



Testimony of John Bergmayer  
Senior Staff Attorney  
Public Knowledge

Before the  
U.S. Senate  
Committee on Commerce, Science, and Transportation  
Subcommittee on Communications, Technology and the Internet

Hearing On: The State of Video

Washington, DC  
May 14, 2013

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Good morning Chairman Pryor, Ranking Member Wicker, and members of the Subcommittee. Thank you for the opportunity to participate in today’s hearing. My name is John Bergmayer, and I work for Public Knowledge, a non-profit public interest organization that seeks to ensure that the public benefits from a media ecosystem that is open, competitive and affordable. Today, I am going to recommend that the Senate consider re-aligning some of the rules that govern the video marketplace so that they better serve the public interest, allowing all creators to be fairly compensated while bringing down bills and increasing the choices available to viewers.

## **INTRODUCTION**

There is widespread agreement that we are living in a golden age of television. Technology has increased people's choices so they can watch just the shows and movies they are interested in. Digital technology allows cable and satellite services to fit more channels in the same bandwidth. DVRs give people control over how they watch broadcast and cable programming, and online streaming services provide access to a large back catalog of movies and TV shows. Computers, smartphones, tablets, and connected devices are changing what it means to “watch TV.”

These new choices have allowed people to watch more specialized programming that fits their individual tastes. But while some pessimists have predicted that new technology would create a “filter bubble” that isolates people from each other and deprives them of common cultural reference points, this has not happened with video. Programs like House of Cards, Mad Men, Game of Thrones, Dancing with the Stars, NCIS, and (of course) live sports are still part of our cultural landscape. Even in this era of 500 channels, these kinds of programs still inspire discussions around the water cooler and on Twitter.

But despite all of the great programming and groundbreaking devices, many Americans are locked into a television business model that limits competition and choice: the expensive bundle of channels. Most of the most popular programming is not available except through traditional subscription TV services, and these grow more expensive year after year. Two years ago, the monthly fee for cable TV (*not* including broadband) hit \$86 per month, and is projected to rise to

\$200 per month by 2020—that is, unless Congress does something about it.<sup>1</sup> By contrast an online video-on-demand service like Netflix or Amazon Instant Video costs less than \$10 per month.

While cable and satellite companies have improved some of their offerings to match the convenience of what is available online, they have a long way to go, and do not come close to matching the value those services offer. This is because most Americans do not have a meaningful choice when it comes to selecting their video provider, so market forces have not been able to keep prices low. Often, if consumers want an affordable broadband and a video subscription that gives them access to must-see content, they can only turn to their local cable company. This is a legacy of a time when subscription video service required a specialized network, and simple economics did not allow for much competition. But this is no longer the case; the technology exists to allow people to have as many choices of video provider as they have of email providers, or of restaurants. While there may be a continuing place for specialized technology or networks to deliver live programming, in a largely on-demand world there should be many more video providers than we currently see.

The ongoing dominance of the MVPD model is made possible largely by an outdated regulatory structure created by broadcast, MVPD, and content incumbents to gain competitive advantages and to cement their place in the video ecosystem. Moreover, most people get their broadband through Internet service providers that also are video distributors, and who have the motivation and the means to discriminate against online video services. It is time for Congress and the FCC to revamp the rules of the video industry to promote the public interest. A video marketplace that served the public interest would give viewers more choice of providers and the ability to watch any programming whenever they want on the device of their choosing. At the same time it would ensure that creators and distributors could continue to get paid a fair price. A video marketplace that served the public interest would align the interests of viewers, creators, and distributors, not set one against the other.

The Senate and other policymakers can achieve this ambitious goal in three ways. First, they can clear away or update some of the outdated rules that slow down the evolution of the video marketplace. For example, protectionist policies like the sports blackout rules should be repealed, and the dysfunctional retransmission consent system should be updated. Second, they can extend the successful policies that protect smaller video competitors. For example, if a large cable system would be prohibited by law from acting anti-competitively toward a satellite provider, there is no reason why it should be able to take the same actions against an online video provider. Third, they can protect Internet openness and prevent discriminatory billing practices that hold back online video. In addition to supporting the FCC's Open Internet rules, Senators and other policymakers should examine whether discriminatory data caps hold back online video competition. By doing this they will increase competition, which will mean lower prices, better services, and more flexibility and control for consumers.

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<sup>1</sup> NDP Group, *Pay-TV bills continue to increase by 6 percent, year-over-year, as consumer-spending power remains flat*, Apr. 10, 2012, [https://www.npd.com/wps/portal/npd/us/news/press-releases/pr\\_120410](https://www.npd.com/wps/portal/npd/us/news/press-releases/pr_120410).

## BACKGROUND

For nearly a century the federal government has shaped the development of electronic media. In the 1920s the Federal Radio Commission brought order to the chaotic and experimental landscape that characterized early broadcasting. In doing so it set the conditions that allowed radio and then television broadcasting to develop into what it was in its heyday, and what it is today. In the 1960s and 1970s the FCC took steps to protect broadcasting from the disorganized and innovative early cable industry.<sup>2</sup> By doing this it made sure that cable became an adjunct to rather than a replacement for established broadcasting.<sup>3</sup>

After Congress passed the Cable Act of 1984, the tables turned and cable became the monopoly. Cable operators controlled who did and didn't get on the new medium, using their power to require cable programmers, such as the fledgling CNN and Discovery, to provide "pay for play" equity interests to cable operators, or sign exclusive agreements prohibiting programmers like MTV from appearing on potential competitors such as Direct Broadcast Satellite (DBS). At the same time, cable operators received access to needed inputs such as pole attachment rights and broadcast programming. The lack of effective competition led to high prices and poor service, but the cable incumbents' control over "must have" programming made it impossible for any competing services to emerge.

