TV Competition Nowhere:

How the Cable Industry Is Colluding to Kill Online TV

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Executive Summary

We stand at a defining moment for the future of television and film. Existing and evolving Internet technologies may finally inject much needed competition and choice into the TV market by enabling Americans to watch high-definition programs on the Internet from anywhere or on the family living room screen. But the big cable, satellite and phone companies, which benefit from the status quo, are trying to put down this revolution in online video.

The dominant distributors and studios have a long history of scrambling to kill online TV and trying to preserve the current market structure and prevent disruptive competition. Over the past decade, they have locked down and controlled TV set-top boxes to limit competing programming sources; they have considered imposing fees for high-capacity Internet use in ways that would discourage online TV viewing; and they have pressured programmers to keep their best content off the Internet.

In addition, these companies, which already dominate the Internet access market, have threatened to discriminate against certain online applications or have already been caught violating Network Neutrality. Indeed, the FCC issued an order in 2008 against Comcast for blocking technologies used to deliver online TV, noting the anti-competitive effect of this blocking. While it may be economically rational for cable, phone and satellite companies to squash online competitors, the use of anti-competitive tactics is bad for American consumers and the future of a competitive media industry.

The latest method of attack aimed at online TV, however, may be the most threatening — and is also likely illegal. Competition laws aim to ensure that incumbent companies fight to prevail by providing better services and changing with the times, not by using their existing dominant position and agreements to prevent new competitors from emerging.

The cable, satellite and phone companies have apparently forged an agreement known within the industry as "TV Everywhere." Adopted after lengthy discussions among incumbents, TV Everywhere is designed to crush online competition while being marketed as a consumer-friendly feature. On Dec. 15, Comcast became the first company to launch its TV Everywhere product, under the brand Fancast Xfinity. The other dominant cable, satellite and phone companies have announced plans to follow suit.

TV Everywhere has a simple business plan, under which TV programmers like TNT, TBS and CBS will not make content available to a user via the Internet unless the user is also a pay TV subscriber through a cable, satellite or phone company. The obvious goal is to ensure that consumers do not cancel their cable TV subscriptions. But this plan also eliminates potential competition among existing distributors. Instead of being offered to all Americans, including those living in Cox, Cablevision and Time Warner Cable regions, Fancast Xfinity is only available in Comcast regions. The other distributors will follow Comcast's lead, meaning that the incumbent distributors will not compete with one another outside of their "traditional" regions.

In addition, new online-only TV distributors are excluded from TV Everywhere. The "principles" of the plan, which were published by Comcast and Time Warner (a content company distinct from Time Warner Cable), clearly state that TV Everywhere is meant only for cable operators, satellite companies and phone companies. By design, this plan will exclude disruptive new entrants and result in fewer choices and higher prices for consumers.

This business plan, which transposes the existing cable TV model onto the online TV market, can only exist with collusion among competitors. As a result, TV Everywhere appears to violate several serious antitrust laws. Stripped of slick marketing, TV Everywhere consists of agreements among competitors to divide markets, raise prices, exclude new competitors, and tie products. According to published reports and the evident circumstances, TV Everywhere appears to be a textbook example of collusion. Only an immediate investigation by federal antitrust authorities and Congress can prevent incumbents from smothering nascent new competitors while giving consumers sham "benefits" that are a poor substitute for the fruits of real competition.

Building the Case

This paper has three parts. The first provides background on the current marketplace and chronicles the previous tactics of cable TV distributors to thwart online TV's disruptive potential. The second part details how the existing cable competitors forged agreements to create TV Everywhere, largely through closed-door discussions and industry conferences. The third part provides a detailed antitrust analysis.

To tell the story of how the existing providers came together to formulate "TV Everywhere," one must set aside the consumer advertisements and review the trade publications, statements by industry executives at trade shows and panels over the past year, as well as the comments those executives made to the press. Such a review shows how cable executives deliberately attempted to avoid a paper trail, crafting the plan with conversations in person, on the phone, and at trade events.

The evidence, including statements by leading cable TV executives, makes clear that, under the circumstances, TV Everywhere cannot work without collusion. Executives recognize that competitive pressures should force programmers to make more and more content available online — and to compete with one another. That is, Comcast's Fancast Xfinity should be competing online *both* with the offerings of other cable operators, like Time Warner Cable, and those of programmers like Hulu, owned (for now) by Disney, Fox, NBC and others. One Comcast executive described the online TV situation as a classic "prisoner's dilemma," in which two criminals are collectively better off by colluding but worse off by following their individual self-interest.

Competitive pressures should require existing cable TV distributors to meet consumer demand for online TV, rather than resist the demand by tying programming to inflated cable TV subscriptions. Recently, when the newspapers sought to implement an industry-wide "pay wall" on the Internet, the papers sought an antitrust exemption from the Justice Department to hold talks. The cable industry did not seek such an exemption for TV Everywhere, but went ahead and implemented an industry-wide agreement anyway, in apparent violation of the law.

Government oversight, antitrust law and competition policy exist to ensure a fair marketplace for all business interests to the benefit of consumers and the economy. This paper calls for congressional hearings on TV Everywhere and an immediate investigation and action by antitrust authorities at the Justice Department or Federal Trade Commission. Swift action must be taken to protect consumer choice and preserve the once-in-a-generation opportunity for emerging competition in TV that new technologies can provide.

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The Battle to Control the Living Room Television

The cable TV industry historically has not been competitive. As a result, it has long feared the Internet would create disruptive new competitors upsetting that current market structure.
This section provides background on the existing cable market structure and on how online TV would hurt dominant distributors by enabling cord-cutting, injecting competition, and increasing independence for programmers. It then discusses the incumbents' earlier tactics used to thwart online TV.

The Cable Industry's Current, Concentrated Market Structure

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

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

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

Distribution. In a market worth billions annually,[1] a cable operator such as Comcast, Time Warner Cable or Cox is usually the lone local cable operator, having long ago received government-backed monopolies and guaranteed returns.[2] In the 1990s, satellite operators were able to compete more effectively, largely through regulatory changes such as a compulsory copyright license for broadcasting and program access rules requiring cable operators to make their content available to rival satellite providers.[3] This decade, after years of promises, telephone companies finally entered the cable TV business, with the benefit of regulatory changes,[4] though their deployment plans will target no more than 40 percent of U.S. homes.[5] So far, government attempts to increase competition in the cable market have resulted in only four players at most,

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[1] One Wall Street analyst, Laura Martin of Soleil Media-Metrics, estimates the current worth of all the companies involved in television production and distribution at $300 billion. See Tim Arango, "Cable TV's Big Worry: Taming the Web," *New York Times*, June 23, 2009.

[2] Time Warner Entertainment Co., L.P. v. FCC, 56 F.3d 151, 183 (DC Cir. 1995) ("The monopolies most cable operators now enjoy resulted from exclusive franchises granted by local authorities").

[3] Satellite Broadcasting and Communications Association v. FCC, 275 F.3d 337 (4th Cir. 2001).

[4] Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, 22 FCC Rcd 5101, 5103 (2006); Chesapeake & Potomac Tel. Co. v. United States, 42 F.3d 181, n.13 (4th Cir. 1994) (suggesting phone carriers could "easily").

[5] Comments of Free Press, (Sixth) Inquiry Concerning the Deployment of Advanced Telecommunications Capability Pursuant to Section 706, GN Docket 09-51, Sep. 4, 2009, at 50.

with the local cable operator still dominant. And entry barriers are so high that additional facilities-based competitors are not expected to emerge. This limited competition and insurmountable barriers to entry have resulted in even higher prices,[6] with few advances in formats and cuts in capital investments even as the cost of technology falls.[7] Broader competition is sorely needed.

For *consumers*, the distribution market is local not national. On *average*, the local cable operator retains roughly 68 percent of the local cable TV consumer market, according to the most recent Federal Communications Commission study in 2007.[8] The satellite operators DirecTV and EchoStar roughly split most of the rest, though phone companies are making inroads.[9] More recent figures, which are not available, would likely show that Verizon's Fios product has taken some market share, though Fios is available only in few, generally wealthy, and densely populated communities.[10] These local markets are oligopolies; indeed, the cable operators' 68 percent share likely signifies monopoly power.[11]

For *programmers*, the distribution market is more national or regional; programmers can sell to more purchasers if different distributors operate, even in different towns. This national market is also highly concentrated. In 2006, four cable TV distributors, which included two satellite operators, served approximately 63 percent of all cable TV subscribers. The top 10 cable TV distributors served 87 percent of subscribers.[12] The two largest were Comcast and Time Warner Cable.[13] While the telephone companies have taken some share, the market remains highly concentrated.

This minimal competition results in bad outcomes for consumers. Cable operators have the lowest consumer satisfaction ratings of any industry,[14] even while they soak up large profit margins and raise prices.[15] Some had predicted that the advent of competition from satellite and phone companies would decrease prices and increase quality.[16]

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[6] "Statewide Video Franchising Legislation: A Comparative Study of Outcomes in Texas, California and Michigan," University of Minnesota, Prepared for the Minnesota Department of Commerce, March 2009, p. 16 (providing theories for this increase, none of which turn on increased cost).

[7] *See* Reply Comments of Free Press, (12th) Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 07-269, August 28, 2009, at 7 ("Free Press MVPD Reply"); *see also* Saul Hansell, "The Cost of Downloading All Those Videos," *New York Times Bits Blog*, April 20, 2009.

[8] 13th Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 06-189, Jan. 16, 2009 (adopted Nov. 27, 2007), at ¶¶34-41 (MVPD 2007 Report).

[9] MVPD 2007 Report; para 75 & n. 636.

[10] Stacey Higginbotham, "Is Verizon FiOS Putting the Hurt on Cable?," *GigaOm*, July 27, 2009.

[11] DOJ& FTC, Competition and Monopoly: Single Firm Conduct Under Section 2 of the Sherman Act, Sep. 2008, at 19-21(now withdrawn for other reasons).

[12] MVPD 2007 Report; Para 178.

[13] MVPD 2007 Report; n. 636.

[14] *See generally* American Customer Satisfaction Index, "Q1 2008 and Historical ACSI Scores," May 19, 2009 (ranking the cable industry tied for lowest overall at 63 in 2009, along with newspapers, and below wireless telephone companies).

[15] Regarding profit margins, see Reply Comments of Free Press, A National Broadband Plan for Our Future, GN Docket No. 09-51, July 21, 2009, at 23-24 (providing charts comparing investment and profit margins of major telecom and cable providers, and comparing the investment and margins with other capital-intensive sectors). Regarding increasing prices, see Free Press MVPD Reply, at 4-6.

[16] Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, 22 FCC Rcd 5101, 5103 (2006) ("We believe this competition for delivery of bundled services will benefit consumers by driving down prices and improving the quality of service offerings.").

Programming. The programming market is also concentrated, with a few dominant programmers, both non-broadcasters and broadcasters.[17] Large non-broadcast players, whose content is available only through a cable TV subscription, include Viacom (owner of MTV Networks, Comedy Central and others) and Time Warner, a content company that split off from Time Warner Cable, and owns TBS, TNT and CNN. Broadcasters, available both on cable TV and over-the-air, for free, include ABC, NBC, CBS, and Fox.[18] Programmers have high profit margins based on adding two revenue sources — advertising and per-subscriber fees. While programmers are sometimes "cagey" about their financials, the head of NBC's cable channels stated her channels' operating profit margins "are well over 50 percent."[19]

Programming is often vertically integrated, with distributors owning programmers. In the FCC's last report in 2007 (which was before Time Warner's split from Time Warner Cable), the FCC found that of the 565 national non-broadcast channels it identified, many of the most popular were affiliated with a cable operator (84 channels total).[20] Dozens more channels were affiliated with a satellite operator.[21] At the time, five of the top seven cable operators held ownership interests in national programming networks.[22]

The industry may become more consolidated if the Comcast-NBC Universal merger is approved. Today, for example, Comcast owns E! Entertainment Television, Versus, The Golf Channel, regional sports networks, G4, and invests in The Style Network, TV One, PBS Kids Sprout,[23] Current, Driver TV, MGM Holdings, NHL Network, Music Choice, Pittsburgh Cable News Channel LLC, and the MLB (Major League Baseball) Network. If the Comcast-NBC merger is approved, then Comcast would also own MSNBC, CNBC, Bravo, USA Network, Sci-Fi, the NBC network (which affiliates with hundreds of broadcast stations), Telemundo and a minority share in broadcaster ION media, as well as more than 20 local NBC-owned-and-operated broadcast stations and a major interest in the online video service Hulu. Comcast also has disclosed its equity interests in several smaller cable programmers.[24]

In a common practice that further increases vertical integration, cable TV distributors require small programmers to give up much of their companies' equity stock to cable TV distributors just to get carried.[25] As one programmer's CEO explained, "Cable and satellite TV companies want to own you before they put you on television."[26] If true, this is illegal under communications laws.[27] Programmers have argued that distributors collectively blackball any programmer who files a

[17] *See* Mark Cooper and Derek Turner, "The Negative Effect of Concentration and Vertical Integration on Diversity and Quality in Video Entertainment," Presented at the 35th Research Conference on Communication, Information and Internet Policy (TPRC), Sept. 29, 2007.

[18] These networks own stations and then affiliate with stations across the country they do not own. The network may negotiate carriage for its affiliates. *See* Melissa Grego, "Retrans … The Bloody Battle to Save Broadcast Television," *Broadcasting & Cable*, Dec. 14, 2009.

[19] David Lieberman, "NBC Universal's Bonnie Hammer Plans to Build on Cable," *USA Today*, March 22, 2009.

[20] MVPD 2007 Report; Para 187.

[21] MVPD 2007 Report; Para 187.

