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Containment, Common Carriage, and Net Neutrality—Regulating the Long Tail of OTT Television

There may be no more-perfect site in which to study the unfinished, transitory, and transformative nature of the liminal than government regulation. While charged with the protection of the airwaves from monopolization by special interests, the use of those airwaves to create a national mass media culture required substantial investment by big business. This conundrum of how to encourage innovation and advancement while not creating unfair advantages or market shares for the corporations with the resources to innovate and advance has been a hallmark of American broadcast regulation since the early twentieth century. The internet—which knows no national boundaries and yet relies upon geographically based wired and wireless communication technologies—has further complicated the issues with which regulators, industries, lobbyists, and citizens must contend.

To begin, there are a few points that should be noted about the US regulatory system and its primary policymaking mechanism, the Federal Communications Commission (FCC). First, “the American approach to regulating new communication technologies and their impact has generally been more reactive than proactive.”¹ Thus, technologies have often developed and entrenched themselves in industrial and user practices before being assessed in relation to existing federal communications law, or without exploration of alternatives to incumbent patterns and practices.* This, of course, shapes

* An illustrative historical example: the regulatory and geographical structure of the mature radio industry (originally established in the 1920s) was the groundwork for the nascent television industry that developed in the post-World War II era, an arrangement that favored the interests of the corporate entities that controlled and programmed radio. These companies argued that they were

regulatory intervention particularly when certain practices or technologies are defined and deployed by corporations with substantial resources long before they have reached market saturation and before or during regulatory deliberation.

Second, FCC commissioners have historically had unusually close relationships with the industries they regulate. A large percentage of former FCC commissioners have gone directly into positions in the television, cable, or information services industries following their terms. Michael Powell, a Clinton appointee to the commission in 1997 and FCC chairman from 2001 to 2005 is the current president and CEO of the National Cable Television Association (NCTA).¹ Current FCC Chairman Tom Wheeler has gone “the other way,” having previously been president and CEO of the NCTA and the Cellular Telecommunications & Internet Association (CTIA); lobbying arms of the cable and wireless industries, respectively.² Meredith Atwell-Baker, an Obama-nominated FCC commissioner, served on the FCC from 2009 to 2011. She left the Commission four months after the Comcast/NBCUniversal merger for a new position as senior vice president of governmental affairs at NBCUniversal.³ In 2014 she became president and CEO of CTIA—The Wireless Association, an industry trade group that lobbies on behalf of the wireless communication sector.⁴

Finally, while the decisions of the Commission are ostensibly justified by the contributions wired and wireless communication make to the public interest, they are often driven by and in response to free market forces and exigencies. As Thomas Streeter writes in his history of broadcast regulation: “Much of what broadcast regulation is about in the United States is crafting the mix of rights, privileges, and restrictions that form the conditions of operation, the bargaining power, and thus the market value of stations, copyrights, and audiences.”⁵

the ones who had the resources to develop the new medium as well as the understanding of broadcasting to bring the new medium to fruition. Therefore, television in the United States was “superimposed on the existing pattern rather than basically altering it” (Sterling and Kitross). (And the Commissioners during this time went to work for NBC, CBS, and ABC at the end of their terms.)

* While the same cannot be said of Powell, it should be noted that current FCC Chairman Tom Wheeler has not shied away from confrontations with his former employers, nor from taking positions in opposition to them. This is particularly evidenced in his advocacy for reclassifying ISPs as “common carriers” in the net neutrality debate as well as his current efforts to create an open market for set-top boxes.

A brief history of regulatory legislation

1934 Communications Act

Although revised by subsequent legislation, the 1934 Communications Act remains the “Ur-text” of American wired and wireless communication regulation. It brought all services that “rely on wires, cables, or radio as a means of transmission” under the regulatory control of the FCC (which replaced the Federal Radio Commission).⁶ This act also codified the tenets of diversity and localism as key to the regulation of the scarce electromagnetic spectrum and mandated that licensees were to operate in the “public interest, convenience and necessity.”⁷ However, this codification ended at the inclusion of these terms and phrases in the act. Nowhere does the act provide operative or even interpretive definitions of “diversity,” “localism,” or “public interest, convenience and necessity.” As a result, the meanings of these terms have been defined and redefined according to the interests (and usually special interests) of the sitting FCC commissioners who of course act in the best interest of their favored constituencies.