It was not until the 1992 Cable Act<sup>4</sup> that Congress embarked on an express policy of promoting competition in the television market. It realized that potential competitors needed access to the same content as large cable systems with market power. New requirements such as program access rules that gave competitors access to programming owned by the cable operators, and program carriage rules that prevented cable operators from demanding an equity share as a condition of carriage ("pay for play"), helped make it possible for new "multi-channel video programming distributors" (MVPDs) to compete with cable operators, as did changes to the law to make it easier for competitors to get access to broadcast programming. (The remainder of this

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<sup>2</sup> See *United States v. Southwestern Cable Co.*, 392 US 157 (1968). This case, in addition to being an important case setting out the bounds of FCC authority, contains a summary of the FCC's early efforts at cable regulation. In 1976, the House Subcommittee on Communications issued a staff report titled "Cable Television: Promise Versus Regulatory Performance" that stated that the FCC "has chosen to interpret its mandate from Congress as requiring primary concern for individual broadcasters rather than the needs of the audience being served." 94th Cong., 2d sess., 1976, Subcomm. Print. See also Office of Telecommunications Policy, *Cable: Report to the President (1974) (OSTP Report)*, which contains an early history of the cable industry and attempts at cable regulation, as well as policy recommendations.

<sup>3</sup> The OSTP Report said that "cable is not merely an extension or improvement of broadcast television. It has the potential to become an important and entirely new communications medium, open while and available to all." OSTP Report at 13. But while cable did succeed in providing viewers with more content it fell short of this early promise, and the regulatory system that developed ensured that cable extended the reach of broadcasting instead of developing into a competitor to it.

<sup>4</sup> Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

testimony will use the term “MVPD” to refer to cable, satellite, and telco video services such as U-Verse and FiOS generically.)

These policies of promoting competition were somewhat successful but their promise was not entirely fulfilled.<sup>5</sup> They enabled some new competitors to operate but these new competitors did not change the fundamental shape of the market. They did not slow the increasing power of cable generally and a few large cable companies in particular.<sup>6</sup> And they did little or nothing to keep the market from consolidating in ways detrimental to consumers and independent content producers alike. To an extent, this result was brought about by the technology of the time. However, broadband now gives policymakers the chance to promote true competition in video.

The Internet is beginning to change the video marketplace just as it changed the market for music, news, books, and other forms of media. Consumers have new options and incumbents are responding. But it is not a foregone conclusion that the Internet will fundamentally alter the video marketplace. Because they are missing so much of the most popular programming, and because fast broadband is not yet sufficiently deployed, online video providers are more complements to, than replacements for, an MVPD subscription. While Netflix and Amazon have proved fatal to most video rental shops, they do not directly compete with MVPDs, which have shown themselves to be considerably more robust.

This is because cable and media incumbents have control both over the content their nascent online competitors need for their service (either through direct ownership, or through contracts that limit online distribution), and over the pipes they must use to reach consumers. As a result much high-value programming is not available online, and online video providers have to contend with artificially low bandwidth caps and other discriminatory practices that keep them from reaching their full potential.

Thus while it is inevitable that IP technologies and the Internet will play an ever-larger role in video delivery, it remains an open question whether consumers or incumbent MVPDs will benefit most from this technological transition. Consumers will still suffer from a lack of choice and independent content producers will still struggle to reach viewers if existing incumbents in the content and MVPD industries continue to thwart disruptive change and control the transition for their own benefit. Congress should once again take the necessary steps to ensure that

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<sup>5</sup> See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Fourteenth Report*, MB Docket No. 07-269 (rel. Jul. 20, 2012), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-12-81A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-12-81A1.pdf). See also Comments of Public Knowledge in Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 07-269 (June 8, 2011), available at [http://www.publicknowledge.org/files/docs/PK\\_Comments\\_MVPD-Competition-Report.pdf](http://www.publicknowledge.org/files/docs/PK_Comments_MVPD-Competition-Report.pdf).

<sup>6</sup> For example, Adelphia’s cable assets were sold to Time Warner Cable and Comcast. See Adelphia Sold to Time Warner, Comcast, *BUFFALO BUSINESS FIRST* (Apr. 21, 2005), <http://www.bizjournals.com/buffalo/stories/2005/04/18/daily37.html?page=all>. Comcast’s cable assets and NBC Universal have been combined in a joint venture that is controlled by, and 51% owned by Comcast. See General Electric, New NBCU, <http://www.ge.com/newnbcu>.

incumbents cannot throttle (literally as well as figuratively) the legions of potential competitors trying to reach willing consumers.

MVPDs and content companies are operating in their own self-interest under a framework that Congress and the FCC designed. Congress can address some of the challenges the future development of the video marketplace faces by pruning away the needless overgrowth of older rules, like syndicated exclusivity, the sports blackout rule and the network non-duplication rule, that exist only to protect the business model of local broadcasters and other incumbents. Some other rules, like retransmission consent and the compulsory copyright license, are outdated, but part of an interwoven fabric of regulatory and business expectations. They should be reformed, but cautiously.

At the same time, measures that are designed to mitigate the market power of certain large video providers should not be repealed until effective competition develops. In some respects they should be extended. For example, online video providers that wish to voluntarily operate as MVPDs should be able to do so, as this would enable them to access certain valuable content and protect them against anti-competitive actions by incumbents.<sup>7</sup> This would ensure that consumers had more choices for high-value content than they do today and would eliminate the incentives that keep certain content from being licensed widely.