[22] MVPD 2007 Report; Para 20.

[23] Mike Farrell, "Is Comcast Trolling For Content?," *Multichannel News*, Sept. 9, 2009.

[24] Rafat Ali, "Comcast Units Not Part of The Deal, and Its Undisclosed Stakes," *PaidContent.org*, Dec. 4, 2009.

[25] *See* discussion in Free Press MVPD Reply, at 9-10 (quoting, from recent news reports, a consultant to many start-up programmers, Cathy Rasenberger, stating, "You need an equity partner these days among the distributors"; Nicolas Saltos, CEO of "The Horror Channel" stating, "Cable and satellite TV companies want to own you before they put you on television.").

[26] "Blacks Support Congress Bill for Fairness in Television Opportunities," *DogonVillage.com*, 2006.

[27] 47 U.S.C. § 536(a)(1).

carriage complaint against one distributor;[28] in addition, distributors may simply copy the programmers' format and deny carriage (or threaten to do so in negotiations).[29] In addition to the formal consolidation, a former cable executive points out "all of the executives at the top of these [cable] companies have been in and around the industry for years and have close personal and professional ties."[30] These ties facilitate discussions such as those around TV Everywhere.

Money flows: Cable TV distributors charge consumers monthly subscription fees for packages of content at generally unregulated prices far above cost.[31] With these revenues, the distributors pay programmers (their suppliers) a per-subscriber fee for every house that receives the programmers' channel. The fee may include advertising slots provided to the distributor, and it may decrease based on channel placement.[32] Cable distributors pay about a third of subscriber fees to cable programmers; these fees comprise half of the programmers' revenues, with the other half coming largely from advertising. Programmers also pay studios, which provide content for their channels.[33] These deals vary based on the market power of the programmer and the distributor.[34] Some "must-have" non-broadcast programmers, such as ESPN (which is owned by Disney) can charge large per-subscriber fees. For instance, Comcast pays ESPN's owners $2.90 per subscriber per month.[35]

Because broadcast channels (such as affiliates of ABC, NBC, Fox and CBS) are available over the air for free, cable operators historically resisted paying fees to broadcasters for carriage but would agree to carry other programming owned by the broadcaster. Today, some broadcasters have succeeded in negotiating per-subscriber fees.[36] Perhaps because their content is already available for free over the air, broadcasters like those participating in Hulu have been relatively quick to distribute content online without subscriptions in an advertiser-supported model.

Cable TV distributors' interest in Internet access providers: Cable TV distributors can attempt to use their control of Internet access in targeting online TV. All the dominant providers of high-speed Internet access are also cable TV distributors. The local cable and phone monopolies dominate residential fixed-line Internet access with 97 percent of the market.[37] The top high-speed Internet access providers include AT&T, Comcast, Verizon, Time Warner Cable, Cox and others. As a result, these cable TV distributors charge consumers twice — once for Internet access and once for a cable

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[28] FCC Tackles Cable Programming Bundling Practices — Transcript," *Media Minutes*, Dec. 12, 2008 (Parul Desai of Media Access Project).

[29] Wealth TV Press Release, "Wealth TV Files Carriage Agreement Complaint Against Time Warner Cable, Inc.," Dec. 21, 2007.

[30] Will Richmond, "The Cable Industry Closes Ranks," *VideoNuze.com*, Nov. 12, 2008.

[31] *See* Free Press MVPD Reply.

[32] Joe Flint, "Want A Better Spot On The Dial In New York City? Open Up Your Wallet," *Los Angeles Times Blog*, July 22, 2009.

[33] Daniel Roth, "Netflix Inside, See Ya, Cable," *Wired*, Oct. 2009, at 124.

[34] Broadcasters, such as ABC (owned by Disney), have the legal benefits of "must-carry," under which they can generally require cable TV distributors to carry their broadcast channels. Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180 (1997); Satellite Broad. & Commc'ns Ass'n v. FCC, 275 F.3d 337(4th Cir. 2001). Broadcasters can also select not to exercise "must-carry," but to negotiate for payment or other additional benefits for carriage. Most popular broadcasters elect negotiations. This is known as retransmission consent. 47 U.S.C. § 325(b).

[35] John Higgins, "Comcast Disney Fight Simmers," *Broadcasting & Cable*, March 19, 2006.

[36] *See* Mike Farrell and Linda Moss, "Operators, Broadcasters Give Peace A Chance On Retransmission Consent," *Multichannel News*, Jan 10, 2009; See Melissa Grego, "Retrans … The Bloody Battle to Save Broadcast Television," *Broadcasting & Cable*, Dec. 14, 2009.

[37] Comments of Free Press, (Sixth) Inquiry Concerning the Deployment of Advanced Telecommunications Capability Pursuant to Section 706, GN Docket 09-51, Sep. 4, 2009, at 46, 48. Satellite operators also offer Internet access, as do wireless providers, but their offerings are inferior to wireline offerings; even if these offerings are considered competitive with wireline offerings, they have minimal market share. *Id.* at 47

TV subscription. Today, cable operators make between 50 percent and 60 percent of their revenues from cable TV, and the balance from Internet access and phone services.[38]

Standardized contract terms: Negotiations for programming are often long-term, with contracts lasting as long as seven years. Moreover, these contracts, particularly among the largest distributors, generally include "most favored nation" clauses granting the distributor the benefit of any contract negotiated with a rival distributor.[39] As a result, terms of the contracts often are standardized across the cable TV industry. In addition, and of particular relevance to this paper, these contracts cover "alternative distribution methods," such as online TV delivery. These terms generally limit what content the programmer can make available online on its own Web sites and, particularly, on third-party Web sites, to ensure these online distributors cannot compete with cable TV distributors.[40]

Set-top boxes: Cable TV distributors also derive revenue from leasing set-top boxes to consumers. These boxes are often needed for on-demand and high-definition offerings and frequently include DVR capabilities. The incumbents can generate huge fees from renting these boxes because they dominate the market for them and have made it difficult for consumers to purchase independent boxes.[41]

The Technologies and Potential of Online TV

Based on new technologies, companies can deliver TV content through an Internet connection (or, as they say in the industry, "over the top"[42] of an Internet connection) and deliver that content to the TV screen. Online TV distribution includes a range of business models, including subscription, per-episode fees, advertiser-supported, or some combination. Distributors include Hulu, which already has 40 million monthly viewers and hundreds of advertisers.[43] Companies like Miro, Vuze and Joost, have offered high-definition video.[44] Apple's iTunes sells movies and shows, charging per program,[45] though Apple is now trying to assemble a disruptive monthly subscription TV service.[46] YouTube is adding full-length films to its user-generated content and splitting the resulting ad revenue with the content owners.[47] Some niche start-ups offer specialized content; for example, one company caters to aviation and air-show enthusiasts with high-definition video.[48]

Users are also now streaming online TV content to more screens — to the computer, the mobile handheld, and the television set. Consumers use simple technological connections like inexpensive cords or more convenient methods like set-top box devices (Apple TV, Roku, Vudu),

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[38] *See, e.g.*, Comcast Corporation, Trending Schedule, 3rd Quarter, 2009.
[39] *See, e.g.*, Gil Ehrenkranz, "Mapping the 'Most Favored Nation,' " *Multichannel News*, Feb. 10, 2008.
[40] Will Richmond, "The Cable Industry Closes Ranks," *VideoNuze.com*, Nov. 12, 2008 ("I believe has closed ranks to frown heavily on the idea of cable programming, which operators pay those monthly affiliate fees for, showing up for free on the web, or worse in online aggregators' (*e.g.* Hulu, YouTube, Veoh, etc.) sites.")).
[41] Cecilia Kang, "Consumer Electronics Group Calls for Broad FCC Set Top Box Review," *Washington Post*, Nov. 24, 2009; Matthew Lasar, "Sneak Peek at FCC National Broadband Plan Gets Mixed Reviews," *Ars Technica*, Dec. 17, 2009.
[42] Leslie Ellis, "Get Ready For Over-the-Top Video," *Translation-Please*, July 11 2005.
[43] Brian Stelter, "Web-TV Divide Is Back in Focus With NBC Sale," *New York Times*, Dec. 3, 2009; Mike Farrell, "Hulu Partners Eye Subscription Model," *Multichannel News*, Sept. 15, 2009.
[44] Juha Saarinen, "Vuze challenges Joost," *The Techsploder* Blog, April 10, 2009.
[45] "iTunes Sells 200 Million TV Shows, Adds New HD TV Lineup," *AppleInsider.com*, Oct. 16, 2008.
[46] Sam Schechner and Yukari Iwatni Kane, "Apple TV-Service Proposal Gets Some Nibbles," *Wall Street Journal*, December 22, 2009.
[47] Jacqui Cheng, "YouTube launching premium section with movies, TV shows," *Ars Technica*, April 16, 2009.
[48] Ben Griffiths, "Superfly Guys: Three Enthusiasts Believe Online TV Can Revolutionise Air-Shows," *City A.M.*, Sept. 8, 2009.

and gaming consoles (Sony's Playstation 3 and Microsoft's Xbox), BluRay players, and Wi-Fi enabled televisions. Apple TV is a device retailing at a few hundred dollars that connects a TV screen to an Internet connection and gives users the ability, using a remote control, to purchase and watch high-definition movies and TV shows from the iTunes store, listen to music, and view photos.[49] Roku, designed and then spun off by Netflix, sells a device for under $100 that streams TV content from Netflix, Amazon VOD (offering 45,000 movies and TV shows[50]), and Major League Baseball's site.[51] Vudu similarly enables online TV viewing on a television screen through a box. The Playstation and XBox are popular gaming consoles that also function as home entertainment centers, particularly when beaming online TV to television screens. Xboxes offer high-definition movies through Netflix.[52] BluRay players, now the industry standard for high-definition DVD, often have online TV capabilities, including Netflix capability. BluRay players are "pretty much open platforms, and anyone can deliver a Web streaming service directly using it."[53]

Boxee is software that enables users to explore online content from CBS.com, Comedy Central and other sites using a device like Apple TV, a computer, a television's built-in Internet connection,[54] game consoles or BluRay players.[55] In December 2009, Boxee unveiled its plan for set-top box pre-loaded with Boxee software.[56] The *New York Times* has reported that Boxee's software has a "well-organized directory,"[57] unlike the "increasingly long and convoluted channel directories on most cable and satellite systems," made by companies that are "clearly not experts at creating elegant interfaces or simple remote controls."[58] Boxee also embeds social networking features enabling users to view, rate, and recommend content through its interface.[59] Boxee has raised millions from investors.[60]

One of the most popular online TV offerings is Netflix, a company known initially for offering DVDs through the mail for monthly subscription fees. Netflix now offers television through the Internet. It has 9 million subscribers and offers programming to numerous devices, having embedded its software in nearly 10 million TVs, DVD players, game consoles like Microsoft's Xbox 360, and laptops.[61] Microsoft incorporated the service in its Windows Media Center software, so everyone with Microsoft Vista can stream Netflix service to their television.[62] As a result, Netflix "routs around" the cable TV distributors. In so doing, Netflix acted "surreptitiously" to avoid "the wrath of the [cable] giants."[63] Netflix has partnered with device makers and with programmers to provide access for subscribers to thousands of its titles online.[64]

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[49] Apple TV, http://www.apple.com/appletv/.

[50] Daniel Roth, "Netflix Inside, See Ya, Cable," *Wired*, Oct. 2009, at 122.

[51] "Roku," *Wikipedia*, http://en.wikipedia.org/wiki/Roku (visited Sep. 2, 2009).

[52] Chris Albrecht, Netflix HD Streams Coming to Xbox," *NewTeeVee.com*, Oct. 29, 2008.

[53] "Research Firm Sees Blu-ray As Key Over-the-Top Drive," *ScreenPlaysMag.com*, Nov. 25, 2009 (discussion analysis of Colin Dixon of the Diffusion Group).

[54] "Web Video Deal Making Intensifies Race to the TV," *ScreenPlays Magazine*, Aug. 27, 2009.

[55] Chloe Albanesius, "Boxee Lands Deal for Set-Top 'Boxee Box,' " *PCMag.com*, Nov. 12, 2009.

[56] Chloe Albanesius, "Boxee Lands Deal for Set-Top 'Boxee Box'"; Avner Ronen, "A Boxee Box?" *Boxee Blog*, Jan. 16, 2009.

[57] Brad Stone, "Boxee, Used to View Web on TV, Generates Buzz," *New York Times*, Jan. 16, 2009.

[58] Brad Stone, "Boxee, Used."

[59] Brad Stone, "Boxee, Used."

[60] Brad Stone, "Boxee, Used"; Robin Wauters, "Boxee Raises $4 Million for Socially Networked Media Center," *TechCrunch*, Nov. 18, 2008; Brad Stone, "Boxee Raises Another $6 Million for Assault on Big Media," *New York Times Bits Blog*, Aug. 13, 2009.

[61] Daniel Roth, "Netflix Inside," at 120, 124.

[62] Daniel Roth, "Netflix Inside," at 120, 124.

[63] Daniel Roth, "Netflix Inside," at 124.

[64] Rose Major, "Netflix Strikes Sony Deal," *Rapid TV News*, Dec. 7, 2009.