1965 First Report and Order on Cable/“must carry” rules

This first substantial piece of cable regulation by the FCC was designed to “ensure local stations equal access to viewers who might be cable subscribers.”⁸ As a result, all cable companies were required to carry all over the air (OTA) signals that were “significantly viewed” within their coverage area but did not have to compensate the broadcasters for the retransmission of their signals.⁹ As the number of original cable networks that could be utilized to “light up the dial” of cable providers expanded, these requirements were challenged by providers who wanted to carry more profitable niche networks on their limited systems rather than being forced to retransmit all ultra high frequency (UHF) and very high frequency (VHF) signals in their operating areas.* While the original *raison d'être* of this legislation was to protect

* What should be noted about the “must carry rules” in this earliest period—while one may think that this pertained solely to local affiliates of the “big three” networks at the time, the term “significantly viewed” is significant. Most municipalities had several independent VHF stations as well as a bevy of stations on the always-disadvantaged UHF channels. Therefore, the number of channels that

broadcasters from being excluded from cable systems by forcing cable systems to accommodate them and their advertising-supported programming as cable networks began to proliferate—funded by both advertisers and carriage fees—broadcasters began to lobby to eliminate the rules so that they could also receive “retransmission fees.”

1992 Cable Television Consumer Protection and Competition Act

This act altered the “must carry” rules by allowing broadcasters to renegotiate their multiple-system operator (MSO) carriage agreements and to choose whether they wanted to receive “retransmission fees,” or “retrans,” (a per-subscriber, per-month payment—as was paid to cable networks) or another type of “compensation in kind.”¹⁰ This “compensation in kind” could be the waiving of retransmission payments in return for the carriage of an additional channel on the cable system and some barter advertising. If one considers the “families” of channels that are owned by companies that either are primarily broadcasters or have substantial broadcast holdings, one can see how this shifted the balance of power toward broadcasting conglomerates who can leverage the carriage of their nationwide programming to ensure the distribution of their niche channels to the cable and satellite subscribing public. If MSOs balk at these deals, broadcasters can withhold their signals until the carrier offers them acceptable compensation. This imbalance of power can be solved, of course, by the MSO’s purchase of the broadcasting company.

1996 Telecommunications Act

The Telecommunications Act of 1996 was heralded by the FCC as “the first major overhaul of telecommunications law in almost 62 years.”¹¹ The goal of

qualified for “must carry” could easily be in the teens. While this did create a multichannel viewing experience for the subscriber, it was also a financial challenge to cable systems, especially those with smaller channel capacities.

this legislation was to create an open market for telephone, cable, broadcast, wired, and wireless information services—“to let anyone enter any communications business—to let any communications business compete in any market against any other.”¹² Poised as it was on the brink of the internet’s maturation as a multimedia information network, it was an interesting moment for the legacy entertainment industries that could be viewed as the culmination of their lobbying efforts to have ownership rules relaxed in order to engage in the empire-building that media companies have pursued since the earliest days of the film industry. In many ways, the act may have been inevitable since in the years preceding its passage, “the final regulatory obstacles were removed, ideological consensus achieved, political will solidified, and significant deals struck. By 1996, the political landscape was no longer hostile to common ownership of telecommunications, cable, broadcast and film.”¹³

The 1996 Telecommunications Act “launched a free-for-all in the TV marketplace because regulation that had been in place for decades was lifted. Broadcasters, cable TV operators, and local and long distance phone companies were now permitted to increase their market power within their traditional markets and to enter one another’s markets.”¹⁴ This allowed telecomm companies such as AT&T and Verizon to begin to enter the multichannel video programming distributor (MVPD) market. While this act increased the options consumers had for how they accessed the multichannel environment in theory, in practice, the situation was much different. There were no provisions in the act against the MVPDs engaging in “clustering” in which they preserved regional monopolies by dividing the country up among them. (“You take the Southwest, I’ll take the Pacific Northwest.”) Ownership caps of broadcast television stations were relaxed, which resulted in the increased power of “station groups” or large holding companies that own multiple locally licensed stations across the United States, and use their market-power to negotiate more cost-effective off-net syndication deals with content producers. In short, writes Jennifer Holt: “The Telecommunications Act of 1996 was the ultimate deregulatory initiative to complete the structural convergence of the media industries that began during the 1980s . . . and the last piece of legislation necessary to solidify the blueprint for the new millennium entertainment empires.”¹⁵

Current FCC issues and actions

At present there are four separate yet interconnected regulatory issues that have, do, or will affect the shape and operation of the television industry/ies:

- Net neutrality
- Ownership
- Spectrum allocation (in particular the incentive spectrum auction)
- Definitions of MVPDs

As many of these will have been decided or the conversation may have shifted by the time this book is released, my purpose here is to sketch out the stakeholding positions of those who stand to benefit or be disadvantaged by particular rulings on these topics, as well as explore some of the implications of the more likely outcomes of these regulatory actions.