Finally, the fact that the largest residential broadband Internet service providers (ISPs) are also MVPDs invested in the existing video distribution models raises concerns. These ISP/MVPD combinations can impose a variety of policies that prevent genuinely disruptive competition. For example, the ability to control how much data subscribers may access through data caps, the ability to privilege some content over others through prioritization or exemption from data caps, and the ability to control what devices can connect to the network, give cable operators (and other broadband providers like FiOS) the ability to pick winners and losers just as cable operators did from 1984 to 1992.

## **DETAILED ANALYSIS AND RECOMMENDATIONS**

The video marketplace is unique, not only because of its complicated business and regulatory structures, but because some cable incumbents are better placed to counter the challenge the Internet poses to their business models in varied ways. The structure and practices of large media companies, copyright policy, and even spectrum policy can directly affect the video marketplace.

### *Threats to Internet Openness*

For a long time it looked as though ISPs would continue doing what Comcast did when it started degrading BitTorrent traffic—picking and choosing which Internet protocols and services got preferential or discriminatory treatment. But recently ISPs have found that it is more

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<sup>7</sup> See Comments of Public Knowledge in Interpretation of the Terms “Multichannel Video Programming Distributor” and “Channel” as Raised in Pending Program Access Proceeding, MB Docket No. 12-83 (filed May 14, 2012) (Sky Angel Comments), *available at* <http://www.publicknowledge.org/interpretation-mvpd>.

effective to discriminate via billing practices. Some ISPs have set their bandwidth caps so low as to make it financially unattractive to switch over entirely to online video, as this would put viewers over their caps and perhaps subject them to overage charges.<sup>8</sup> At the same time, at least one ISP exempts its own video services that are delivered over the same infrastructure from its caps.<sup>9</sup> To top it off, some ISPs cannot even accurately measure their subscribers' usage.<sup>10</sup> These practices disadvantage services like Netflix and Amazon Instant Video and relegate most online video to the role of a supplement to, rather than replacement for, traditional MVPD services.

To counter this, Congress needs to stand behind the FCC's attempts to protect Internet openness,<sup>11</sup> and it needs to find out more about why wireless and wireline providers set data caps at the levels they do.<sup>12</sup> At the same time these protections need to be strengthened, their loopholes need to be closed, and they need to take into account the fact that discrimination can happen through billing, as well as through Internet "fast lanes" that prioritize one service's traffic over another's, and other forms of technological discrimination.

### *Restrictions on the Availability of Content and Rising Content Costs*

The current regulatory system is based around the relationship of broadcasters and MVPDs,<sup>13</sup> and this system makes it easy for incumbents to share content with each other while keeping it

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<sup>8</sup> ANDREW ODLYZKO, BILL ST. ARNAUD, ERIK STALLMAN, & MICHAEL WEINBERG, KNOW YOUR LIMITS: CONSIDERING THE ROLE OF DATA CAPS AND USAGE BASED BILLING IN INTERNET ACCESS SERVICE 48 (Public Knowledge 2012) ("Comcast's own estimate for the amount of data required to replace its pay-television offering with an over the top competitor is 288 GB per month. In light of this, it may come as no surprise that Comcast's data cap is set at 250 GB per month."). Comcast has since raised its cap, but it is worth observing that the 288 GB per month figure is based on an unknown mix of standard and high-definition content; presumably, a higher percentage of high-definition video would lead to a higher figure. See Mark Israel and Michael L. Katz, *The Comcast/NBCU Transaction and Online Video Distribution*, Submitted by Comcast Corporation, MB Docket No. 10-56 (May 4, 2010) at 33, available at <http://apps.fcc.gov/ecfs/document/view?id=7020448237>.

<sup>9</sup> Michael Weinberg, *Comcast Exempts Itself From Its Data Cap, Violates (at least the) Spirit of Net Neutrality*, PUBLIC KNOWLEDGE (March 26, 2012), <http://www.publicknowledge.org/blog/comcast-exempts-itself-its-data-cap-violates->.

<sup>10</sup> Stacey Higginbotham, *More Bad News About Broadband Caps: Many Meters Are Inaccurate*, GIGAOM (Feb. 7, 2013), <http://gigaom.com/2013/02/07/more-bad-news-about-broadband-caps-many-meters-are-inaccurate>.

<sup>11</sup> Preserving the Open Internet, *Report & Order*, GN Docket No. 09-191, FCC 10-201, (rel. Dec. 23, 2010), available at [http://fjallfoss.fcc.gov/edocs\\_public/attachmatch/FCC-10-201A1.pdf](http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-10-201A1.pdf).

<sup>12</sup> For example, Representative Anna G. Eshoo, Ranking Member of the Communications and Technology Subcommittee of the House Energy and Commerce Committee, has recently asked the GAO to investigate data caps. Letter from Representative Anna G. Eshoo to The Honorable Gene L. Dodaro, Comptroller General of the U.S. Government Accountability Office (May 9, 2013).

<sup>13</sup> 47 U.S.C. § 325; 47 C.F.R. § 76.64.

out of the hands of potential new competitors.<sup>14</sup> And while it's unlawful for incumbent providers to behave anti-competitively towards each other, they are free to keep their content away from online services, and to use exclusionary contracts and "most favored nation" clauses to limit the online distribution of independent programming.<sup>15</sup>

As a result, while a lot of very good video programming is available online, the most popular programming is not.<sup>16</sup> Most popular broadcast and cable channels are not available online. Many popular shows are not available online at all or are only made available after a "windowing" period. Some programs are put online reasonably promptly, but are only viewable in inconvenient ways. Some of the best online content is only available to viewers who also have cable subscriptions, through TV Everywhere and similar efforts. Live local sports are generally not available online at all. Thus, while online services make it easy to watch great documentaries, classic movies, and old sitcoms, the kinds of culturally-current programming that people talk about at the office and online are often not available without a cable or satellite subscription.