The Incumbents' Fears of Online TV

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

Cord-cutting

"Cord-cutting" refers to cancelling a cable TV subscription. As one cable trade publication noted, cord-cutting is "becoming easier than ever" since consumers can watch television through the Internet, supplemented by over-the-air digital broadcasts.[65] By April 2009, 8 percent of consumers had already hooked up their televisions to the Internet.[66] Publications often feature families cutting the cord and saving hundreds or thousands of dollars a year.[67]

One publication quoted a user who canceled cable and uses Apple TV: "It's hard to justify paying $100 a month for TV programming when so much is available online."[68] Another publication noted Boxee's fans think Boxee is "a way to euthanize that costly $100-a-month cable or satellite connection,"[69] and quoted one Boxee user saying, "Most people my age would like to just pay for the channels they want, but cable refuses to give us that option."[70] And the CEO of Roku has publicly stated, "Our goal is to have everyone cancel their cable subscription."[71] Roku provides 10 channels to its box; as one reporter noted, if "some bigger names in content — Hulu, are you listening? — were to sign on and make channels," then Roku "would be truly be an excellent replacement for cable."[72]

A recent article in the *New York Times* described one family's use of an inexpensive mini computer, an Xbox (which was not even "absolutely necessary"), Boxee, Hulu and Netflix to cancel their monthly $140 cable subscription and save $1,600 a year.[73] Thirty-five percent of respondents in a recent survey said they would consider canceling their cable TV subscription within the next five years to watch TV exclusively on the Internet.[74] Americans already could watch a third of their television hours without a cable TV subscription on over-the-air standard- and high-definition digital channels available with an antenna for free.[75] While clearly not all Americans will cancel their subscriptions in the short term, millions of households could. As one financial analyst observed, "People are starting to wonder, do we even need the cable connections?"[76]

Whether consumers will actually cut the cord, clearly cable providers fear the possibility. "We are starting to see the beginning of cord cutting," said Glenn Britt, the chief executive of Time Warner

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[65] Todd Spangler, "Breaking Free," *Multichannel News*, Nov. 2, 2008.

[66] Mary Madden, "The Audience for Online Video-Sharing Sites Shoots Up," Pew Internet & American Life Project, July 2009.

[67] Nick Bilton, "Cable Freedom is a Click Away," *New York Times*, Dec. 10, 2009. *See also* Marguerite Reardon, "You Don't Need Satellite TV When Times Get Tough," *Cnet.com*, Dec. 19, 2008.

[68] Spangler, "Breaking Free."

[69] Brad Stone, "Boxee, Used."

[70] Brad Stone, "Boxee, Used."

[71] As *Wired* noted, cable TV distributors and programmers are "some of the most powerful incumbents in media," and they "have successfully stymied or co-opted all previous entrepreneurial efforts." Daniel Roth, "Netflix Inside," at 124.

[72] Chris Foresman, "First Look: Roku Channel Store Expands Connected Set-Top Box," *Ars Technica*, Nov. 23, 2009.

[73] Nick Bilton, "Cable Freedom is a Click Away," *New York Times*, Dec. 10, 2009. *See also* Marguerite Reardon, "You Don't Need Satellite TV When Times Get Tough," *Cnet.com*, Dec. 19, 2008 (discussing a family saving $93 a month).

[74] "Cable TV Follows Its Subscribers to the Internet," *Knowledge@Wharton*, Aug. 26, 2009.

[75] Wayne Friedman, "Cable Share Grows, Broadcast Recedes," *Media Post News*, Dec. 9, 2009.

[76] Dawn C. Chmielewski and Meg James, "Hulu's Tug of War with TV," *Los Angeles Times*, May 11, 2009 (quoting Bobby Tulsiani, Forrester Research media analyst).

Cable in February 2009. "People will choose not to buy subscription video if they can get the same stuff for free."[77] According to a senior vice president at Cablevision-owned Rainbow Media Holdings, which owns channels like AMC and IFC, "My biggest fear would be not so much people cutting the cord, but the younger generation coming up and never buying into [cable TV]."[78] A recent report by the firm SNL Kagan concludes that "videos over the Internet will continue to erode the subscriber base from the multichannel services vendors in the United States," though perhaps less than cable TV distributors fear.[79]

While cord-cutting is likely further in the future for most Americans, many Americans may turn to existing devices and services — like Netflix and Hulu — instead of paying a few dollars for a TV show on-demand or a monthly fee to rent a cable DVR. As the cable industry would like to preserve and expand DVR and on-demand revenues, this is a real threat to them. Cable TV distributors do not like this picture. They would rather charge consumers twice — for cable TV *and* for Internet service. These operators "worry that the proliferation of free video on the Web — and downloadable shows on Apple iTunes — may be harming the $60-billion-a-year subscription video business by allowing people to unplug their cable services."[80] As Professor Jonathan Taplin noted, cable TV distributors "would rather" you not cancel your cable TV subscription and "that you pay them 70 bucks a month for maybe a lot of channels you don't use."[81]

Cable distributors fear, in short, "cannibalizing" their existing cable TV subscriptions with their Internet subscriptions.[82] The idea of consumers watching online TV on the television "terrifies television networks and distributors"[83] and represents a "potentially dangerous idea for the TV industry."[84] As a result, according to press reports, "some [cable TV distributors] are trying to make sure people have a reason to keep paying hefty cable bills"[85]; TV Everywhere, which ties online TV to cable subscriptions, is meant to be such a reason.[86]

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[77] Deborah Yao, "Cable Companies See Customers Cutting Back: 'The Beginning Of Cord Cutting,' " *Associated Press*, Feb. 8, 2009.

[78] Steve Donohue, "Cisco: Set-Top Data Could Boost 'TV Everywhere,' " Nov. 19, 2009.

[79] Mike Robuck, "Report: OTT Eating Into Video Market Share Pie," *CedMagazine.com*, Oct. 9, 2009.

[80] Brad Stone and Brian Stelter, "Some Online Shows Could Go Subscription Only," *New York Times*, March 20, 2009.

[81] Laura Sydell, "Hooking Up PC To TV Could Be Near," *All Things Considered*, March 12, 2009. Cable operators note this reality themselves when discussing the benefits of moving to switched digital video. Comcast CTO Tony Werner: "It's clear that the last 200 to 300 channels are watched such a small fraction of the time ... if you never have more than 40 streams watched out of 200." Leslie Ellis, "How Sexy is HFC? (Answer: Plenty)," *CED Magazine*, May 1, 2007. The FCC has confirmed that cable service prices continue to rise out of pace with inflation or investment. Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, 21 FCC Rcd 15087,15088 (2006).

[82] Brad Stone and Brian Stelter, "Some Online Shows Could Go Subscription Only," *New York Times*, March 20, 2009.

[83] Brad Stone and Brian Stelter, "Some Online Shows Could Go Subscription Only."

[84] Brad Stone, "Boxee Raises Another $6 Million for Assault on Big Media," *New York Times Bits Blog*, Aug. 13, 2009 ("The more free Web video that makes its way to the television, the fewer reasons people have to pay those hefty monthly bills to the cable and satellite companies, which split revenue with" the cable programmers).

[85] Brad Stone and Brian Stelter, "Some Online Shows Could Go Subscription Only."

[86] According to the *New York Times*, "leading the charge" against online TV "are the cable and satellite companies." Brad Stone and Brian Stelter, "Some Online Shows Could Go Subscription Only." The fear of online TV is one reason "why they are engaged in efforts like TV Everywhere." (Brad Stone, "Boxee Raises Another $6 Million.") According to NBC's president of digital distribution, cutting the cord "will become more easily doable" with the available television sets that have built-in Internet connections, but he "pointed out that efforts like TV Everywhere could dissuade subscribers from cutting the cord on cable." Steve Donohue, "Cisco: Set-Top Data Could Boost 'TV Everywhere,' " Nov. 19, 2009 (quoting Jean-Briac Perette, of NBC).

Competition

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

With online competition, companies like Comcast and Cox would be forced to compete nationally with one another and with programmers. Today, Comcast and Cox have local cable monopolies that do not overlap. In the online space, all these distributors could compete with one another through Internet delivery, even if Comcast does not have a cable network in a traditional Cox market like San Diego. Programmers like the owners of Hulu also could become direct competitors to Comcast and Cox. Finally, new entrant programmers could use the Internet to reach consumers, forcing existing programmers to lower their prices to consumers (*e.g.*, through fewer ads) or to provide greater value, perhaps through innovation.[87]

Control Over Programming and Talent

With competition from online TV, cable TV distributors could lose some of their market power with smaller programmers. Today, powerful distributors have incredible power over smaller programmers. Being able to decide whether a programmer can succeed, the distributors often pay little to carry smaller programmers or can demand an equity stake in exchange for carriage. A large online TV market could subvert that dynamic. Programmers could go directly to consumers without cutting a deal with the cable TV distributor. As a result, programmers would have greater leverage in negotiating with the cable TV distributor, as programmers could reach an audience without being wholly dependent on a few powerful distributors. In addition, if there are more distributors to negotiate with, both online and offline, smaller programmers could negotiate for better terms with distributors.

Widespread online TV also could give unions, such as screenwriters, more bargaining power to negotiate more favorable deals with cable TV programmers.[88] Such talent would have the option of working for more programmers, as smaller programmers succeed. The talent would also have the ability to distribute content directly to consumers online, becoming programmers themselves.

Earlier Actions to Attack Online TV

Since the advent of high-speed Internet access service, cable TV distributors have used at least four main tactics to undermine television over the Internet before the unveiling of TV Everywhere. All have been famously unpopular and controversial, and they have prompted investigations, legal action, legislation and regulations.

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[87] Time Warner acknowledges that after it spins off its AOL online unit, 70 percent of its profits will come from its cable deals, and the company sees that dependence increasing as broadcast TV continues to lose viewers and ad revenue. Industry analysts looking at Hulu and other current sites warn that ad revenues from online video will never match those of broadcast and cable television, amplifying fears over losing cable programming fees. Steve Donohue, "Online Distribution Threatens TV Ad Revenue," *Contentinople*, June 5, 2009.

[88] Dante Atkins, "The WGA Strike, the Internet and Media Decentralization," *FlowTV.org*, May 22, 2008.

Network Neutrality Violations

Cable TV distributors have targeted and blocked online software enabling high-definition online TV. As early as the 1990s, the operators made "efforts to block or otherwise impair a user's ability" to access streaming video longer than 10 minutes,[89] fearing that Internet access would undermine cable TV revenues.[90] The CEO of AT&T Broadband and Internet Services (then a cable operator) explained AT&T would not "allow others to freely transmit movies and TV shows" over AT&T's Internet access connections because "AT&T didn't spend $56 billion to get into the cable business 'to have the blood sucked out of our vein' " by online TV.[91]

A more high-profile and recent example is Comcast's degradation of peer-to-peer applications used to distribute, among other things, high-definition online TV from providers such as Vuze, Miro, BitTorrent.com and ABC.com.[92] In the Federal Communications Commission's *Free Press-Comcast Order* directing Comcast to stop blocking these technologies, the FCC noted Comcast's clear anti-competitive motives: "Peer-to-peer applications … have become a competitive threat to cable operators such as Comcast because Internet users have the opportunity to view high-quality video with BitTorrent that they might otherwise watch (and pay for) on cable television."[93] Other carriers also engage in questionable conduct.[94]

The distributors' "technical" defenses of these practices are questionable. Internet networking experts have maintained that increases in capacity to meet increased usage are economical.[95] While carriers initially claimed they could not handle the peer-to-peer or video traffic,[96] the largest carriers are "flush with cash, enough to upgrade and expand their broadband networks on their own" without government subsidies.[97] They also now hope to carry increased amounts of online TV — their own — through the TV Everywhere initiative.[98]

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[89] "Excite@Home Keeps a Video Collar," *ZDNet.com*, Nov. 1, 1999 (noting that the other major cable ISP, similarly a joint venture including cable operators, called Road Runner, limited 10 minute streaming videos created particularly for its service).

[90] "Excite@Home Keeps a Video Collar." ("Part of the genesis of the 10 minute restriction was from the concern that folks would start watching streaming media on the computer instead of going to the core cable business and watching TV shows," said Gary Arlen, a Maryland-based consultant, adding that the cable companies were concerned "that video on the Net would take away from the core business and maybe make customers not watch what the advertising supported cable programming side was offering." David Card, senior analyst for Jupiter Communications, puts a fine edge on the reason for the restriction: "They don't want the cable modem business to cannibalize their basic core business, which is delivering filmed entertainment, news and sports.")

[91] David Lieberman, "Media Giants' Net Change Establish Strong Foothold Online," *USA Today*, Dec. 14, 1999.

[92] "BitTorrent Firms: Comcast Throttling is Anti-competitive," *CNet News*, Feb. 14, 2008.

[93] In re Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, 23 FCC Rcd. 13028, 13030 (2008).

[94] Cox Communications trialed a system to prioritize supposedly "time-sensitive" Internet applications, excluding peer-to-peer services from its category, even for streaming TV, phone or video conferencing. (Todd Spangler, "Cox To Test Bandwidth-Throttling System," *Multichannel News*, Jan. 28, 2009.) AT&T Wireless specifically prohibits any P2P file sharing and redirecting television signals. (Lynnette Luna, "AT&T revises data usage rules," *Fierce Broadband Wireless*, May 3, 2009.) AT&T Wireless has an exclusive deal with Apple for the iPhone to encourage Apple to reject BitTorrent, SlingPlayer and other video applications. AT&T cited network burdens and un-adjudicated copyright infringement as justifications. (David Kravets, "Apple Rejects iPhone BitTorrent App," *Wired Threat Level Blog*, May 11, 2009; Dan Moran, "AT&T Defends SlingPlayer's Wi-Fi Limit," PC World, May 13, 2009.)

[95] Testimony of Gary R. Bachula, Internet2, Net Neutrality: Hearing before the United States Senate Committee on Commerce, Science and Transportation, 109th Cong. (2005), Feb. 7, 2006.

[96] *See, e.g.*, Comments of Free Press et al., Broadband Practices NOI, WC Docket No. 07-52, Feb. 13, 2008; Reply Comments of Free Press et al., Broadband Practices NOI, WC Docket No. 07-52, Feb. 28, 2008.