Net neutrality

The term “network neutrality” was coined in 2003 by Columbia Law Professor Tim Wu in a journal article that highlighted potential problems with “broadband discrimination.” Wu sees network neutrality as an end goal of policy that should prioritize innovation in a dynamic communications environment whose fundamental industrial organization has not yet been concretized.¹⁶ Because “cognitive biases” toward existing schema or traditional protocols may stifle innovation, especially by those who may already be established on the platform (in this case the internet) it is crucial “that the platform be neutral to ensure the competition remains meritocratic.”¹⁷ In specific terms of what net neutrality means for the end consumer, it ensures that all traffic carried over an internet service provider’s service network and into the subscriber’s home be treated equally in terms of access and delivery efficiencies. For example: the principle of net neutrality would not allow Comcast to slow down the movement of Netflix’s information packets to Comcast internet subscribers (as it did in 2013) while optimizing the Comcast subscriber’s reception of video over Hulu (in which Comcast subsidiary NBC owns a controlling interest).

On February 26, 2015, the FCC elected to codify net neutrality as a fundamental principle of broadband network regulation.¹⁸ Its “Open Internet” ruling reclassified broadband internet as a “Title II telecommunications service” under the 1934 Communications Act.¹⁹ This means that broadband internet providers (both wired and wireless) are now legally defined “common carriers”—just like the (wired) phone companies. As such, they have responsibilities to “act in the public interest” and cannot “make any unjust or unreasonable discrimination [or undue or unreasonable preference] in charges, practices, classifications, regulations, facilities or services.”²⁰ This means that internet service providers may not engage in blocking, throttling, or paid prioritization—in other words, all websites, regardless of owner, content, or bandwidth usage must be delivered to consumers without preferential or prejudicial altering of their load times.²¹

The open internet ruling also invokes Section 706 of the Telecommunications Act of 1996 which states that “advanced telecommunications services” must be utilized “in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.”²² Section 706 also seeks to extend “advanced telecommunications capability to all Americans” but particularly “elementary and secondary schools and classrooms.”²³

It appears that the FCC invoked Section 706 in its classification of broadband as a common carrier under the original Title II so as to refute earlier judicial rulings in the 2014 *Verizon v. FCC* case. In this case, Verizon stated that because the FCC had previously defined broadband as an information service (under Title I of the 1934 Communications Act); it could not reclassify them as a common carrier. If Verizon and other internet service providers (ISPs) had remained information services, they would be free to engage in competitive speed capping as well as avoid the much stricter regulatory requirements that adhere to common carriers. Section 706 softens the language of Title II by emphasizing the promotion of infrastructure investment and preservation of a competitive market for advanced telecommunication capacities that preemptively strikes at industry complaints that common carrier status will prevent innovation and expansion.

In what can also be interpreted as a preliminary strike against legal challenges by the industry, the FCC also explicitly claims “broad forbearance” in the parts of Title II that apply to ISPs. It states: “In finding that broadband Internet access service is subject to Title II, we simultaneously exercise the Commission’s forbearance authority . . . to establish a light-touch regulatory framework tailored to preserving those provisions that advance our goals of more, better, and open broadband. We thus forbear from the vast majority of rules adopted under Title II.”²⁴

The sections that the FCC specifically/explicitly does *not* waive are “sections 201, 202 and 208 (or from related enforcement provisions), which are necessary to support adoption of our open Internet rules.”²⁵ These sections of the 1934 Communications Act pertain to interconnectivity (the ability of ISPs to make arrangements with each other to carry each other’s traffic across the internet until their proprietary “last mile”); discriminatory provision of services (throttling, paid prioritization, etc.); and the right of persons with complaints about the common carrier to petition the Commission, who will follow an information-gathering process to ensure fairness to all parties involved. Therefore, these parts of the act protect consumers, preserve competition, and encourage growth without creating ownership caps on MSOs or engaging in rate-regulation. (ISPs may set their own rates in accordance with whatever the market will bear.)