This problem would be largely abated if online providers like Sky Angel and ivi<sup>17</sup> were permitted to operate as MVPDs, like they want to.<sup>18</sup> The rules that protect MVPDs from anti-competitive conduct would then protect them as well as incumbents. At the same time, the FCC should find that the current rules that prohibit incumbents from behaving anti-competitively toward each other also prohibit them from taking anti-competitive acts against online video

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<sup>14</sup> 47 U.S.C. § 548 provides that,

It shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.

These baseline statutory requirements still apply even though the Commission has recently modified its program access rules. *See* Revision of the Commission's Program Access Rules, *Report & Order*, MB Docket 12-86 (rel. Oct. 5, 2012), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-12-123A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-12-123A1.pdf).

<sup>15</sup> Jon Brodtkin, *DOJ Probing Big Cable Over Online Video Competition*, ARS TECHNICA, (June 13, 2012), <http://arstechnica.com/tech-policy/2012/06/doj-probing-big-cable-over-online-video-competition> (noting that "[t]he DOJ is also investigating contracts programmers sign to be distributed on cable systems, which include 'most-favored nation clauses' that may favor cable companies over online video distributors.")

<sup>16</sup> *See* Carlos Kirjner, *Internet TV (or Why It Is So Hard to Go Over the Top)*, Bernstein Research (June 15, 2012).

<sup>17</sup> *See* Ryan Lawler, *Court Rules Ivi.tv Not a Cable System, Issues Injunction*, GIGAOM (Feb. 22, 2011), <http://gigaom.com/2011/02/22/ivitv-injunction>.

<sup>18</sup> *See* Public Knowledge Sky Angel Comments.

providers, including those that choose not to operate as MVPDs.<sup>19</sup> But even short of that, if more content were available from online services that might choose to operate as MVPDs, the incentive to keep content offline would evaporate to the benefit of the entire video marketplace.

The current pay TV MVPD model is very lucrative for some creators and distributors because it forces viewers to pay for large bundles of cable channels even if they only want to watch a few.<sup>20</sup> In fact, every cable subscriber has to pay for broadcast channels, even though they are available over the air for free. This is why some studies have shown that current monthly cable bills are approaching \$90 per month,<sup>21</sup> and the FCC has shown that cable rates continue to rise at a faster rate than inflation.<sup>22</sup> If these practices were to be lessened, not only would bills shrink, but also more content might become available to new online providers.

But it is important to understand exactly what causes these problems. Input costs—the fees MVPDs pay to content companies—certainly contribute. Rising fees paid by MVPDs to content

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<sup>19</sup> As Public Knowledge has argued,

The [FCC] should use its authority over the video programming distribution market to protect online video distribution generally, by prohibiting MVPDs from behaving anti-competitively in ways that harm any video distributor, whether or not it is an MVPD. Section 628 of the Communications Act provides authority for this. This Section bans any actions “the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing ... programming to subscribers or consumers.” The close connection between the markets for MVPD and non-MVPD video distribution mean that anti-competitive actions taken against a non-MVPD would likely have a deleterious effect on the ability of a competitive MVPD to offer programming—for example, by increasing its costs, or inhibiting the ability of an MVPD to offer programming on demand or online.

Sky Angel Comments at 24-25 (quoting 47 U.S.C. § 548).

<sup>20</sup> Peter Kafka, *Hate Paying for Cable? Here's Why*, ALLTHINGS.D, March 10, 2010, <http://allthingsd.com/20100308/hate-paying-for-cable-heres-the-reason-why>.

<sup>21</sup> NDP Group, *Pay-TV Bills Continue to Increase by 6 Percent, Year-Over-Year, As Consumer-Spending Power Remains Flat*, Apr. 10, 2012, [https://www.npd.com/wps/portal/npd/us/news/press-releases/pr\\_120410](https://www.npd.com/wps/portal/npd/us/news/press-releases/pr_120410).

<sup>22</sup> The FCC measures the expanded basic tier, which is “the combined price of basic service and the most subscribed cable programming service tier excluding taxes, fees and equipment charges.” Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment, MM Docket No. 92-266, *Report on Cable Industry Prices* ¶ 2 (rel. Aug. 13, 2012), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-12-1322A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-12-1322A1.pdf). This is not the same as the average or median cable bill, measures which reflect what subscribers actually pay. The Commission found that this specialized measure of rates “increased by 5.4 percent over the 12 months ending January 1, 2011, to \$57.46, compared to an increase of 1.6 percent in the Consumer Price Index (CPI). The price of expanded basic service increased at a compound average annual growth rate of 6.1 percent during the period 1995-2011. The CPI increased at a compound average annual growth rate of 2.4 percent over the same period.” *Id.*

companies are one of the main drivers of rising cable bills.<sup>23</sup> MVPDs are often forced to pay for, and pass along to their consumers, less-popular channels in exchange for access to the popular ones. Sports fees are a huge portion of viewers' bills. Derek Thompson has calculated that "if you pay \$90 a month for cable, you are paying about \$76 a year (about 7 percent of the total cost of cable TV) just for the NFL."<sup>24</sup> A typical MVPD subscriber might pay about \$60 per year just for ESPN, whether or not she watches it.<sup>25</sup>

Retransmission fees for broadcast networks keep rising—NBC expects to collect \$200 million in such fees this year, an increase of about 400% from 2012.<sup>26</sup> What's more, retransmission agreements often require that MVPDs carry certain cable networks, limiting the ability of MVPDs to offer more flexible price plans. Content companies are able to do this because of media consolidation. The most popular programming is controlled by a handful of companies like Viacom and Disney. When they make offers, they are hard to refuse. Even the broadcast industry is consolidating as companies like Sinclair scoop up local broadcaster after local broadcaster, contributing to the ongoing problem of different local broadcasters coordinating their retransmission consent negotiations and driving up rates.<sup>27</sup>

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<sup>23</sup> In fact, Cablevision has recently sued Viacom for bundling channels, "a practice that's led to rising cable bills and ballooning channel lineups." Alex Sherman & Edmund Lee, *Cablevision-Viacom Suit Aims to Shake Up \$170B Industry*, BLOOMBERG (Feb. 27, 2013), <http://www.bloomberg.com/news/2013-02-27/cablevision-viacom-suit-aims-to-shake-up-170b-industry.html>.