[97] Cecilia Kang, "Major Carriers Shun Broadband Stimulus," *Washington Post*, Aug. 14, 2009.

[98] Similarly, AT&T made a deal with Major League Baseball to carry the MLB's television channel on the iPhone, providing customers with live games streamed over the 3G network for a single $9.99 application charge. (Jordan Golson, "MLB iPhone

Moreover, these Network Neutrality violations have resulted in thousands of consumer complaints, several bills proposed in Congress, two FCC enforcement actions, and an imminent FCC rulemaking.[99]

Targeted Cap-and-Metered Pricing

Cable and phone companies have proposed cap-and-metered pricing for Internet service that appears to target online TV.[100] Unlike the current all-you-can-eat monthly fee-plans, cap-and-metered pricing would charge users based on the capacity used. As a result, downloading or streaming large files will be more expensive than smaller files. In March 2009, Time Warner Cable announced metered pricing trials in four cities that would have made watching online TV cost-prohibitive.[101] AT&T is testing a metering plan on its wireline U-verse service with hopes for national expansion.[102] Even under generous allowances for bandwidth, users could not watch high-definition programming for many hours a day.[103]

In response to trials by Time Warner Cable, a House bill was introduced in Congress, and Time Warner Cable dropped its immediate plans under consumer pressure.[104] The company stated the plans would be reintroduced following a "customer education process."[105]

Control Over Set-Top Boxes

While many devices can put online TV programming onto TV screens, the cable operators have made it nearly impossible to attach independent devices to the cable TV connection or, in doing so, to integrate online TV content and cable TV content through the same convenient interface.[106]

Third-party box makers have little to no hope of penetrating the set-top box market for delivering cable TV programming (including video-on-demand). Cable operators have spent almost two decades actively thwarting congressional and FCC efforts meant to ensure consumers can attach

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App to Live-Stream Games Over 3G; Still No Sling," *GigaOm.com*, June 18, 2009). Time Warner CEO Bewkes predicted that TV Everywhere would exceed the popularity of YouTube and Hulu: "This will be by far the highest amount of online video watched in the United States." (Todd Spangler, "Pay TV's Internet Acid Test," *Multichannel News*, July 6, 2009.)

[99] Preserving The Open Internet Broadband Industry Practices, 2009 WL 3413028 (F.C.C., Oct. 22, 2009).

[100] S. Derek Turner, "Blocking or Metering: A False Choice," Free Press, August 2008.

[101] Time Warner Cable offerings started at only 5 GB for a month, with $1 charges for each GB of overage. Meanwhile, downloading a single high-definition movie often requires 8 GB. Stacey Higginbotham, "The Twilight Problem: Why Metered Broadband Could Suck," *Gigaom.com*, April 14, 2009.

[102] John Timmer, "Sorry, Beaumont! AT&T Brings (More) Bandwidth Caps to Texas," *Ars Technica*, Dec. 2, 2008.

[103] Brian Mahoney, "Comparing Hybrid OTT/Pay TV Solutions on Opposite Sides of the Pond: TV Everywhere and Project Canvas," *Trender Research*, November 4, 2009 ("If my math is correct, Comcast's 250 GB cap is good for about 1 hour of HD content viewing per day. Most consumers would not even come close to that right now, but what about "cord-cutters" wanting to replace the 8+ hours of TV viewing common to U.S. households?

[104] *See* "Time Warner Cable Charts a New Course on Consumption Based Billing," *PR-Inside,* April 16, 2009); Saul Hansell, "Time Warner Cable Profits Will Grow With Broadband Caps," *New York Times Bits Blog*, April 8, 2009. TWC is also moving ahead with trials of the revised plan in Beaumont, Texas. (Nate Anderson, "Time Warner Tries Again, Fails to Justify Caps and Charges," *Ars Technica*, April 10, 2009).

[105] Nate Anderson, "Time Warner Tries Again."

[106] This process already revolutionized online music: Though few consumers would have switched to the iPod from compact discs based merely on the legal digital content then available, many users moved quickly to the iPod because it permitted users also to listen to their existing libraries. This created a larger market for digital downloads, making a CD-free life feasible for millions. Because of the strategies of cable operators, however, "Apple has largely failed to ignite the same fire in the video and TV markets as the audio market." (Alex Salkever, "Three Reasons Why Verizon's App Store Doesn't Threaten Apple," *Daily Finance*, July 15, 2009.)

devices to the network. In 1992 and again in 1996, Congress passed laws to ensure the commercial availability of third-party cable devices,[107] and the FCC has sought to implement Congress' directive, if somewhat unevenly, sometimes half-heartedly, and often incompetently.[108] As a result, the set-top box is not subject to competition or innovation (many boxes consist of very old technology[109]), and cable operators rent boxes to users at very high monthly prices. As a *Wired* author noted, "The set-top box has proven to be a closed and well-guarded fortress against a world of clouds and openness," and the incumbents "work strenuously to keep it that way."[110]

The FCC admits its policies have failed. In late 2009, the FCC concluded that "set-top box competition has not emerged, limiting innovation."[111] In 2008, there were only 14 set-top boxes on the market, including those leased by cable TV distributors; by contrast, there are 900 mobile phone and handheld devices on the market.[112] The Consumer Electronics Association, which represents thousands of companies, has fought for years to open up the set-top box market. As their vice president recently concluded, "It's been a long slog. … Cable operators have been loath to give up control."[113]

Device-makers can, however, attach boxes to the *Internet* connection through, for example, an ethernet jack.[114] This has resulted in devices like Apple TV, Roku, Vudu and Boxee's announced device — as well as the ability to connect televisions, gaming consoles, computers and BluRay players.

But in a move that drastically reduces the consumer-friendliness of these boxes, the cable industry forbids outside boxes from integrating cable TV offerings within the same interface used for navigating online TV.[115] For example, Boxee's popularity rests on it being a user-friendly interface that displays, in one place, TV content from users' hard drives and multiple sites across the Internet.[116] As a result of this restriction, users cannot easily "change channels" among online and cable TV programs.[117] While public TV distributors in Europe have moved to incorporate online and cable TV into one interface,[118] the cable industry lobbying association has recently argued that

[107] 47 U.S.C. § 549.

[108] Reply Comments of Free Press, (12th) Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 07-269, Aug. 28, 2009, at 6-8.

[109] The cable industry supplies tens of millions of consumers with "old set-top boxes that have limited memory and processing capabilities"; the chief software architect for Comcast admits that the "lowest end set-top box [still supplied by Comcast] is the equivalent of a Mac II from 1991." Saul Hansell, "Like Apple, TV Explores Must-Have Applications," *New York Times*, Sept. 6, 2009.

[110] Daniel Roth, "Netflix Inside, See Ya, Cable," *Wired*, October 2009, at 120, 124.

[111] FCC, "FCC Identifies Critical Gaps in Path to Future Universal Broadband," Nov. 18, 2009.

[112] Cecilia Kang, "Consumer Electronics Group Calls for Broad FCC Set Top Box Review," *Washington Post*, Nov. 24, 2009.

[113] Cecilia Kang, "Consumer Electronics Group Calls for Broad FCC Set Top Box Review," *Washington Post*, Nov. 24, 2009.

[114] Implementation of Section 304 of the Telecommunications Act of 1996 Commercial Availability of Navigation Devices, 13 FCC Rcd 14775, 14778 (1993).

[115] *See e.g.* Memorandum of Understanding Among Cable Operators and Consumer Electronics Adopters Regarding Interactive Digital Cable Ready Products, April 25, 2008, at 8-10, *available at* http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520013345.

[116] Boxee is a "New York-based start-up [that] makes elegant software that cobbles together offerings from all of those services [Hulu and Netflix], plus many more — with whatever media you have stored on your hard drive — and serves it up to you on your big screen, with a minimum of fuss." Peter Kafka, "Boxee: WebTV That Makes Sense. Is that Good or Bad for Big Cable?" *All Things Digital Blog*, Jan. 12, 2009.

[117] Even the Supreme Court has noted that consumers prefer not to switch between cable TV offerings and non-integrated offerings. Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180, 219-21 (1997).

[118] Brian Mahoney, "Comparing Hybrid OTT/Pay TV Solutions on Opposite Sides of the Pond: TV Everywhere and Project Canvas," *Trender Research*, Nov. 4, 2009 ("Project Canvas [in the UK, led by BBC] is also tackling the hybrid interface challenge head-on by providing an integrated electronic program guide").

enabling integrated interfaces could result in a cable industry rushing to the government for subsidies to survive.[119]

While these issues are independent of TV Everywhere, we can expect cable TV distributors to tie TV Everywhere to their controlled set-top boxes: An executive of Comcast's subsidiary online technology, called "ThePlatform," has stated Comcast will be "downloading authentication devices into users' set-top boxes" for TV Everywhere.[120]

Content Lockout

Before launching TV Everywhere, cable operators pressured programmers "to keep as much content offline as possible."[121] Some cable TV distributors "have gone so far as to stipulate that cable networks limit the number of episodes they make available online. Others have imposed an outright ban."[122] Executives at an unnamed, major programmer (which requested confidentiality for fear of retribution by cable TV distributors) confirmed that it would not put its programming online, based on the demands of cable TV distributors.[123] The distributors generally threaten to pay lower per-subscriber fees on the cable TV platform if programmers make content available online: "The message is loud and clear to programmers," said one observer. "You'll be jeopardizing those monthly affiliate fees come renewal time if your crown jewels leak out; worse, you'll be subverting the entire cable business model."[124]

Historically, incumbent distributors have tried to stifle emerging competitors by denying them content, almost invariably requiring government action to protect competition. In the 1910s, publishers of sheet music tried to deprive manufacturers of piano rolls and records;[125] in the 1930s, song performers tried to deprive over-the-air radio of songs.[126] In the 1970s, the incumbent TV broadcasters (like NBC and CBS) tried to kill cable operators — then a new entrant — by denying access to broadcast TV content. Without access to that incumbent content, cable operators would have been unable to gain initial subscribers; without initial subscribers, the cable operators would not have had the revenue and the audience to then create their own programming content, like HBO.[127] Years later, cable operators attempted to deny content to emerging satellite operators.[128]

Recently, cable operators have deprived phone companies of premium local sports content. A new TV entrant's need for content is so powerful that AT&T had to run to the FCC to file a complaint

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[119] Comments of the National Cable & Telecommunications Association on NBP Public Notice #27, A National Broadband Plan for Our Future, GN Dkt No. 09-51, December 22, 2009, at v, 9, 11-12.

[120] "ThePlatform" also serves Cablevision, Cox, and Time Warner Cable. (Mike Robuck, "ThePlatform Powers TV Everywhere on Programmers' Sites," *CED Magazine*, Nov. 18, 2009.) From September to November, as TV Everywhere is about to launch, ThePlatform signed up 20 programmers, including E!, Style, Travel Channel, and regional Fox and Comcast sports. (Todd Spangler, "ThePlatform Wants to Handle 'TV Everywhere' for Everyone," *Multichannel News*, Nov. 18, 2009.)

[121] Dan Frommer, "Why Comcast Has To Worry About Hulu," *Silicon Alley Insider*, May 4, 2009. Another noted, "Believing that they should have exclusivity because their [per-subscriber] payments support the enormous cost of producing TV shows, [cable TV distributors] have been pushing back against the Hulu freebies." (Dawn C. Chmielewski and Meg James, "Hulu's Tug of War with TV," *Los Angeles Times*, May 11, 2009.).

[122] Dawn C. Chmielewski and Meg James, "Hulu's Tug of War with TV," *Los Angeles Times*, May 11, 2009.

[123] Peter Kafka, "Did Big Cable Force Hulu off Boxee?" *All Things Digital Blog*, Feb. 18, 2009.

[124] *See also* Will Richmond, "The Cable Industry Closes Ranks," *VideoNuze.com*, Nov. 12, 2008.

[125] Tim Wu, "Copyright's Communications Policy," 103 *Mich. L. Rev.* 278, 303 (2004).

[126] Tim Wu, "Copyright's Communications Policy," at 305-10.

[127] Tim Wu, "Copyright's Communications Policy," at 320-24.

[128] Tim Wu, "Copyright's Communications Policy," at 324. *See also* Satellite Home Viewer Act of 1988, Pub. L. No. 100-667, 102 Stat. 3949 (codified as amended in scattered sections of 17 U.S.C.).

about access to San Diego Padres games, which Cox, the local cable operator, refused to license to AT&T. Notably, Cox licensed the games to other cable operators that did not compete directly with Cox in San Diego.[129] Similarly, Verizon, which offers cable TV service in New York City, brought a complaint against Cablevision because the company denied Verizon access to a Cablevision-owned high-definition version of a channel airing local professional sports.[130]

The cable operators and other distributors have engaged in this content-lockout strategy with online distributors, too. Time Warner Cable has been particularly public in pressuring programmers not to put content online. According to the *New York Times*, Time Warner Cable's chief executive Glenn Britt told reporters in response to a question about making more content available online, "Guess what? We do mind."[131] Britt announced to content providers at the 2008 Cable Show in New Orleans that putting shows online the same day of cable TV broadcast "will erode your other business model" of cable per-subscriber fees. If the cable networks continue putting shows online, said Britt, "we have to intervene at some point."[132] Britt has repeatedly argued "that free, ad-supported TV sites such as Hulu undermine the subscription-TV revenues that the [content] industry depends on."[133]

Time Warner Cable Chief Operating Officer Landel Hobbes agrees with his boss. "We have to be very careful of stuff like over the top or all video content over the top on the Internet," he said. "There is a dual revenue stream that we have to be careful of. Surviving on just advertising is a very tough thing."[134] These comments are focused not on survival, of course, but on preserving a model where cable companies and programmers are overpaid and consumers underserved. Incumbents recognize that, in a competitive world, their current margins are not sustainable.