Other Title II regulations of the 1934 Communications Act that remain in effect in this ruling are sections 222, 224, 225, and 254. These pertain to privacy, accommodations for persons with disabilities, and the requirement that local utilities grant the ISPs access to their infrastructure (poles, ducts) so as to encourage the growth and development of universal service.

One interesting feature of this ruling is that it redefines both wired and wireless broadband services as “common carriers.” Therefore, wireless ISPs (essentially cell phone providers) are now subject to the same rules as are their wired ISP brethren (the cable companies). In this case the forbearances have much more direct advantages for the wireless ISPs as “data caps” are expressly not forbidden so as to encourage the universal spread of internet access to mobile-only users. Thus, wireless providers may provide different “tiers” of data plans with different pricing points as presumably this supports universal

access through different price points. It should be noted that this is a capping of amount of data one can receive a month for one's set fee, not the capping of the speed of the delivery of certain kinds of data.

A less clear wireless data initiative is that of "zero rating" particular apps or families of apps that stream content. Zero rating means that customers use of these apps does not count against their monthly data allowance. The FCC has yet to rule on a case about this, but it would seem to fall into a grey area, particularly if it favors the streaming consumption of one company's service (e.g., YouTube) over another's (Netflix). (This is also where programs like T-Mobile's "Binge On" may be vulnerable to challenge.)

As was predicted, the industry majors immediately filed suit against the FCC open internet regulations claiming that the agency had again exceeded their power in reclassifying wired and wireless broadband as common carriers and insisting that the ruling not only violated the First Amendment rights of the corporations involved, but also would retard innovation in the field. On June 14, 2016, the District of Columbia's Appeals Court rendered a decision upholding the network neutrality rules finding that the Commission was acting within its powers to reclassify the service providers as common carriers.²⁶ While AT&T, Verizon, and the other plaintiffs have vowed to take this to the Supreme Court, it is unlikely that this will occur in the immediate future. FCC Chairman Tom Wheeler said of the ruling "It is a victory for consumers and innovators who deserve unfettered access to the entire web" and that it would "ensure the Internet remains a platform for unparalleled innovation, free expression and economic growth."²⁷

Ownership

As repeatedly noted, due to market realities and the economies of scale traditionally required to create and sustain the production, distribution, and exhibition of entertainment, these industries tend toward oligopolies. The role of regulators has been to control conglomeration by maintaining ownership caps or prohibitions against purchases that would create too large a controlling entity in any industrial segment so as to ensure a diversity of voices in

the marketplace and to prevent one corporate perspective from gaining too much exclusive or exclusionary access to the viewing population. Station caps and ownership limits were inscribed in the original 1934 Communications Act but, as we have seen, these caps have been revised in subsequent legislation to respond to the multiplication of choice with regard to viewing options and presumably voices that are now available to the citizen-consumer.

Patterns of corporate acquisition can take several forms. The overall goals were originally vertical and horizontal integration. Vertical integration brings companies involved in all phases of production—distribution—sale together while horizontal integration is the accumulation of multiple companies whose primary economic activity is at the same phase or stage of industrial activity.²⁸ Now we have reached a stage of transindustrial conglomerates—“firms that vertically and horizontally integrate multiple media operations within and across multiple media industries.”²⁹ The result of this is an “increased concentration of ownership across all media, with fewer companies involved in more media oligopolies.”³⁰ The easiest way to understand this is to consider the holdings of any of the six global conglomerates that controlled 90 percent of media markets in 2011.³¹ Among the holdings of each of these companies (Comcast-NBCU, News-Corp, Disney, Viacom, TimeWarner, and CBS) one finds not only film studios, television production companies, television and cable networks, station groups, and O&Os, but also publishing companies, music, theme parks, newspapers, and magazines—all in the same corporate family.

For example, in 2011, the merger of Comcast and NBCUniversal united the largest cable MSO in the United States and a large diversified entertainment company with many broadcast and cable holdings. More recently TimeWarner, a highly vertically and horizontally integrated media company with holdings across television, film, music, and publishing, merged with Charter Communications (the number two MSO in the country). Shortly afterward, Altice, the fourth largest cable provider in Europe purchased New York-based Cablevision (more on this in the next chapter). The implications of this new wave of conglomeration which brings together massive content creators with cable and internet providers are massive for both the market and the consumers.