<sup>24</sup> Derek Thompson, *Mad About the Cost of TV? Blame Sports*, THE ATLANTIC (Apr. 2, 2013), <http://www.theatlantic.com/business/archive/2013/04/mad-about-the-cost-of-tv-blame-sports/274575>.

<sup>25</sup> See Daniel Frankel, *By the Numbers: The Spiraling Cost of Sports Programming*, PAIDCONTENT (Apr. 8, 2012), <http://paidcontent.org/2012/04/06/by-the-numbers-the-spiraling-cost-of-sports-programming>.

<sup>26</sup> Steve Donohue, *Comcast CFO: NBC Will Collect \$200 Million in Retrans Fees in 2013*, FIERCECABLE (Feb. 26, 2013), <http://www.fiercecable.com/story/comcast-cfo-nbc-will-collect-200-million-retransmission-consent-fees-2013/2013-02-26>.

<sup>27</sup> Among other things, so-called "Joint Services Agreements" allow different broadcasters to collude on retransmission negotiations. As Public Knowledge argued earlier this year,

Media pluralism does not only ensure that citizens have access to a diversity of viewpoints and sources of information; it creates a baseline level of competition between media companies that helps keep markets competitive and prices low for consumers. Because of the joint negotiations between ostensible competitors, television stations are better able to create a "united front" in demanding higher fees, which are ultimately passed along to consumers. If competing companies worked together on other aspects of their business—for example, in colluding to raise advertising rates—most observers would identify a plain violation of antitrust laws. But under current policies stations feel free to collaborate on this other important aspect of their business operations. This harms consumers and contributes to ever-rising subscription TV bills.

But content companies have grown accustomed to these practices for a good reason: in a concentrated market for video distribution, it is easier to pass along increased input costs.<sup>28</sup> MVPDs have never liked having to pay more for content, but it has historically been the cost of doing business. They have traditionally resisted calls to move to an à la carte model. But bills have reached a point where a notable number of viewers (especially younger and more tech-savvy ones) are “cutting the cord” (or never getting a cord to begin with) and doing without MVPD subscriptions. Cable executives like Time Warner Cable CEO Glenn Britt have started talking about offering consumers more flexible packages and greater control over the bundles they subscribe to.<sup>29</sup> This would be a positive development for consumers. It is an open question, however, whether a market that remains concentrated both on the content and distribution side can evolve to a lower cost model on its own.

One quick way to fix this would be to scrap the rules that require that cable systems carry broadcast stations as part of their basic tier (“basic tier buy-through”)—customers should be able to choose what they pay for. Policymakers should also look very closely at the practice some media companies have of bundling their programming together and requiring that cable operators buy it all and put even less-popular channels on lower programming tiers. Bundles can make economic sense for buyers and sellers but they can be abused when there are imbalances in bargaining power or a lack of competitive alternatives. If MVPDs themselves had more flexibility in the programming they purchase, they might become more willing to offer that flexibility to viewers. At the same time, MVPDs should be encouraged to offer more flexible programming packages. Consumers do not object to “bundles” *per se*—popular online services like Spotify and Amazon Instant Video work on a bundled approach that is quickly surpassing the pay-per-download iTunes model. What they object to is expensive bundles that feel like a rip-off. They simply want to get good value for their monthly bill. For some consumers who only watch a few programs, this might mean channel-by-channel à la carte subscription, perhaps

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Letter from John Bergmayer to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission, in *Promoting Diversification of Ownership in the Broadcasting*, MB Docket No. 07-294; *Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 09-182; and *Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71 (filed Jan. 22, 2013).

<sup>28</sup> It is important to note that not all MVPDs have equal bargaining power with respect to content suppliers. A very large cable company with its own content interests like Comcast is in a different position than DISH, Cablevision, or a rural cable system. These smaller MVPDs may not be able to pass along increased prices to their customers, or internalize them through acquisitions. Also, larger MVPDs may be able to negotiate around certain non-price restrictions, such as limitations on the functionality of cable-supplied set-top boxes and other equipment, or the ability to make programming available on tablets or smartphones within the home. By contrast, smaller cable systems may not be able to overcome these kinds of restrictions.

<sup>29</sup> Cecilia Kang, *Time Warner Cable CEO Wants to Slim Cable Bundles, Eyes Aereo's Technology*, WASH. POST (May 2, 2013), [http://www.washingtonpost.com/business/technology/want-to-cut-the-cable-cord-time-warner-cable-may-help-you/2013/05/02/f6b43b84-b27b-11e2-baf7-5bc2a9dc6f44\\_story.html](http://www.washingtonpost.com/business/technology/want-to-cut-the-cable-cord-time-warner-cable-may-help-you/2013/05/02/f6b43b84-b27b-11e2-baf7-5bc2a9dc6f44_story.html).

coupled with over-the-air TV and online services. For others, it might just mean better bundles—for example, a cheaper sports-free programming package, or a kid-friendly package.