Time Warner Cable also engaged in hardball tactics to limit the content its programmers made available online. Time Warner Cable threatened to pull Viacom's 18 networks, which include MTV, Comedy Central and Nickelodeon, from its TV service based partly on online TV. Its execs "put together a document outlining which shows Viacom is distributing online and where" and threatened to "start instructing subscribers how to connect their TVs to a computer and watch Viacom content online."[135] Viacom caved, agreeing to delay releasing shows online and not to provide full online episodes of *The Daily Show* and other popular content, to benefit Time Warner Cable's controlled video-on-demand offerings.[136] Time Warner Cable used the same strategy last fall against LIN TV, an over-the-air broadcaster, regarding its online offerings.[137]

Some online TV distributors have already failed for lack of content. Joost, for example, was a company started by the successful founders of Skype that raised over $50 million in capital. Joost aimed to provide TV programming directly to consumers, as an online virtual cable TV provider. But after years of gaining little traction, Joost announced it would become a technology provider,

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[129] Molly Peterson, "FCC Rejects AT&T Program-Access Complaint Against Cox (Update2)," *Bloomberg*, March 9, 2009.

[130] John Eggerton, "Verizon Files Program Access Complaint Against Cablevision," *Broadcasting & Cable*, July 8, 2009.

[131] Saul Hansell, "The Real Fight Over Fake News," *New York Times Bits Blog*, May 29, 2008. *See also* Meg James, "Viacom, Time Warner Cable Face Midnight Deadline," *Los Angeles Times*, Dec. 31, 2008. ("Cable operators such as Time Warner are also miffed that Viacom and other companies have made some of their most popular programming available for free on the Internet.")

[132] Saul Hansell, "The Real Fight Over Fake News."

[133] Jon Healey, "Time Warner Cable Shows Customers How to Get TV for Free," *Los Angeles Times Technology Blog*, Oct. 6, 2008.

[134] Steve Donohue, "Time Warner Cable COO Rips "Over-the-Top" Services," Contentinople, March 18, 2009.

[135] Michael Learmonth, "Viacom vs. Time Warner Cable: Is Hulu to Blame?" *Ad Age*, Dec. 31, 2008.

[136] Merissa Marr and Nat Worden, "Viacom, Time Warner Cable Reach Last-Minute Programming Deal," *Wall Street Journal*, Jan. 5, 2009.

[137] Jon Healey, "Time Warner Cable Shows Customers."

rather than a competitor, to incumbent cable TV distributors. In a detailed look at "what went wrong for Joost," telecommunications analyst Om Malik concluded, "it all boiled down to a lack of content."[138] Other companies, like Vuze, similarly had cutting-edge technology for delivering high-definition TV online but lacked access to much premium content.[139] After many years and more than $34 million raised in private equity, Vuze finally abandoned its first business model of competing with cable TV distributors.[140]

Netflix's ability to get valuable content is something of an exception that proves the rule. Netflix began as a DVD service through the mail, but it always intended to become an Internet service (hence the name Netflix, not Postalflix).[141] To get valuable content, Netflix found a "loophole" in contracts, realizing that premium channels like Starz could sell rights to Netflix.[142] This window may not stay open long because "unhappy studios or cable companies could easily renegotiate their contract with Starz to discourage it from working with Netflix."[143]

Distributors also pressure companies to ensure online content stays off the living room TV. Perhaps the most high-profile scuffle in the online TV space was between Hulu and Boxee. In February 2009, Hulu announced that it was denying access to Hulu through Boxee at the request of its content providers.[144] Despite an outcry from Hulu users,[145] Hulu has since blocked Boxee even from Hulu's public RSS feed.[146] Hulu's terms of service for its desktop software now forbid using the software with any device other than a personal computer — including, notably, with TV screens.[147]

Unleashing TV Everywhere

The latest strategy to "preserve the revenue stream and business model of subscription TV," in the words of an AT&T executive,[148] is an industry-wide agreement to ensure users cannot watch cable TV programming on the Internet without also paying for a cable TV subscription.[149] The TV Everywhere initiative aims to ensure content distribution online is "a natural extension of the existing [cable TV] model."[150] With TV Everywhere, a consumer can watch online programming only if "authenticated" as a subscriber to traditional cable TV; in other words, only cable TV subscribers can watch the most popular content through the Internet.

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[138] Om Malik, "What Went Wrong With Joost?" *GigaOm.com*, June 30, 2009.

[139] Even YouTube, a company with dominant market share owned by Google, has had some trouble making revenue-sharing deals to access content. John Kell, "Google to Host Time Warner Content on YouTube," *Dow Jones*, Aug. 19, 2009.

[140] Mark Hendrickson, "Vuze Raises $20M More in Series C, Brings Aboard TiVo Co-Founder Ramsay," *Tech Crunch*, Dec. 18, 2007.

[141] Daniel Roth, "Netflix Inside, See Ya, Cable," *Wired*, October 2009, at 120, 122.

[142] Daniel Roth, "Netflix Inside," at 142. (" 'We looked at our contract rights and saw that they [Netflix] were an aggregator of content just like any of the other distributors,' says Starz CEO Robert Clasen.")

[143] Daniel Roth, "Netflix Inside," at 142.

[144] Jason Kilar, "Doing Hard Things," *Hulu Blog*, Feb. 18, 2009.

[145] Jose Castillo, "Boxee vs. Hulu vs. Cable (Spoiler: The Customer Loses)," *StreamingMedia.com*, March 10, 2009.

[146] Mike Masnick, "The Hulu/Boxee Battle Continues To Go Back And Forth," *TechDirt*, March 9, 2009.

[147] "Hulu Desktop License," *Factory Joe Blog*, *available at* https://factoryjoe.pbworks.com/Hulu-Desktop-License.

[148] Sarah Reedy, "TV Everywhere and the End of Free TV," *SuperComm Daily News*, Oct. 8, 2009 (quoting Dan York, AT&T's executive vice president of content and programming: "It is important to the established pay TV providers and content community to preserve the revenue stream and business model of subscription TV, and authentication could be an important initiative to maintain that.").

[149] Sarah Reedy, "TV Everywhere and the End of Free TV."

[150] Staci Kramer, "Time Warner CEO Plans 'TV Everywhere' – But Not For Everyone," *Paid Content*, March 2, 2009.

Forging an Industry-Wide Agreement Among Competitors

The TV Everywhere strategy, which saw rapid adoption in the summer of 2009, took hold months earlier in questionable discussions and agreements among competitors, in which the competitors sought to avoid a paper trail of evidence. In early 2009, according to the *Wall Street Journal*, the largest phone, satellite, and cable companies held off-the-record discussions on how to combat the threat of free online TV.[151] As that report noted, competitive rivals were making agreements to ensure continued control over the market: "The satellite television, telecommunications and cable industries — *longtime rivals* — *agree* on one issue: The need to put TV shows that are available online, most of which are now free, behind a pay wall."[152]

All incumbent cable TV technologies were involved: "Cable companies have been out-front on this issue, but satellite and telcos are joining the fight."[153] The *New York Times* reported that among the companies in these discussions were AT&T, Comcast, DirecTV, Time Warner Cable and Verizon.[154] The *Wall Street Journal* noted: "The rare *agreement among the normal combatants* reflects their strong concern that allowing free access to such content could lead to problems similar to those faced by the music and news industries, now struggling to establish subscription-based business models. No barriers to Internet content also could push subscribers to cancel their TV service and rely solely on the Web."[155] An analyst at an independent financial advisory firm told *AdWeek*: "This is a way to stem concern about cable infrastructure being bypassed by free online viewing."[156]

Because of fears of violating antitrust law through colluding, the cable TV executives did not seek an antitrust exemption; instead, they attempted to hide their actions by eliminating a paper trail. They deliberately engaged in only unwritten, verbal conversations. As the *New York Times* reported:

> The electronic media chiefs, including [Time Warner CEO Jeffrey] Bewkes, Jeff Zucker [CEO] of NBC Universal and Philippe P. Dauman [CEO] of Viacom, among others, have been more careful [than newspaper executives had been in their discussions], so as to avoid being accused of collusion: much of the discussions have been *on the telephone and in private, one-on-one chats* during industry events. Pricing is *rarely*, if ever, discussed, according to executives involved in the discussions.[157]

Jeff Gaspin, president of NBC's Universal Television Group, said the idea of collaborating with cable operators on online video has been floated for a while but talks began in earnest this year.[158]

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[151] Roger Cheng, "Telcos, Satellite Join Cable's Push to Build Pay Wall On Web," *Wall St. Journal*, April 20, 2009.

[152] Roger Cheng, "Telcos, Satellite Join Cable's Push to Build Pay Wall On Web," *Wall St. Journal*, April 20, 2009. (*Emphasis added.*)

[153] Roger Cheng, "Telcos, Satellite Join Cable's Push to Build Pay Wall On Web," *Wall St. Journal*, April 20, 2009.

[154] Brad Stone and Brian Stelter, "Some Online Shows Could Go Subscription Only," *New York Times*, March 20, 2009.

[155] Roger Cheng, "Telcos, Satellite Join Cable's Push to Build Pay Wall On Web," *Wall St. Journal*, April 20, 2009. (*Emphasis added.*)

[156] George Szalai, "Opinion: Online Video's Impact Remains Unclear," *AdWeek*, July 3, 2009 (quoting Collins Stewart analyst Thomas Eagan).

[157] Tim Arango, "Cable TV's Big Worry: Taming the Web," *New York Times*, June 23, 2009. (*Emphasis added.)*.

[158] Deborah Yao, "Cable Companies Want a Way to Win with Online TV," *Associated Press*, Feb. 24, 2009.

If the incumbents believed they were conforming to the law, they would likely have documented their discussions, rather than avoided a paper trail.

Learning from Newspapers and the Music Industry

According to news reports, cable executives have closely watched the struggling newspaper industry. As Stephen B. Burke, Comcast's chief operating officer, told the *New York Times*, "The biggest risk is so much stuff gets on the Internet for free that we turn into the newspaper business."[159]

On the Internet, consumers can access content from any print newspaper in the world — from New Jersey to Jerusalem — and countless online publication. As Michael Kinsley, the founding editor of *Slate*, recently observed, "Just a few years ago, there was no sweeter perch in American capitalism than ownership of the only newspaper in town. Now, every English-language newspaper is in direct competition with every other."[160]

Newspapers have been forced to compete and to give consumers what they want — access to content, widely available, sometimes under subscription, sometimes free. If a newspaper refuses to make its content available online, or does so only at high rates, another newspaper can gain revenue by making its content available at more reasonable rates or giving it away for free and relying on ad revenue. Most newspapers haven't charged or required subscriptions to their content because they fear being undercut by their competitors. And any industry-wide agreement to set prices for newspaper content would be a classic antitrust violation of collusion.

In April 2009, Newspaper CEOs held "under-the-radar discussions" about online payment systems at the annual meeting of the Newspaper Association of America, which were "held quite separately from the convention under the guidance of a lawyer to ensure the talks don't stray into inappropriate territory."[161] Such assurances didn't temper all fears of industry collusion about erecting a "pay wall" requiring payment or subscriber authentication for access to newspaper content.[162]

But during these conversations, U.S. newspaper executives were openly seeking an antitrust exemption – and idea endorsed by some newspaper columnists and industry analysts — so they could hold industry-wide talks on how to put all newspaper content behind pay walls.[163] On April 21, Brian Tierney, the CEO of Philadelphia Newspapers LLC, testified before Congress to ask for a "limited antitrust relief for newspapers and journalists to discuss and experiment with new and more sustainable business models and strategies";[164] at the same hearing, however, the Department of Justice opposed such an exemption.[165]

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[159] Saul Hansell, "Tweaking the Cable Model, to Avoid Newspapers' Fate," *New York Times Bits Blog*, April 6, 2009.
[160] Michael Kinsley, "You Can't Sell News by the Slice," *New York Times*, Feb. 9, 2009.
[161] Alan Mutter, "Publishers Zero in on Charging for Online News," *Reflections of a Newsosaur*, April 5, 2009.
[162] Michael Masnick, "Newspapers Gather In Secret (With An Antitrust Lawyer) To Collude Over Paywalls," *TechDirt*, May 29, 2009.
[163] Tim Rutten, "Newspapers Need an Antitrust Exemption," *Los Angeles Times,* Feb. 4, 2009; John Chacas, "4 Steps to Stave Off the Death of Newspapers," *The Dallas Morning News*, Feb. 6, 2009 (discussing antitrust exemption for a unified response to aggregators).
[164] Brian P. Tierney, Written Statement Before the Subcommittee on Courts and Competition Policy, Committee on the Judiciary, United States House Of Representatives, April 21, 2009.
[165] Carl Shapiro, "A New Age For Newspapers: Diversity of Voices, Competition and the Internet" (Statement Before the Subcommittee on Courts and Competition Policy, Committee on the Judiciary, United States House Of Representatives), April 21, 2009.