Prior to the merger, Comcast was the largest cable operator in the United States, the largest residential high-speed internet provider in the United States, the third largest home phone company, the owner of key content properties including eleven regional sports networks and the manager of a large video on demand (VOD) concern.³² NBCUniversal was a content conglomerate that owned one of the largest national broadcast networks as well as some of the most popular cable networks in the United States, owner of NBC Sports, seven production studios, twenty-five television stations in all major US DMAs and had interest in several internet properties, including iVillage and 1/3 of Hulu.³³

Writing shortly after the merger, Susan Crawford noted that the merged company controls “one in five hours of all television viewing in the United States ... and more than 125 media outlets (cable channels, television stations, film studios, web sites).”³⁴ But more important than the content library and branded channels that NBCUniversal brought to the table was Comcast’s broadband service—a primary provider of broadband connectivity in most major US cities.³⁵ This bears further examination in light of the “sky is falling” rhetoric that has been employed with regard to the “threat” of OTT producers and distributors to traditional television “because no other widely available privately provided wired Internet access product is fast enough or can be installed cheaply enough to compete with cable, each of the country’s large cable distributors can raise prices in its region for high-speed Internet access without fear of being undercut.”³⁶ While cable subscriptions may have declined in recent years, “80% of Americans buying a wired high-speed connection these days sign up with their local cable incumbent” and in fact, “for 75% of Americans, the only choice for globally standard high-speed Internet access will soon be the local cable guy.”³⁷ So, if the traditional “legacy” broadcast and cable television companies are part of these large wired internet service-providing conglomerates, how much do they really have to worry about cord cutters or cord shavers? If “broadcasting” and “cablecasting” moves predominantly to IPTV platforms, it is their same content, same advertising, just served via a different pipe, which they still own and receive revenue streams from. And, of course, cable companies can, have, and will “push subscribers toward bundles of pay-TV and Internet access by pricing Internet-only subscriptions at a higher rate than that of the bundle.”³⁸

Spectrum allocation and auctions

Among the lesser-discussed mandates of the 1996 Telecommunications Act was the transition of all analog television broadcasters to digital. The presumed and widely publicized reason for this conversion was to “free up parts (‘bands’) of the scarce and valuable broadcast [airwaves], allowing these bands to be used for public safety and emergency services, such as police, fire and medical services, and new wireless, services, such as wireless broadband.”³⁹ This conversion was pushed back several times, from 2006 to 2007 to 2008, until analog television broadcasting ultimately ended on June 12, 2009. The spectrum that was freed by the transition was sold through an FCC-administered auction and netted the government \$19.5 billion, \$16.3 of it from wireless mobile providers Verizon and AT&T.⁴⁰ Verizon, AT&T, and US Cellular have utilized their new spectrum to enhance the speed of their wireless broadband coverage in urban areas, rather than enhancing coverage in less populous area.

As I write this, the 600MHz spectrum is imminently going up for auction by the FCC. This auction is actually composed of two separate actions, one of which is a “reverse auction” (Auction 1001) in which current license holders (television broadcasters) will sell their spectrum back to the FCC. This repurchased spectrum will be bundled with additional spectrum currently controlled by the FCC and then offered in a “forward auction” (Auction 1002) which will offer this spectrum for reprovisioning as wireless broadband infrastructure. The FCC states explicitly that the goal of this buy-back/sell-forward is to “expand the benefits of mobile wireless coverage and competition to consumers across the Nation, offering more choices of wireless providers, lower prices, and higher quality mobile services.”⁴¹

The major participants registered for both auctions are, not surprisingly, Verizon AT&T and T-Mobile US; it is assumed that they will be the winners of the largest amount of spectrum. This particular part of the spectrum is technologically attractive to wireless providers because it “offer[s] both distinct propagation characteristics for deployments over long distances and strong in-building penetration.”⁴²

It is instructive to note that Chairman Wheeler emphasizes the fact that broadcasters’ participation in his auction process will be “purely voluntary,

and participation ... does not mean they have to leave the over-the-air TV business entirely. New channel-sharing technologies offer broadcasters a rare opportunity for an infusion of cash to expand their business model and explore new innovations, while continuing to provide their traditional services to customers.”⁴³ How this will be accomplished, both technologically and in a regulatory sense, remains to be determined.

