public Knowledge, Petition for Rulemaking to Amend the FCC's Rules Governing Retransmission Consent, MD Dkt. No. 10-71, 7 (June 2010),

Classifying providers like Sky Angel and Hulu as MVPDs would be a step forward in legitimizing these services as important players in the field of media, and towards increasing competition in the MVPD marketplace.[105] It would also stabilize a licensing structure that is labyrinthine at best. OVDs are facing threats from cable companies who want to run online video the way they do their cable subscriptions, from networks who are reluctant to license content for online viewing, and from broadband providers who are incentivized to slow access to streaming content. Including OVDs in the definition of MVPD could level the playing field by applying regulations equally to equivalent services. Opposed to an expansion of the definition are cable companies like Comcast and Verizon, who argue that the statute requires that MVPDs provide a transmission path as well as access to channels.[106] On the other side, some argue that OVDs would be hindered by the imposition of legacy regulations, but it seems possible that the benefits to OVDs would outstrip the potential for harm. Guaranteed access to programming and exemption from data caps are just two of the benefits OVDs would enjoy if included in the definition of MVPD.

Just as the current definition limits which video providers are MVPDs, expanding the definition to include OVDs must not throw the industry into disarray by suddenly labeling any and all content providers MVPDs. Identifying OVDs as a second, online category of MVPD would maintain some traditional distinctions while still enabling them to exercise benefits as MVPDs. Only certain OVDs should be included, based on the following limiting principles:

1. The online MVPD must be able to ensure geographic locking.
2. The online MVPD must be secure (for transmission of data and purchases).
3. The online MVPD must be able to offer tiered services, including the minimum service tier, and otherwise may

available at http://www.publicknowledge.org/files/docs/10.06.03%20Reply%20Comment%20Final2.pdf.

105. Reply Comments of the Walt Disney Co., Interpretation of the Terms "Multichannel Video Programming Distributor" and "Channel" As Raised in Pending Program Access Complaint Proceeding, ("Online distributors have great potential to increase competition in the MVPD marketplace, thereby benefiting both consumers and content providers."), MB Dkt. No. 12-83, 6 (June 2012), *available at* http://apps.fcc.gov/ecfs/document/view;jsessionid=RJfdPh9J9mFvDPyvd6QdLTnLmmDJptQYTRxChnywGNkTLJjcHnY8!-1969853125!NONE?id=7021922672.

106. Reply Comments of the National Cable & Telecomm.'s Assoc., Interpretation of the Term "Multichannel Video Programming Distributor" and "Channel" as Raised in Pending Program Access Complaint Proceeding, MB Dkt. No. 12-83 (June 2010), *available at* http://apps.fcc.gov/ecfs/document/view?id=7021922687.

offer Pay, VOD and PPV.

4. If the online MVPD desires to carry television broadcast signals, it must have retransmission consent from each such broadcast station.
5. The online MVPD must pay compulsory copyright license fees based on the tier of carriage revenues.
6. The online MVPD should have "'must carry"' obligations upon reaching 5,000,000 customers if it wants to carry local stations.
7. Within reason, the online MVPD should have to comply with current standards of an MVPD, which include closed captioning and emergency services, among others.[107]

Imposing such limits would prevent chaos in the industry, but would also make it possible for some OVDs to retain that classification if they prefer.

The television industry and the FCC must take steps to ensure that the public interest is met, that competition continues to flourish, and that advancement in both service and technology in the public's interest remains the ultimate goal.

CONCLUSION

What will happen when vast amounts of original content are no longer subject to compulsory licenses and retransmission consent negotiations remains to be seen, but as Netflix, Hulu, YouTube and others expand their offerings, and services like Sky Angel and Aereo emerge, it is a future that has become much more probable than possible. These issues are not limited to regulatory oversight concerns, but relate to a central tenant of telecommunications regulation: the public's interest. It is likely that if compulsory licenses were repealed, broadcasters would adopt a strategy similar to that used in cable-to-cable transactions, in which the network aggregates the content licenses and negotiates with others on behalf of all the content.[108]

Online content joins an entrenched battle between cable and broadcast for viewers, and only time will tell what effect it will have on

107. Reply comments of M3X Media, Inc., Interpretation of the Term "Multichannel Video Programming Distributor" and Channel" as Raised in Pending Program Access Complaint Proceeding, MB Dkt. No. 12-83 (June 2010), *available at* http://apps.fcc.gov/ecfs/document/view?id=7021922749.

108. John Bergmayer, *Cable and Satellite Compulsory Copyright Licenses,* SILICON FLATIRONS CENTER (2011), *available at* http://www.siliconflatirons.com/documents/publications/report/CompulsoryCopyrightLicenses.pdf.

these behemoth entities, and they on it. History has shown that regulations attempting to process this dynamic field in a static way risk irrelevance before they can even be implemented. It is critical that the public's interest in access to high quality content is not stifled by outdated attempts to preserve cable and broadcast network's market share. In an ideal world, perhaps the Cable Act of 1934 would be completely scrapped, and the industry permitted to begin again. In the real world, however, updating the interpretation of MVPD to include OVDs is a logical progression within the extant regulatory framework that will encourage competition and innovation in a growing and valuable industry.