One solution to the problem of rising input costs that would *not* be good for consumers is further consolidation, allowing distributors to internalize content costs and profits. The merger between Comcast and NBC Universal brought a large amount of programming under the control of a cable system that has an incentive to limit its distribution online. While it is true that both the Department of Justice and the FCC conditioned their transaction on Comcast’s commitment to make certain programming available to online distributors and to deal with independent programmers fairly,<sup>30</sup> such time-limited behavioral remedies are insufficient to overcome all the anti-competitive effects of mergers, joint ventures, and other structural changes that create incentives to limit distribution and innovation.<sup>31</sup> Furthermore, without an agency that is willing to hold companies to the letter and spirit of their merger conditions, they can simply be ignored, requiring that affected parties undertake expensive legal proceedings to enforce them. Just this has happened with the Comcast merger, where Bloomberg has maintained since 2011 that Comcast has not met its “neighborhooding” requirements, and Internet video provider Project Concord had alleged that Comcast was not meeting its online video requirements.<sup>32</sup>

Similarly, horizontal collaboration between different video distributors (such as the “TV Everywhere” authentication system) may seem to provide new options to some viewers in the short term, but only at the long-term cost of preventing the marketplace from evolving to a more competitive state. Likewise, arrangements between large content companies like ESPN where some content gets preferential treatment, such as an exemption from data caps, would not benefit either consumers or creators.<sup>33</sup> Large and small creators might find that they have to negotiate with many different ISPs just to reach viewers, and viewers might only have access to the programming of companies that have paid up. Smaller competitors might not be able to reach viewers at all. This would be counterproductive, anti-competitive, and a violation of Open Internet principles.

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<sup>30</sup> Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc., for Consent to Assign Licenses and Transfer Control of Licenses, Memorandum Opinion & Order, 26 FCC Rcd. 4238 (2011); Final Judgment in *United States v. Comcast*, United States District Court for the District of Columbia, Case No. 1:11-cv-00106 (Sept. 1, 2011).

<sup>31</sup> Petition to Deny of Public Knowledge and Future of Music Coalition in WT Docket No. 11-65 (filed May 31, 2011), at 62-70, available at [http://www.publicknowledge.org/files/docs/pk\\_fmc-att\\_tmo-petition\\_to\\_deny.pdf](http://www.publicknowledge.org/files/docs/pk_fmc-att_tmo-petition_to_deny.pdf).

<sup>32</sup> See Letter from Senator Al Franken to FCC Chairman Genachowski, FCC Commissioners, and Assistant Attorney General Varney, Aug. 4, 2011, [http://www.franken.senate.gov/files/letter/110804\\_Letter\\_to\\_DOJ\\_and\\_FCC\\_Comcast\\_conditions\\_and\\_Bloomberg.pdf](http://www.franken.senate.gov/files/letter/110804_Letter_to_DOJ_and_FCC_Comcast_conditions_and_Bloomberg.pdf). While there has been some activity on this matter at the FCC the dispute is ongoing. See John Eggerton, *Parties Continue to Tussle over News Neighborhooding Condition in NBCU Deal*, MULTICHANNEL NEWS (Oct. 1, 2012), <http://www.multichannel.com/distribution/bloomberg-comcast-trade-fcc-filings/139564>.

<sup>33</sup> Anton Troianovski, *ESPN Eyes Subsidizing Wireless-Data Plans*, WALL ST. J. (May 9, 2013), <http://online.wsj.com/article/SB10001424127887324059704578473400083982568.html>.

### *Outdated Rules That Protect Incumbent Business Models*

Finally, there are some rules on the books today that seem designed to prop up legacy business models and have long outlived any functions they may once have served. Many of them can and should be repealed today. Examples of these include sports blackout rules, network non-duplication, and syndicated exclusivity provisions,<sup>34</sup> and the previously mentioned basic tier buy-through rule that requires that all cable subscribers pay for free over-the-air television.<sup>35</sup> Some of these rules were passed to protect aspects of the video distribution system from disruption before Internet video was a possibility, and when it seemed that if local broadcasters lost revenue nothing could replace them. Exclusivity rules not only keep cable systems from carrying signals from “distant” markets but they prevent networks from distributing content on a non-exclusive basis. The world these rules were written for is gone now and they have outlived their purpose. Some local broadcasters never provided unique local programming, and the various public goals that they provide can be achieved more effectively through other means. Traditional models of video distribution are still valuable, and local broadcasters who serve their communities will continue to thrive after any regulatory reform. Viewers will still have access to local news, weather, and locally relevant programming because they demand it. Reforms should reward local broadcasters and other media outlets for creating their own content rather than for distributing national programming. Simply put, the broadcasting industry no longer needs extraordinary protection against changes in technology, business models, and viewer behavior.

Some other rules are outdated, but so interconnected with other rules and marketplace expectations that they need to be approached carefully. Among these are the compulsory copyright license,<sup>36</sup> retransmission consent,<sup>37</sup> and must-carry.<sup>38</sup> The compulsory license cannot be reformed unless video providers are given assurance that they never have to stop carrying programming just because they do not know who to call for a license, and to make sure that they can cope with any potential holdout problems. It would make no sense to embark on a comprehensive reform of the laws governing video carriage in a way that replicated the problems that afflict the retransmission consent process today, while introducing new ones.

Short of dealing with the compulsory license and retransmission consent together, several reforms could improve the current retransmission consent process. Many of the rules that have already been mentioned give an unfair advantage to broadcasters and drive up the rates they can charge. Some broadcasters have engaged in brinksmanship tactics that harm viewers, where they pull their signals from MVPDs right before high-profile events.<sup>39</sup> These problems can at least be

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<sup>34</sup> 47 C.F.R. §§ 76.92(f), 76.106(a), 76.111, 76.120, and 76.127-130.