What this means is that there may be locally licensed broadcast affiliates or independent stations that are going to sell back all of their spectrum allocation to the FCC—in effect ceding their identities as traditional broadcasters. This would free them from certain legally defined responsibilities of FCC-licensed OTA broadcasters such as main studio rules, local programming, and the nebulously defined “public interest” services and force them to rely upon carrier agreements with cable and satellite MSOs as well as their own IPTV websites to distribute themselves to viewers.

What is important to understand about the spectrum auction is that while it will increase the industrial size and capacity of wireless providers, this does not pose a major threat to the wired broadband providers. Wired high speed internet and wireless services do not currently compete with each other directly. They are complementary services.⁴⁴ Therefore, “there are two enormous monopoly submarkets—one for wireless and one for wired transmission. Both are dominated by two or three large companies.”⁴⁵ In many of the largest markets, the same companies (Verizon and AT&T) might be dominant in both the wired and the wireless broadband markets, making such distinctions irrelevant except to those interested in antitrust legislation.

Because spectrum is a limited resource, wireless is inherently a limited technology. Wireless might seem to be the antidote for the stranglehold the cable companies have on wired internet access but coaxial cable and fiber optics are 20–100 times faster than a 4G wireless connection.⁴⁶ According to Crawford, “In order to build a wireless network that could be used by everyone and that would perform as well as wired high-speed Internet services there would have to be a wireless tower on every rooftop—connected to a wire—that no user shared with any other.”⁴⁷ Therefore, while AT&T and Verizon must abide by net neutrality rules in their provision of wired high-speed internet, the very nature of their wireless technology (use of the scarce spectrum) ensures that

they will not challenge MSOs broadband services in the marketplace, particularly not in the delivery of IPTV.

Wired distribution systems such as telephone and cable are what Crawford calls “natural monopoly industries” because “up-front capital costs are high and the marginal cost of serving one additional customer is low.”⁴⁸ Once the major wiring has been installed and the necessary deals made with the municipalities through whose infrastructure the wires run, additional customers “will not only mean more revenue for the provider, it will also reduce the company’s average cost of serving its entire customer base.”⁴⁹ This obviously favors incumbents, especially if they already have monopoly control over particular regions and markets—and it also dissuades competitors from attempting to enter the market.⁵⁰ This is what caused the “nationwide rollout” of Verizon FiOS to stall as well as what makes Google Fiber unlikely to spread beyond its experimental run in Kansas City.⁵¹ The incumbent cable systems already have formed a natural monopoly and the cost of running fiber into these communities is prohibitively expensive when compared with what the market will currently bear, even though a large-scale capital investment in this infrastructure now would yield much higher profits for Verizon and Google in the long run.

MVPD vs. OVD—What’s in a definition?

The legal definition of a “multichannel video programming distributor (MVPD)” is “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 consumers, multiple channels of video programming.”⁵² This includes all existing cable and satellite MSOs. As a result, content providers such as AT&T/DirectTV, Comcast, Charter-Time Warner, Cablevision/Altice, and Verizon FiOS (the five largest MVPDs in the United States)⁵³ are subject to regulations that exclusively online video distributors (OVD) such as Amazon Instant Video, Hulu, and Netflix are not.

The primary point of contention here is the financial challenges that the regulatory requirements of MVPD classification would create for OVDs,

particularly those seeking to enter the market. Among these regulations are cable program access, Equal Employment Opportunity Commission (EEOC) obligations, mandatory closed-captioning/video description, and, most importantly, retransmission consent fees.

The FCC released a Notice of Proposed Rulemaking on the topic in 2014, in which it advocated the reclassification of OVDs as MVPDs, arguing that the designation MVPD should apply to any “services that make available for purchase, by subscribers or customers, multiple linear systems of video programming, regardless of the technology used to distribute the programming.”⁵⁴ Presumably the FCC is seeking to primarily address one reality and one industry/market-based concern with this proposed redefinition. The reality is the acceptance that “television” can no longer be technologically defined as “broadcast, cable and satellite”—it is now “platform everywhere” and its definition in practice is more based on the characteristics of its content rather than the container through which it is delivered to the viewer. The market-based concern (according to Chairman Wheeler) is that “efforts by new entrants to develop new video services have faltered because they could not get access to programming content that was owned by cable networks or broadcasters” and that “big company control over access to programming should not keep programs from being available on the Internet.”⁵⁵