In contrast, the cable industry never sought or received an antitrust exemption for its backroom discussions on TV Everywhere; it just had the talks and made the agreements, avoiding a paper trail. Yet cable TV distributors explicitly invoked the newspaper industry in discussions. "The newspaper industry … is suffering because newspaper publishers opted to make their product free, and are now scrambling to put up walls," said one cable executive discussing TV Everywhere. "Once the horse has left the barn, it's hard to get it back in."[166]

The cable executive did not note that the newspapers' "scrambling" would require an exemption from the antitrust laws to make agreements. Neither did he explain that his industry had to get a horse of its own back into the barn. As one trade publication reported, "Beating a full-scale retreat from last year's enthusiastic experimentation with Web video initiatives, cable operators and programmers are struggling to figure out how to offer traditional cable network fare online without hurting their successful financial model for delivering pay-TV."[167]

Cable TV distributors also drew lessons, correctly or not, from the music industry. A Comcast executive, in discussing TV Everywhere, noted that keeping valuable content off the Internet would eventually push users to piracy.[168] As one network CEO said, while moderating a panel on TV Everywhere at a cable show: "In the music business, as theft accelerated ... they didn't get ahead of the trend, and they offered consumers no option but to steal if they wanted to get the product the way they wanted."[169]

"Whether it is music or newspapers or radio," concluded Comcast's Burke. "[They] didn't have a model that protected their core business, and then, boom, here comes the Internet as this destroyer of wealth."[170] By "destroyer of wealth," Comcast really means "creator of competition," which might hurt Comcast's bottom line but is good for consumers.

Ongoing Industry Negotiations and Conversations to Collude

In conjunction with the private conversations reported in the *Wall Street Journal*, industry executives held conversations in at industry events like the Cable Show, the annual event of the National Cable & Telecommunications Association, the largest cable operators' lobbying arm,.[171] In "several sessions" at this event, distributors and programmers "advanced different ideas for developing a responsible, lucrative business model for the content convergence concept. It's known as 'TV Everywhere' or 'everything-on-demand.' "[172] A trade publication reporting on the show noted that distributors feared "cord-cutting" but concluded that, despite discussions, programmers and distributors had still "failed to reach *broad consensus* on the best way for *the industry* to move forward"[173] As the publication reported, "To stave off such cord-cutting, [the] president of Comcast Interactive Capital said his group is now building a 'cross-platform experience' … to 'create a cable-friendly model good for consumers' that protects cable's current

[166] Steve Donohue, "Execs Rip Hulu for Giving Away Content," *Contentinople.com*, Sept. 23, 2009 (quoting YES Network CEO Tracy Dolgin).
[167] "Cable Grapples With Striking Balance Between TV and Web Video," *Communications Daily*, April 7, 2009.
[168] "Cable Grapples With Striking Balance Between TV and Web Video," *Communications Daily*, April 7, 2009.
[169] Steve Donohue, "Execs Rip Hulu for Giving Away Content," *Contentinople.com*, Sept. 23, 2009 (quoting YES Network CEO Tracy Dolgin).
[170] Jeff Baumgartner, "Comcast Nears 'TV Everywhere' Launch," *Light Reading*, Sept. 9, 2009.
[171] "Cable Grapples With Striking Balance Between TV and Web Video," *Communications Daily*, April 7, 2009.
[172] "Cable Grapples With Striking Balance Between TV and Web Video," *Communications Daily*, April 7, 2009.
[173] "Cable Grapples With Striking Balance Between TV and Web Video," *Communications Daily*, April 7, 2009. (*Emphasis added.)*

dual-revenue stream from subscriptions and advertising fees."[174] The *New York Times* stated that "perhaps the hottest topic at the show" was that "cable operators and networks could create a joint way to put subscription-based video onto the Internet."[175]

The first public discussion of the TV Everywhere strategy happened at an even earlier cable conference held by Cable & Telecommunications Association for Marketing (CTAM) in Boston on Nov. 9-11, 2008. According to Will Richmond, a former cable TV executive: "[After] moderating two panels, attending several others and having numerous hallway chats, I've reached a conclusion: The cable industry — including operators and networks — is closing ranks to defend its traditional business model from disruptive, broadband-centric industry outsiders."[176]

CableFax: The Magazine noted that Time Warner Cable Chief Strategy Officer Peter Stern first discussed Time Warner Cable's plans to "create a Web replica of cable programming" that became TV Everywhere at the CTAM conference.[177] (This speech oddly helped Time Warner Cable earn *CableFax*'s Leadership Award for moving on this "hot button issue" and making it "clear that cable programmers must remember where their bread is buttered."[178]) Another industry publication reported that Stern told the audience: "Programmers should work with cable operators to distribute TV content to paying customers over the Internet — instead of throwing it up online for free and undermining cable's existing business model."[179] Stern argued that "the challenge for the cable industry" is to get content to consumers "on that high-def, communal [living room] television when they want it — and that means we need to aggressively embrace time-shifting … but we need to do that in a way that grows the pie."[180]

Viacom CEO Philippe Dauman defended these discussions to the press, saying "we can't get together and talk about business terms, but we can get together to work on setting open technology standards."[181] Yet his colleagues admit the business terms, not the technology, are the issues worth discussing. As Multichannel News reported from an industry conference in June 2009:

> The chief roadblock to "TV Everywhere" -- the concept that pay TV customers should be able to access the content available on the television sets online – *isn't with the technology*, Time Warner Cable chief operating officer Landel Hobbs told an industry conference Thursday, but rather the sticky situation of the *business rules* governing the service. … "The hard part is not the technology," Hobbs said. "The hard part is putting the business rules around it, which is really from the programmers' perspective."[182]

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[174] "Cable Grapples With Striking Balance Between TV and Web Video," *Communications Daily*, April 7, 2009.

[175] Saul Hansell, "Tweaking the Cable Model, to Avoid Newspapers' Fate," *New York Times Bits Blog*, April 6, 2009.

[176] Will Richmond, "The Cable Industry Closes Ranks," *VideoNuze.com*, Nov. 12, 2008.

[177] "Leadership Award: Time Warner Cable," *CableFax: The Magazine*, July 2009, at 22. *See also* Daisy Whitney, "Open Source: A Web of Cable," *OMMA Magazine*, May 1, 2009 ("Time Warner first floated the idea of building a Web replica of its programming at the CTAM Summit in Boston, revealing that it had begun talks with programmers.").

[178] "Leadership Award: Time Warner Cable," *CableFax: The Magazine*, July 2009.

[179] Todd Spangler, "CTAM Live: TWC's Stern Urges Exclusive Web-Video Deals," *Multichannel News*, Nov. 10, 2008.

[180] Todd Spangler, "CTAM Live: TWC's Stern Urges Exclusive Web-Video Deals," *Multichannel News*, Nov. 10, 2008.

[181] Tim Arango, "Cable TV's Big Worry: Taming the Web," *The New York Times*, June 23, 2009.

[182] Mike Farrell, "Hobbs: Business Rules Delay 'TV Everywhere," *Multichannel News*, June 11, 2009. *(Emphasis added.)*

Simply, industry-wide "business rules" require more attention than the technology, which is not "the hard part." A Verizon vice-president agreed: "*As an industry*, it is critical that we get the TV Everywhere user experience and value proposition right."[183]

The executives have also been clear that an *industry-wide* solution can only succeed if they collude, as such a solution is not in a company's interest *unless others agree with one another* on the solution. A centerpiece of our market economy is that consumers are better off if each company follows its own self-interest rather than colluding with its competitors to raise prices, allocate markets, or otherwise harm consumers and competitors. Stephen B. Burke, the chief operating officer of Comcast, has publicly admitted that if each incumbent operator and programmer merely followed its own self-interest (as each should under the law in a competitive market), then each incumbent would be worse off. As the *New York Times* reported:

> The problem is that if each goes in different directions — some offering more shows free, others holding them back only for cable subscribers — then the economics of the industry could crumble.
>
> "It's the classic prisoner's dilemma," said Mr. Burke, referring the famous problem in game theory. "If there's a vacuum, and some start to inch in to the water hoping others will hold back, the whole industry could be affected."[184]

This reflects the understanding that if each actor independently follows consumer demand, all the participants would make content available online (like incumbent newspapers did) and be worse off than they would be *without collusion*.

This public statement sends a signal to other participants. Indeed, Burke made a similar statement in April 2009, shortly after the Cable Show in Washington: "What I worry about is that of the 50 cable channels that matter, five of them will have a bad year and start putting up more and more free [content online]."[185] This competitive pressure from "defectors" would — through competitive forces — compel other channels to follow suit.

An NBC executive noted another potential problem with competition, worrying that competitors could try to differentiate their TV Everywhere platforms, confusing customers: "We have to be careful that the competitive nature of this ecosystem doesn't create an issue."[186]

While the executives have been fairly vocal at industry events, the company lawyers seem to have noticed that these statements might raise legal concerns. Recently, cable company lawyers have objected to letting their executives speak on industry panels to discuss TV Everywhere, forcing these executives to cancel speaking engagements.[187]

Programmers Get On Board

In the current market, cable TV distributors can threaten programmers with a choice — either the benefit of dual revenue of cable TV or the exposure to new competition and uncertain sources of

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183 Verizon press release, "Verizon Launches Trial of FiOS TV Online, Extending Multi-Screen Leadership," Aug. 27, 2009. (*Emphasis added.*)

184 Tim Arango, "Cable TV's Big Worry: Taming the Web," *New York Times*, June 23, 2009.

185 Saul Hansell, "Tweaking the Cable Model, to Avoid Newspapers' Fate," *New York Times Bits Blog*, April 6, 2009.

186 Ryan Lawler, "User Experience Could Hamper TV Everywhere Adoption," *NewTeeVee.com*, Nov. 18, 2009.

187 Kent Gibbons, " 'Cheerleader' Urges Speedy Adoption of 'TV Everywhere,' " *Multichannel News*, Aug. 18, 2009.

revenue online. Programmers would prefer to receive *both* cable TV revenues and online revenues, but if they must choose only one, the former are more secure and likely larger. According to one network president, cable programmers would switch to online distribution if that provided the same economic value.[188] Cable distributors want to make sure that time never comes, and today programmers generally follow the money to the incumbent distributors. The industry and press understand this dynamic.[189] In the words of *CableFax*, "So what's a cable programmer to do? Give in to customer demand or keep its distribution partners happy?"[190]

Cable distributors are apparently offering programmers nothing "extra" for being part of TV Everywhere. A programming executive (who did not want to be named) told the *New York Times* that cable operators were not guaranteeing networks "any additional revenue for the right to distribute their content online."[191] Time Warner claimed that it did not expect the cable operators to pay any more for being able to offer Time Warner's content online; Time Warner sought merely to "hold the value" of its current fees.[192] This may be enough for some powerful programmers like Time Warner that are happy under the current system. Such powerful programmers can negotiate for a healthy cut of the increasing cable bill, garnering operating profit margins well over 50 percent.[193]

Some programmers, however, initially expressed doubts about TV Everywhere, noting the initiative is anti-consumer and that the programmers are hoping for additional online revenues. Several major programmers such as Discovery and Scripps reportedly were skeptical about cable operators controlling what network video programming might be made available to cable subscribers online.[194] But both networks are part of Comcast's TV Everywhere trial.[195] In fact, a few

[188] Todd Spangler, "CTAM Live: TWC's Stern Urges Exclusive Web-Video Deals," *Multichannel News*, Nov. 10, 2008 ("For cable programmers, distributing ad-supported content online simply doesn't provide the same level of return on investment, Scripps Networks Digital president Deanna Brown. 'When the Internet is able to provide us with that same economic value [as affiliate fees], we'll probably shift our activities accordingly,' Brown said.").

[189] Cable programmers "are loath to put programs online unless they can maintain their per-subscriber fee" from cable operators. (Brad Stone and Brian Stelter, "Some Online Shows Could Go Subscription Only," *New York Times*, March 20, 2009.) As Will Richmond, president of consulting firm Broadband Directions, noted, cable programmers "are not going to do anything to encourage cord-cutting by putting their content online. … That undermines not only their own business models but also their best customers' models." (Todd Spangler, "Breaking Free," *Multichannel News*, Nov. 2, 2008.) The chief operating officer of Comcast told the press, "We [cable TV distributors] have the exact same interests that the content providers have in making sure that we get ahead of the steamroller that is the Internet." (Jeff Baumgartner, "Comcast Nears 'TV Everywhere' Launch," *Light Reading*, Sept. 9, 2009.) The CEO of Move Networks, TV Everywhere's technology provider, has stated that content programmers need cable TV distributors, rather than online distribution, for the "big S: subscriptions. In 2008, DirecTV, EchoStar, Comcast and Time Warner Cable alone paid [a combined] $22 billion for content. You can't walk away from that." (Saul Hansell, "Don't Count Out Cable Online," *New York Times Bits Blog*, Feb. 20, 2009.) The *New York Times* suggests the obvious relationship between cable operators' fees to cable programmers and the result of programmers keeping their content offline: "Comcast alone writes $6 billion in checks to Viacom, Time Warner and other media companies. And *in return* those companies have kept most their best programs off the Internet." The domestic distribution president for Turner Broadcasting stated, "We have to be mindful of the fact that we have a good business that works for all the players. … We have to find ways to advance the business rather than cannibalize it." (Dawn C. Chmielewski and Meg James, "Hulu's Tug of War with TV," *Los Angeles Times*, May 11, 2009.) Another programmer notes the pressure: " 'There's pressure on all of us,' [Jeff Gaspin, president of NBC's Universal Television Group] said, referring to TV networks. 'We get paid quite a bit of money from cable operators. ... It's important we find ways to do business that protects that business model.' " (Deborah Yao, "Cable Companies Want a Way to Win with Online TV," *Associated Press*, Feb. 24, 2009.)

[190] "Leadership Award: Time Warner Cable," *CableFax: The Magazine*, July 2009, at 22.

[191] Brad Stone and Brian Stelter, "Some Online Shows Could Go Subscription Only," *New York Times*, March 20, 2009.

[192] Staci Kramer, "Interview: Jeff Bewkes, Chairman and CEO, Time Warner: Part One: TV Everywhere Front And Center," *PaidContent.org* (April 2, 2009).

[193] David Lieberman, "NBC Universal's Bonnie Hammer Plans to Build on Cable," *USA Today*, March 22, 2009.