<sup>35</sup> 47 U.S.C. § 543(7); 47 C.F.R. § 76.901(a) (“The basic service tier shall, at a minimum, include all signals of domestic television broadcast stations provided to any subscriber”); 47 C.F.R. § 76.920 (“Every subscriber of a cable system must subscribe to the basic tier in order to subscribe to any other tier of video programming or to purchase any other video programming.”).

<sup>36</sup> 17 U.S.C. §§ 111, 119, 122.

<sup>37</sup> 47 U.S.C. § 325; 47 C.F.R. § 76.64.

<sup>38</sup> 47 U.S.C. § 534; 47 C.F.R. § 76.55.

<sup>39</sup> Some of these incidents were cataloged in Amendment of the Commission’s Rules Related to Retransmission Consent, *Notice of Proposed Rulemaking*, 26 FCC Rcd. 2718, ¶15 (2011).

alleviated with meaningful “good faith” standards that discourage unfair negotiation tactics, and interim carriage requirements that minimize disruption to viewers.<sup>40</sup> Finally, while the must-carry system is used by many low-value broadcasters in ways that Congress never intended, public and non-commercial stations continue to serve a valuable role and policymakers should find ways to protect the good that they do.

Still other rules serve a function and should be maintained, at least until effective competition develops. These include the program access, program carriage rules, as well as rules that promote choice in set-top boxes and other video devices. The program access rules prevent MVPDs from taking certain anti-competitive actions toward each other. Although the video market is not as competitive as it can be in the Internet age, the fact remains that the American video distribution market is more competitive than that of many other countries.<sup>41</sup> The program access rules have contributed to that, and they should be extended to all services that wish to operate as MVPDs, even ones that are exclusively online. Similarly, the program carriage system, which protects independent programmers from the negative effects of bottleneck control by some MVPDs, still serves a role in ensuring that viewers can enjoy content from diverse sources. Finally, the FCC has not done enough to fulfill Congress’s directive to promote set-top box competition—in fact, the FCC’s Media Bureau has recently imperiled<sup>42</sup> the Commission’s CableCARD program which, though far from perfect, at least gives some cable subscribers more options when it comes to video devices. Until Internet-delivered video becomes a true substitution, preserving the FCC’s authority to promote set-top box choice will remain necessary.<sup>43</sup>

### *Copyright and Spectrum Policy*

There are two other kinds of regulations that can hold back the development of online video. Policymakers who are steeped in media issues do not always see them as “regulations” in the same sense as things like syndicated exclusivity. But copyright and spectrum laws are regulations nonetheless, and they have profound effects on the shape of the market.

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<sup>40</sup> See Comments of Public Knowledge and New America Foundation in MB Docket No. 10-71 (filed May 27, 2011), available at [http://www.publicknowledge.org/files/docs/11-05-27PK-NAF\\_retrans\\_comments.pdf](http://www.publicknowledge.org/files/docs/11-05-27PK-NAF_retrans_comments.pdf).

<sup>41</sup> For example, “Free-to-air television in Mexico is a stale duopoly in which 70% of viewers tune in to channels broadcast by Televisa, the biggest media company in the Spanish-speaking world. Televisa dominates pay-TV as well, with about 45% of Mexico’s cable market and 60% of the satellite market.” *Let Mexico’s Moguls Battle*, THE ECONOMIST (Feb. 4th, 2012), <http://www.economist.com/node/21546028>.

<sup>42</sup> Charter Communications had asked for a waiver of some of the Commission’s rules, but the Bureau went far beyond what Charter asked for and decided, based on a misapplication of the recent *EchoStar Satellite L.L.C. v. FCC* decision, 704 F.3d 992 (D.C. Cir. 2013), to effectively eliminate most CableCARD requirements.

<sup>43</sup> For example, by implementing AllVid or a similar technology-neutral solution. See AllVid, <http://www.publicknowledge.org/issues/allvid>.

Copyright law should not be misused to hold back the evolution of the video marketplace. Broadcasters are suing DISH for making a DVR that is too sophisticated and easy to use. But it is not illegal to skip commercials or for users to take full advantage of their home recording rights.<sup>44</sup> And as the Second Circuit Court of Appeals recently found, Aereo's remote antenna is legal just as Cablevision's remote DVR is.<sup>45</sup> Copyrights are limited monopolies granted by the government, and they come with a series of limitations and exceptions designed to protect users as well as creators. They should not be a weapon used to limit experimentation with business models and services.

Nor should misplaced fears of piracy keep content offline. Some content industry executives have a view of technology and the Internet that can only be described as superstitious, and they think that if they give people access to content they will lose control of it. But recent history shows that many people only turn to piracy when content is not available online through other means. Indeed, Netflix has recently provided data that show that as its online service is adopted, unlawful file-sharing decreases.<sup>46</sup> From the perspective of reducing copyright infringement, limiting online distribution is simply counterproductive. Creators will benefit most from an open marketplace that allows different services and voices to reach viewer's homes.<sup>47</sup>

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<sup>44</sup> See *Fox Broadcasting v. Dish*, 2012 U.S. Dist. LEXIS 169112 (C.D. Cal. 2012).