That being said, the validity of the market-based concern raises more questions than it addresses. The majority of OVDs are owned and operated by big companies anyway—as such they are already operating in the collaborative cross-licensing economy that is part and parcel of the operation of the entertainment oligopolies (you pay me for my content and delivery, I’ll pay you for yours and do likewise). When “big companies” have restricted access to their content (as NBC and ABC did with Netflix in the lead up to the Hulu launch), Netflix’s response was to expand its licensing deals of overseas English-language programming and to enter the original production realm. This was possible because it already had the revenue streams and capital to invest in this competitive action. If it were classified as an MVPD, NBC, and ABC would have been forced to negotiate carriage fees with Netflix, but could have made these negotiations prohibitively expensive or stalled them until it had sufficiently benefitted Hulu.

The position that OVDs should be recategorized as MVPDs to encourage competition and new entry into the market is interesting in the wake of the Supreme Court decision on Aereo in 2014. In 2012, Aereo began offering OTA viewers in New York City access to broadcast channels via a remotely located dime-sized antenna and DVR service that the viewer accessed over the internet via his or her computer, tablet, phone, SmartTV, or streaming device.⁵⁶ The viewer leased the remote antenna for about \$8 a month which included twenty hours of cloud-based DVR storage. Technologically, Aereo worked by tuning the individual subscriber's antenna to the broadcast feed of the channel that the subscriber selected to view, began recording the broadcast feed of that channel to a remote DVR on a cloud server and then streamed the programming from the cloud-based DVR on the device to which the subscriber was viewing. Therefore, the subscriber was not receiving a direct live feed of the OTA broadcast signal, but rather a seconds-delayed replay of the content from the remote DVR.⁵⁷ Aereo was thus technically an OVD—while it relied upon the OTA broadcast signal for initial reception of the content, its use of broadband and wireless connectivity made it an online video distributor of sorts.

Aereo's design was widely critiqued as being "barely legal" from the start. Writing in the *Harvard Business Review's HBR Blog* in 2013, Larry Downes said "the entire business is engineered to exploit existing copyright law."⁵⁸ It did so mainly by relying on a combination of one of the central unchallenged tenets of American broadcasting—that "over-the-air television [is] free to anyone who puts up an antenna and connects it to a receiving device" and legal precedents set by the 1984 Sony Betamax case that said individual consumer use of video recording devices to time-shift the viewing of video programming was "fair use" of the content.⁵⁹ The Betamax decision was further complicated by a 2008 case in which the television networks sued Cablevision for its development of a "'Remote Storage' DVR." Cablevision wanted to maintain "virtual DVRs" for each of its subscribers to which the subscriber would record his or her time-shifting programming via home remote. While "from an engineering standpoint it would only have needed one [recorded copy of the shows] to handle the replay," the Cablevision system made an individual copy of each show on its cloud servers as the show was aired for each subscriber who requested it.⁶⁰ Thus, the Cablevision customers were watching "their" copy of

the show during playback. The Cablevision system looks very much like what Aereo offered. The networks argued that the virtual DVR system as “really just a ruse to let Cablevision offer their content as on-demand programming without paying extra for it. The difference between a home VCR and a remote DVR was legally significant, they said. Indeed, it was the difference between fair use and an unauthorized rebroadcast.”⁶¹ The court ruled in favor of Cablevision saying that as long as separate viewer-initiated recordings were made and maintained by Cablevision on its hard drives and served individually to customers, the service was within the boundaries of Betamax.

The television industry argued that Aereo was operating as a cable or satellite provider—providing “retransmission” of their content without paying “retransmission fees,” which were established by the 1992 Cable Television Consumer Protection and Competition Act and are federally regulated. The specific charge made in this case (*ABC Television Stations v. Aereo*) hinged on the interpretation of the definitions of “public versus private performance” in US copyright legislation.⁶² Central to this question was “when private consumer technology crosses the line into becoming a public performance.”⁶³ According to the Copyright Act of 1976, an indirect public performance (as opposed to a direct one, such as a movie screening) is when “members of the public capable of receiving it did so ‘in the same place or in separate places, and at the same time or at different times.’”⁶⁴

Aereo claimed that its activity was within the “fair use” rulings of the Betamax and Cablevision decisions because its service was based on the individual—“hundreds of thousands of tiny antennas . . . one for each of its customers. It’s just like having your own antenna and a DVR at home, the company argues, except that the antenna and the DVR are both remote, and you control both through the Internet and not your television. It’s not just time shifting. It’s place shifting.”⁶⁵ The assigning of an individual antenna to every subscriber thus made the transmissions private performances.