[194] "Cable Grapples With Striking Balance Between TV and Web Video," *Communications Daily*, April 7, 2009.

[195] Yinka Adegoke, "Verizon, Time Warner Cable to Test TV on the Web," *Reuters*, Aug. 27, 2009.

short months later, a Discovery executive stated, "You're going to hard-pressed to find anybody in the industry that says they don't support TV Everywhere."[196]

However, at the 2009 Cable Show, Disney CEO Robert Iger gave a keynote address raising questions about TV Everywhere, noting he was "curious about its practicality, both technically and otherwise."[197] He stated: "Preventing people from watching any show online unless they subscribe to a multichannel service could be viewed as anti-consumer and anti-technology. … That's something we would find very difficult to embrace."[198] Iger "was worried that making it harder for customers to see video they want might alienate users and could encourage piracy."[199] He "challenged what he implied were proposals by cable companies that Disney restrict the video programming that it makes available free."[200]

But it is no longer so hard to imagine Hulu, the free video service co-owned by Disney, becoming part of TV Everywhere, especially if Comcast completes it proposed merger with NBC Universal, another Hulu partner.[201]

Rushed Announcements and Launchings

With TV Everywhere, these large companies are moving faster than they did on anything else having to do with the Internet. On June 24, Comcast and Time Warner announced a partnership to promote TV Everywhere. presenting "principles" designed "to ensure rapid adoption and deployment of online television content across the industry."[202]

And the adoption has been rapid. Comcast initially called its service "Comcast OnDemand Online" — though it already has been renamed "Fancast Xfinity" — and set up trials for 5,000 of its customers to access cable-network programming through their Internet access service.[203] Other programmers, including Scripps Networks, Cablevision's Rainbow Media, A&E Television Networks,[204] and premium channels Starz[205] and HBO[206] agreed to add their shows and movies to the Time Warner and Comcast network offerings.[207] A long-time industry analyst running a popular tech blog wrote: "The deal makes it painfully obvious that everything cable companies do … is done to save their video franchises."[208]

On August 27, Time Warner Cable announced it would begin TV Everywhere trials over the next few months.[209] Time Warner Cable partnered with BBC America, IFC, Sundance Channel, Discovery and others, as well as the Time Warner content arm.[210]Verizon announced its Online

[196] Steve Donohue, "Cisco: Set-Top Data Could Boost 'TV Everywhere,'" *Cable Digital News,* Nov. 19, 2009.
[197] Saul Hansell, "Tweaking the Cable Model, to Avoid Newspapers' Fate," *New York Times Bits Blog*, April 6, 2009.
[198] Nat Worden, "Disney CEO: Open to 'TV Everywhere' Concept," *Wall Street Journal*, April 2, 2009.
[199] Saul Hansell, "Tweaking the Cable Model, to Avoid Newspapers' Fate," *New York Times Bits Blog*, April 6, 2009.
[200] Saul Hansell, "Tweaking the Cable Model, to Avoid Newspapers' Fate," *New York Times Bits Blog*, April 6, 2009.
[201] Julia Boorstin, "Fall TV's Biggest Hit: HULU," *CNBC.com*, Sept. 9, 2009.
[202] Press Release, "Time Warner Inc. Announces Widespread Distribution of Cable TV Content Online," June 24, 2009.
[203] Om Malik, "Comcast, Time Warner Team Up to Control TV on the Internet," *Gigaom.com*, June 23, 2009.
[204] Chris Albrecht, "More Networks Line Up for TV Everywhere Test," *New TeeVee*, June 26, 2009.
[205] Steve Donohue, "Starz Beats Rival HBO to 'TV Everywhere,'" *Contentinople*, July 10, 2009.
[206] Glen Dickson, "It's Not TV, It's HBO Everywhere," *Broadcasting & Cable*, July 31, 2009.
[207] Todd Spangler, "Satellite, Telcos In 'TV Everywhere' Camp," *Multichannel News*, May 21, 2009.
[208] Om Malik, "Comcast, Time Warner Team Up to Control TV on the Internet," *GigaOm.com*, June 23, 2009.
[209] Julia Boorstin, "Time Warner Cable's TV Everywhere and the Push to Protect Revenue," *CNBC*, Aug. 27, 2009 (calling it a "push to protect cable subscription revenue"); "Time Warner Cable to Launch TV Everywhere Trials," XChange, Aug. 27, 2009.
[210] "TV Everywhere Accelerates as Solutions Prove Effective," *ScreenPlays Magazine*, Aug. 31, 2009.

Fios TV on the same day.[211] News outlets discussed DirecTV and AT&T's involvement in TV Everywhere the next day, though as early as May 21, the trade press was reporting that "DirecTV, Dish Network, Verizon Communications and AT&T are each aligned with TV Everywhere."[212]

In the haste to launch the product, according to a Comcast executive, the advertising model need not be "nailed down at this point," and "some" people in the industry have suggested getting TV Everywhere "up and running without advertisements."[213] Speaking at an industry panel, the head of CBS Interactive urged "speedy adoption" to ensure success.[214]

Why such a hurry? Speedy deployment is likely needed both to get to market before users get accustomed to online TV that is *un*tethered from cable TV subscriptions and to launch before a possible antitrust investigation.

On Dec. 15, when Comcast launched Fancast Xfinity, the *Wall Street Journal* reported matter-of-factly, "Comcast rolled out its version of TV Everywhere … Tuesday in a bid to keep consumer from cutting their cable cord."[215] A blog on the site NewTeeVee answered the question "Why is TV Everywhere being created?" by saying, "The bigger issue is control. Thanks to the Internet and all kinds of magical video technology, premium content can be piped not only to your PC, but to your TV. If you get all your video through your Internet connection, then you have no need for your cable company."[216]

Anti-competitive Effects of TV Everywhere

TV Everywhere has many anti-competitive effects in the market. As intended, the outlines of the plan suggest reduced competition, higher consumer prices, less privacy, and less universal television service.

First, the plan undermines new entry and competition by explicitly excluding new competitors — notably online TV distributors. Comcast and Time Warner's published "principles" of TV Everywhere maintain that these deals are "open and non-exclusive"[217] and state, "cable, satellite or telco video distributors can enter into similar agreements with other programmers."[218] That is, in each local area, four companies at most *can* join — the local cable operator, the local phone carrier, and two satellite operators, all incumbents. Excluded from these deals are all online TV distributors, the disruptive innovators and potential competitors.

For whatever content they do offer, online distributors will face an apparent price disadvantage. Under TV Everywhere's initial plans, a consumer who pays for a cable TV subscription can view many online TV programs at no additional charge. But an independent online programmer must recoup its costs through charging users or advertisers for content. It must compete with "free." As

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[211] "Verizon Launches Trial of FiOS TV Online, Extending Multi-Screen Leadership," (Press Release), Aug. 27, 2009.
[212] Todd Spangler, "Satellite, Telcos In 'TV Everywhere' Camp," *Multichannel News*, May 21, 2009; Todd Spangler, "DirecTV, AT&T Waiting in the 'TV Everywhere' Wings," *Multichannel News*, Aug. 28, 2009.
[213] "TV Everywhere Accelerates as Solutions Prove Effective," *ScreenPlays Magazine*, August 31, 2009.
[214] Kent Gibbons, "'Cheerleader' Urges Speedy Adoption of 'TV Everywhere,'" *Multichannel News*, Aug. 18, 2009.
[215] Andrew LaVallee, "Comcast Opens Fancast Xfinity TV," *Wall Street Journal*, Dec. 15, 2009.
[216] Chris Albrecht, Everything You Need To Know About TV Everywhere," *NewTeeVee*, Dec. 3, 2009.
[217] Todd Spangler, "Nets Jump Into Comcast's Online VOD Trial," *Multichannel News*, June 25, 2009.
[218] Press Release, "Time Warner Inc. Announces Widespread Distribution of Cable TV Content Online," June 24, 2009.

Time Warner's CEO has said, "We're fortunately in a position where this doesn't cost us much money."[219]

The Independent Film and Television Alliance,[220] the trade association of independent producers and distributors of motion picture and television programming worldwide, filed comments with the FCC attacking the TV Everywhere strategy.[221] IFTA found TV Everywhere "troubling" and fears that the "stage is being set" for "exclusive carriage deals" that "ultimately create new distribution platforms to which independents will be denied equal access."[222] TV Everywhere does nothing, quite deliberately, to support new programming competitors, IFTA points out. TV Everywhere "Web sites will only repeat the program that was lucky enough to secure a network or cable television slot in the first place."[223]

Second, TV Everywhere envisions higher prices for consumers, both through increased subscription fees and more advertisements. Consumers cannot save money by watching only online TV programming or even purchase a TV Everywhere subscription without the cable TV service.[224] Consumers already "pay" for advertiser-supported programming, including "free" broadcast television, by watching advertising. But the shows in Comcast's TV Everywhere trials "will likely carry four times the ad load compared to most web video sites, such as Hulu."[225] Comcast plans to establish a C3 commercial rating accreditation for TV Everywhere, which would require TV programs to run in the same format online as on standard television — meaning about 15 minutes of ads per hour.[226] In addition, consumers in rural areas may face even higher subscriber fees, because small cable operators warn they may receive TV Everywhere content only subject to "unreasonable rates, terms, and conditions, as is the case today in the subscription video market."[227]

Third, TV Everywhere would exact an additional privacy cost on consumers. According to the technology company chosen for TV Everywhere, "We can also do enhanced ad insertion, so we can increase ad revenue. We also have a lot of data on who's watching what."[228] A Comcast executive stated that Comcast will "dynamically insert the ads," with the ability to target based on "audience types."[229] Cable TV distributors have "granular" information about users and can use

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[219] "Cable TV Follows Its Subscribers to the Internet," *Knowledge @ Wharton*, July 22, 2009.

[220] IFTA represents 150 member companies from 22 countries, including independent production and distribution companies, sales agents, television companies, studio-affiliated companies, and financial institutions engaged in film financing. Comments of the Independent Film & Television Alliance, In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 07-269, July 29, 2009 ("IFTA Comments").

[221] IFTA Comments, at 3.

[222] IFTA Comments, at 11.

[223] IFTA Comments, at 13.

[224] Responding to reporters' questions whether an online-only subscription for the service would be available, Time Warner CEO Bewkes answered, "I think what we should do is watch this unfold and see what consumer habits tend to be." Considering the plan of TV Everywhere is to replicate the cable TV model, such an option appears unlikely, or to be a replica of the cable TV fee structure. Chloe Albanesius, "Comcast gets TNT, TBS Content for 'TV Everywhere,'" *PC Magazine*, June 24, 2009.

[225] David Kaplan, "Advertising Everywhere: Comcast Broadband Trials Bring Fears Of Clutter To Web Video," *Reuters*, July 19, 2009.

[226] Claire Atkinson, "Analysis: TV Everywhere Could Remake Online Ad Model," *Broadcasting & Cable*, June 25, 2009.

[227] Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies, MB Docket No. 07-269, July 29, 2009, at ii-iii, 7-9.

[228] Ed Gubbins, "Move Networks' New CEO on monetizing Internet video," *Telephony Online*, July 20, 2009.

[229] "TV Everywhere Accelerates as Solutions Prove Effective," *ScreenPlays Magazine*, August 31, 2009.

that information to better target advertisements, with little competition from other distributors that might expand market share based on offering increased privacy.[230]

Finally, the impact of this collusion will affect the wide availability of both Internet services and TV services. Regarding TV services, the 15 percent of Americans who lack a cable TV subscription — at least 30 million — were recently the subject of years of political action to ensure the digital TV transition would be smooth. These Americans should be able to supplement their over-the-air TV watching with programming from online TV. So, while "the cable and telcos argue that more than four out of every five households subscribe to a service, so only few of them would be affected" by denial of content because they do not have a cable TV subscription, one in five households is a lot of people.[231] Further, over time, millions more Americans would likely cancel their cable TV subscriptions more quickly and subscribe to online services instead were it not for TV Everywhere. As it is, all these users (4 of 5 Americans) will have to pay twice, for cable TV and for online TV, indefinitely.

Moreover, online TV could be a driver for Internet adoption. As the United States develops a long overdue national plan to increase adoption,[232] the FCC has already suggested that liberating online TV is one part of the solution.[233]

Antitrust Law Analysis

The facts above give rise to significant antitrust concerns regarding the anti-competitive effects resulting from TV Everywhere and collusive practices required to implement it. Accordingly, the antitrust authorities should investigate TV Everywhere to ensure consumers do not suffer harms resulting from less innovation, fewer choices, and higher prices.[234]

Antitrust Enforcement: Agencies and Statutes

Two federal agencies enforce the antitrust laws — the Department of Justice and the Federal Trade Commission. Where the DOJ and FTC have overlapping jurisdiction, the two agencies coordinate to determine which agency takes a case. For online TV, both the DOJ and FTC have jurisdiction.[235] The DOJ, not the FTC, is tasked with criminal enforcement, rendering the DOJ perhaps more appropriate for an investigation involving potential criminal penalties. In addition to these agencies, harmed competitors may file private lawsuits under the antitrust laws, and state authorities can bring suit on behalf of their citizens for violations of federal antitrust laws. The FCC also considers competition policy in its public interest analyses, for example, in approving mergers and adopting rules.

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[230] Sarah Reedy, "Will pay TV providers shut down Hulu?," *Telephony Online*, Sep. 9, 2009.

[231] Roger Cheng, "Telcos, Satellite Join Cable's Push to Build Pay Wall On Web," *Wall Street Journal*, April 20, 2009.

[232] Berkman Center, "Next Generation Connectivity, A Review of Broadband Internet Transitions and Policy from Around the World," October 2009 (draft).