<sup>45</sup> *WNET et al. v. Aereo*, No. 12-2786-cv (2d Cir. Apr. 1, 2013), available at [http://www.publicknowledge.org/files/aereo\\_decision\\_2d\\_circuit.pdf](http://www.publicknowledge.org/files/aereo_decision_2d_circuit.pdf)

<sup>46</sup> See *Netflix's Ted Sarandos Talks Arrested Development, 4K and Reviving Old Shows*, STUFF, May 1, 2013, <http://www.stuff.tv/news/apps-and-games/news-nugget/netflixs-ted-sarandos-talks-arrested-development-4k-and-reviving-old> (quoting the Netflix Chief Content Officer as saying "when we launch in a territory the BitTorrent traffic drops as the Netflix traffic grows."). It is true, as BitTorrent, Inc. states, that BitTorrent has many lawful uses and that BitTorrent, Inc. is not associated with copyright infringement. See BitTorrent Blog, *Reports Of Our Death Have Been Greatly Exaggerated* (May 6, 2013), <http://blog.bittorrent.com/2013/05/06/reports-of-our-death-have-been-greatly-exaggerated>. However, Sarandos appears to have been referring to all files that are exchanged using the BitTorrent protocol (which BitTorrent, Inc. does not control), not just the minority of those associated with BitTorrent, Inc. While BitTorrent is a general-purpose tool with lawful and unlawful uses, it is also true that many viewers use BitTorrent to unlawfully access content that is not otherwise available online.

<sup>47</sup> For this reason, trade and other agreements negotiated on behalf of the United States should not include provisions that could expand the scope of copyrights or copyright enforcement (as many trade agreements do, even though copyright law is already handled internationally by a series of treaties), create new kinds of intellectual property rights (as the proposed WIPO Broadcast Treaty would), or attempt to limit the online distribution of broadcast content. See John Bergmayer, *The US-Colombia Free Trade Agreement: Policy Laundering in Action*, PUBLIC KNOWLEDGE (Apr. 20, 2012), <http://www.publicknowledge.org/blog/us-colombia-laundering> (arguing that language in some free trade agreements could be read as limiting online video distribution). *But see* Comments of ABC, CBS, and NBC Television Affiliates in MB Docket No. 12-83 (filed June 13, 2012), available at <http://apps.fcc.gov/ecfs/document/view?id=7021922660> (arguing that it would be consistent with such agreements if online systems were categorized as MVPDs and subsequently followed standard retransmission consent procedures).

A service like Aereo’s raises issues of spectrum policy as well as copyright. Broadcasters are given free use of the public’s airwaves in exchange for certain public obligations, such as the obligation to provide free programming to the public. While it is true that Aereo does not pay retransmission fees like MVPDs do, it is also true that Aereo, unlike MVPDs, *only* provides people with access to the free local signals they are already entitled to view. As Congress found in 1976,

The Committee determined ... that there was no evidence that the retransmission of ‘local’ broadcast signals by a cable operator threatens the existing market for copyright program owners. Similarly, the retransmission of network programming, including network programming that is broadcast in ‘distant’ markets, does not injure the copyright owner. The copyright owner contracts with the network on the basis of his programming reaching all markets served by the network and is compensated accordingly.<sup>48</sup>

The majority of viewers do not watch over-the-air broadcasters directly, but only as those stations are carried by MVPDs. This leads some to question whether the allocation of spectrum to broadcasting makes sense at all.<sup>49</sup> Certainly, the broadcasters who have said they may no longer want to continue broadcasting should feel free to return their spectrum to the public so that it can be put to other uses.<sup>50</sup> However, broadcast content is still important to many viewers and, driven to cut the cord because of rising MVPD subscription costs, a new generation of viewers is becoming more familiar with rabbit ears and over-the-air viewing.<sup>51</sup> Aereo and services like it should be part of this. If Aereo ultimately wins the court challenges against it and the Senate decides to revisit the law, it should consider creating a path where online video services can choose to operate as online MVPDs, which would increase the opportunity for content creators to get paid for their work and to reach new viewers. However, making an antenna rental service illegal would not benefit the public, would provide no benefit to creators, and would be contrary to the public purpose of broadcasting.

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<sup>48</sup> Copyright Law Revision, House Report No. 94–1476 (1976).

<sup>49</sup> For example, Economist Thomas Hazlett has observed that “[t]oday, the social opportunity cost of using the TV Band for television broadcasting – 294 MHz of spectrum with excellent propagation characteristics for mobile voice and data networks, including 4G technologies – is conservatively estimated to exceed \$1 trillion (in present value).” Comment of Thomas Hazlett, in *A National Broadband Plan for Our Future*, GN Dckt. No. 09-51, Federal Communications Commission (filed Dec. 18, 2009), available at

[http://mason.gmu.edu/~thazlett/pubs/NBP\\_PublicNotice26\\_DTVBand.pdf](http://mason.gmu.edu/~thazlett/pubs/NBP_PublicNotice26_DTVBand.pdf).

<sup>50</sup> See John Bergmayer, *As Broadcasters “Threaten” to Shut Down, They’re Not Getting the Reaction They Were Looking For*, PUBLIC KNOWLEDGE (Apr. 10, 2013),

<http://publicknowledge.org/not-the-reaction>.

<sup>51</sup> Christopher S. Stewart, *Over-the-Air TV Catches Second Wind, Aided by the Web*, WALL STREET JOURNAL (Feb. 21, 2012),

<http://online.wsj.com/article/SB10001424052970204059804577229451364593094.html> (“It’s cool to have rabbit ears again.”).

## CONCLUSION

As they have in the past, policymakers are starting to consider the implications of increasing change in the market for video distribution. History provides examples both of protectionist regulations that should be avoided today, and of pro-competitive measures that enable new entrants to reach viewers. But today is different in one way: Finally, the technology exists that could eliminate the physical, bottleneck control of video distribution that has existed in various forms for decades.

If policymakers take some simple steps to facilitate the development of competitive online video now, later they can begin to disengage from regulations that were designed to counter the effects of this bottleneck control. However, if they fail to do this, it is likely that incumbents will be able to continue to shape the development of the video market and extend their current dominance indefinitely. While the Internet provides grounds for hoping that the future of video will be better for consumers, policymakers have a lot of work to do to help make that happen.