The Supreme Court disagreed and in a 6–3 decision said that Aereo had violated the copyright of the broadcasters. Writing for the majority, Justice Breyer said that Aereo was “‘not simply an equipment provider’ but acted like a cable system in that it transmitted copyrighted content.”⁶⁶ As for the private performance argument, Breyer stated “You can transmit a message to your

friends whether you send identical emails to each friend or a single email all at once.”⁶⁷ Justice Scalia, writing for the dissent objected to Aereo’s entire business model saying it was one that “exploited a loophole” and that it was the job of regulators and legislators, not the Court to plug loopholes.⁶⁸

CBS CEO Leslie Moonves, one of the most outspoken television industry leaders said of the decision: “We expected to win, but it certainly feels good to win as decisively as we did.”⁶⁹ He was blunt about what was expected of the Aereo-like service: “all that’s important here is that broadcasters and cable content companies and everyone who’s involved with the content producing business gets paid appropriately for their content. And that somebody can’t come and take that content, charge for it, and not pay us back for that content.”⁷⁰ Other industry entities from networks to unions and guilds voiced much the same relief at the exit of Aereo from the market since it protects a valuable revenue stream that supports new production.

In 2014, Aereo filed paperwork to be reclassified as a cable company.⁷¹ This reclassification would have required Aereo to pay retransmission fees to the broadcasters whose signals it provides, which begged the question of Aereo’s viability as an MVPD. At the end of 2013, Aereo had “77,596 subscribers, spread out among 10 cities.”⁷² With a maximum subscription of \$12 per month, Aereo would not have been able to cover the cost of retrans fees for all the signals it was rebroadcasting. Additionally, although Aereo claimed to have the technological capacity to serve hundreds of thousands of subscribers, its market performance indicated that the majority of viewers were unwilling to pay a monthly fee to get programming that is usually available (along with many other options) for next day viewing via online outlets like Hulu Plus or the networks’ own sites. This left locally originated programming (primarily news) as the unique programming Aereo was able to provide. Regulatory issues aside, as all local television stations maintain websites that include streaming video, Aereo was ultimately providing a redundant service without sufficient value-added for all but a small group of viewers. After filing for bankruptcy, Aereo was acquired by TiVo for \$1 million and briefly used in an attempt to sell its now-defunct Roamio OTA DVR system.⁷³

The use of Aereo-like technology to offer access to broadcast signals has just now begun to be explored by cable MSOs. Optimum is offering a \$24.95

subscription package that essentially provides subscribers with a digital antenna that receives all broadcast signals in their service area plus a DVR. This, however, is a bona fide retransmission-fee-paying MVPD utilizing this technology to bring cord-cutters back into its subscriber fold. This convergence of cable and OTT seems primed to continue as Comcast has recently announced the integration of Netflix subscriptions into its new set-top boxes in late 2016.⁷⁴ This would seem to indicate a tacit acceptance of the OTT platforms by the traditional video industries—and it legitimates them as another form of television. Whether this will be subject to FCC intervention at a later date (the set-top box issue is currently moribund but may rise again) remains in a liminal state.

Regardless of parent company ownership, it behooves OVDs to be excluded from the MVPD definition. While some may find future OVD retransmission markets to be lucrative, the requirements to carry OTA content would create needless duplication as well as raise further questions about the relevancy (and definition) of “local broadcast footprints” in an era of IPTV. The comment-period for this rulemaking was extended into spring 2015, but as of summer 2016 it remains in a decidedly liminal phase while OVDs continue to behave like (and be acquired by MVPDs).

What we can say of the contemporary moment in US communications regulation is that it appears to favor an expansion of viewing options through mandated “equal access” of content via the internet. At the same time, spectrum auctions seem destined to sharply contract the technological existence of “broadcast” television and to move that distribution to wired and wireless broadband common carriers. The ability of the on demand audience to engage in substantial mobile viewing will be directly affected by the strength and expansiveness of high-speed next generation wireless systems, as will the building of a reliable nationwide wireless system with capacities suitable to provide universal service to urban and rural populations equally.