[233] Cecilia Kang, "FCC Takes on Cable, Satellite on Television Set-Top Boxes," *Washington Post*, Nov. 18, 2009.

[234] Lawrence Lessig, *The Future of Ideas* (Vintage: 2001); Brett M. Frischmann, "An Economic Theory of Infrastructure and Commons Management," 89 *Minn. L. Rev.* 917 (2005); Clayton Christiansen, *The Innovators Dilemma* (Collins Business Essentials: 1997); Barbara van Schewick, *Architecture and Innovation* (MIT Press: forthcoming, 2010); David Warsh, Knowledge and the Wealth of Nations (W.W. Norton: 2006).

[235] The FTC lacks authority over common carriers, but the FCC has determined that providing Internet access is not a common carrier activity, conferring clear jurisdiction on the FTC. FTC Staff Report, Broadband Connectivity Competition Policy, June 2007, at 3.

Several statutes, including the Sherman Act, the Clayton Act, and the FTC Act, set out the antitrust laws.[236] Based on the language in these statutes, antitrust law has developed as a common law of judicial opinions and enforcement actions based on those statutes over the past century.

Antitrust law draws two key distinctions in determining which kinds of practices are illegal. First, antitrust law distinguishes between concerted and unilateral activity. Section 1 of the Sherman Act declares illegal concerted activity, namely "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce."[237] Section 2 of the Sherman Act outlaws unilateral activity to "monopolize" or attempt to monopolize a market, while acting alone.[238]

Second, antitrust law draws a distinction between vertical and horizontal restrictions. Contractual restrictions that occur up and down a distribution chain, such as between suppliers (such as programmers) and distributors (such as cable operators) are termed vertical restraints, while restrictions based on agreements among direct competitors are termed horizontal restraints. Antitrust law generally considers horizontal agreements (among competitors) more problematic than vertical restraints (among competitors and suppliers).

Currently, the horizontal and vertical relationships in the cable TV industry are somewhat fluid. Satellite, phone and cable distributors all compete with one another as distributors of subscription television services, having a clear horizontal relationship. Similarly, programmers like Viacom and Discovery Channel also have clear horizontal competition relationships. Programmers and distributors have vertical relationships in cable TV distribution; for example, Viacom supplies Comcast.

In the online realm, however, these traditional relationships have come undone. In the online space, traditional programmers and distributors could have a horizontal relationship. Low barriers to entry enable suppliers to compete with their distributors. A distributor like Comcast, which owns Fancast.com, competes with Hulu.com, which is controlled by programmers. As Kaufman Bros. analyst Todd Mitchell notes, "Hulu was started by NBC and Fox so they could compete with Comcast," and Reuters states that "Comcast has even tried to match Hulu with its own free TV website, Fancast."[239]

In determining whether unilateral or multilateral conduct violates antitrust law, courts generally apply one of two antitrust legal tests, or (more precisely) something on a continuum between them, based on the conduct alleged.[240] First, the most fact-intensive test, the rule of reason, requires an inquiry whether the restraint is likely to have anti-competitive effects and, if so, whether the restraint is reasonably necessary to achieve pro-competitive benefits that outweigh those anti-competitive effects.[241] Second, the *per se* rule requires no detailed market analysis and

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[236] The Sherman Antitrust Act, July 2, 1890, ch. 647, 26 Stat. 209, codified at 15 U.S.C. § 1–7); The Federal Trade Commission Act of 1914, Sept. 26, 1914, ch. 311, 38 Stat. 717, codified at 15 U.S.C §§ 41-58, as amended; The Clayton Antitrust Act of 1914, October 15, 1914, ch. 323, 38 Stat. 730, codified at 15 U.S.C. § 12–27, 29 U.S.C. § 52–53).

[237] Sherman Act, § 1, 15 U.S.C. § 1.

[238] Sherman Act, § 2, 15 U.S.C. § 2.

[239] Yinka Adegoke, "Web TV Could Come With a Price Tag After Comcast-NBC," *Reuters*, Oct. 2, 2009.

[240] Somewhere on the continuum between these two is the "quick look," which is a truncated rule of reason analysis for some horizontal conduct "where the great likelihood of anti-competitive effects can easily be ascertained." *See, e.g.*, California Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999).

[241] *See, e.g.*, Federal Trade Commission v. Indiana Federation of Dentists, 476 U.S. 447 (1986); NCAA v. Board of Regents of the University of Oklahoma, 468 U.S. 85 (1984); Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979).

presumes certain practices unreasonable "without elaborate inquiry as to the precise harm [it has] caused or the business excuse for [its] use."[242] The *per se* rule applies only to practices that are themselves clearly unreasonable restraints of trade regardless of market facts, such as Section 1 horizontal collusion — horizontal price-fixing, market allocation, and certain group boycotts.[243] Additionally certain tying arrangements, meeting several factors, are also *per se* violations.[244] The Supreme Court requires, in essence, an inquiry appropriate, or "meet," for the case.[245]

As discussed below, the TV Everywhere agreements are collusive horizontal agreements likely to be found illegal under the applicable *per se* rules.

Per Se Violations Based on Agreements Among Competitors

Based on the known evidence in the public record, the distributors and programmers appear to engage in *per se* illegal collusion falling in several well-established legal categories.

These *per se* violations rest largely on horizontal agreements. The existence of an "agreement" may be demonstrated by either "direct" or "circumstantial" evidence.[246] As direct evidence of an express agreement is "only rarely" available,[247] "circumstantial evidence" is often dispositive.[248] To prove an agreement by circumstantial evidence, some evidence must tend "to exclude the possibility" colluders "were acting independently."[249] This evidence, of course, need not exclude *all* possibility of independent action but "only that there must be *some* evidence which, if believed, would support a finding of concerted behavior."[250] In addition, it does not matter if some parties (here, programmers) were "coerced" by the other parties (here, cable TV distributors like Comcast and Time Warner Cable) to submit to such agreements. Antitrust precedent makes clear that, even though parties may have different incentives, or one party may be coercing another, an agreement exists so long as the parties are committed to a "common scheme designed to achieve" an anti-competitive and unlawful effect.[251] As a result, circumstantial evidence of a "coerced" agreement includes when a supplier warns a dealer "raise your prices or else," and the dealer "merely grunts, but complies."[252] Thus, even when one party coerces another, an agreement can be found.

With TV Everywhere, both the direct and circumstantial evidence in the record point to an illegal agreement warranting further investigation. The "direct" evidence is indicated in discussions such as those reported in newspaper that reveal an agreement. The antitrust authorities would have to

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[242] Northern Pacific Railway v. United States, 356 U.S. 1, 5 (1958).
[243] *See, e.g.*, Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980) (price fixing); United States v. Topco Associates, 405 U.S. 596 (1972) (market allocation); FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990) (group boycott).
[244] *See* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 9 (1984).
[245] California Dental, 526 U.S. at 780-81.
[246] *See* Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986).
[247] *See* Local Union No. 189 v. Jewel Tea Co., 381 U.S. 676, 720 (1965); ES Dev., Inc. RWM Enters., Inc., 939 F.2d 547, 553-54 (8th Cir. 1991) ("Proof of such a combination or conspiracy does not depend upon the existence of a formal agreement. Indeed, it is axiomatic that the typical conspiracy is 'rarely evidenced by explicit agreements,' but must almost always be proved by 'inferences that may be drawn from the behavior of the alleged conspirators.' Thus, an antitrust plaintiff may prove the existence of a combination or conspiracy by providing either direct or circumstantial evidence sufficient to 'warrant a ... finding that the conspirators had a unity of purpose or common design and understanding, or a meeting of the minds in an unlawful arrangement.'") (citations omitted).
[248] *See, e.g.*, Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 765-766 (1984).
[249] Matsushita, 475 U.S. at 588.
[250] Toys "R" Us, Inc. v. FTC, 221 F.3d 928, 935 (7th Cir. 2000) (emphasis in original).
[251] Monsanto Co., 465 U.S. at 768.
[252] Isaksen v Vermont Castings, Inc., 825 F.2d 1158, 1164 (7th Cir. 1987); *see also id.* at 1163 ("an agreement procured by threats is still an agreement for purposes of section 1").

confirm the nature of these discussions through investigation to garner the admissible direct evidence. As discussed above in more detail, however, the *Wall Street Journal* and the *New York Times* reported that major phone, satellite and cable companies, including AT&T, Comcast, DirecTV, Time Warner Cable, and Verizon,[253] got together to make agreements to counter the threat of free online TV and place online TV behind a cable pay wall.[254] The *Wall Street Journal* noted how these "longtime rivals" and "normal combatants" had a "rare agreement"; "to avoid being accused of collusion," they have had many of the discussions "on the telephone and in private, one-on-one chats during industry events."[255]

Additionally, there is strong circumstantial evidence of collusion. Circumstantial evidence includes evidence that would-be competitors engage in actions that "would be in the parties' self-interest if all agreed to act in the same way but would be contrary to their self-interest if they acted alone."[256] Indeed, the chief operating officer of Comcast, the first cable operator offering TV Everywhere, admitted that the parties lack an incentive, if acting alone, to restrict viewing of online content: "It's the classic prisoner's dilemma. … If there's a vacuum, and some start to inch in to the water hoping others will hold back, the whole industry could be affected."[257] Apparently, he means that if some members of a cartel aim "inch in to the water" by placing content online while hoping others do not, the "whole industry" could start jumping in and, undermining the collusion. Indeed, the decision to compete or collude is, in fact, a "classic prisoner's dilemma."[258]

This appears true in the case of TV Everywhere. Independently, without collusion, the cable TV distributors and programmers would have an incentive to generate marginal revenue by offering an online TV product (like distributors' Fancast or programmers' Hulu) across the nation, not just in their own region. With competition, programmers would have incentives to reach even those users who have "cut the cord" and do not have cable subscriptions. They would have competitive incentives to include fewer ads than TV Everywhere envisions. Unless a core number of programmers announces agreement with TV Everywhere at the same time — as programmers did — no programmer could feel comfortable joining and offering higher prices and fewer choices for consumers. Indeed, these incentives explain why some programmers began competing online initially and only reversed course after the industry's collusive talks.[259] The distributors would have similar incentives increasingly to make content more widely available online, to catch up with Hulu and Netflix by lowering prices on on-demand services.

Taken together, the likelihood of an agreement here is certainly high enough to warrant investigation.

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[253] Brad Stone and Brian Stelter, "Some Online Shows Could Go Subscription Only", *New York Times*, March 20, 2009.

[254] Roger Cheng, "Telcos, Satellite Join Cable's Push to Build Pay Wall On Web," *Wall Street Journal*, April 20, 2009.

[255] Tim Arango, "Cable TV's Big Worry: Taming the Web," *New York Times*, June 23,2009.

[256] According to the ABA Section on Antitrust, this factor is "among the most important plus factors" needed to show that parallel activity is likely based on collusion. *See* ABA Section of Antitrust Law, *Antitrust Law Developments* (5th Ed. 2002), at 12, n.55 (citing, among others, Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939); Re/Max Intern., Inc. v. Realty One, Inc., 173 F.3d 995, 1009-10 (6th 1999); City of Tuscaloosa v. Harcros Chemicals, Inc., 158 F.3d 548, 572 (11th Cir. 1998).

[257] Tim Arango, "Cable TV's Big Worry: Taming the Web," *New York Times*, June 23, 2009.

[258] Daniel Shaviro, "Why Worldwide Welfare As A Normative Standard In U.S. Tax Policy?," 60 *Tax Law Review* 155, 162 (2007) ("A further classic example of a prisoner's dilemma is the problem faced by a producer cartel that seeks to extract monopoly profits from consumers by colluding on supply and price. Acting unilaterally, each cartel member would be best off defecting from the group by selling more than its allotment and undercutting the monopoly price, whether other members of the cartel similarly defect or not."); *see also* Christopher R. Leslie, "Cartels, Agency Costs, and Finding Virtue in Faithless Agents49 William and Mary Law Review 1621, 1692 (2008) ("Price fixing represents a prisoner's dilemma.").

[259] "Cable Grapples With Striking Balance Between TV and Web Video," *Communications Daily*, April 7, 2009.

Horizontal Collusion to Allocate Markets

TV Everywhere consists of horizontal agreements to illegally allocate geographic and product markets regarding high-quality online TV. Market allocations are subject to per se illegality, whether or not price-setting is involved.[260] Moreover, these agreements are *per se* illegal even among "potential" competitors.[261]

First, under TV Everywhere, competing distributors allocate markets geographically. The incumbent industry rested on local cable and local phone monopolies, competing with satellite operators to varying degrees. Generally, a town has one monopoly cable provider; that is, Time Warner Cable, Comcast and Cox each has a locality to itself and does not compete with the other. Phone companies like Verizon and AT&T face the same structure for U-Verse and Fios, with one provider per local area.

Based on the different economic costs of online distribution on the Internet, the whole world is a potentially overlapping service area. That is, Comcast's Fancast could compete nationally with online TV sites offered by any other carrier — Cox, AT&T and Verizon. Under TV Everywhere, traditional cable TV distributors will continue to serve only consumers within their current geographically limited footprints, not competing with providers in other areas. By tying programming to local cable subscriptions, while denying content to pure online TV distributors, the incumbent industry hopes to artificially reproduce the lack of competition for TV distribution to which it is accustomed, based on geographical fiefdoms and turf. This is why, to "authenticate" users, the cable TV distributor must ensure "you have the right to watch based on what's on the channels you're watching in your area," as "different markets associate programming with different packages."[262]

Second, under TV Everywhere, the competitors agree to allocate markets on a vertical dimension. Today, cable TV distributors distribute content from programmers. On the Internet, however, traditional cable TV distributors like Comcast have been competing horizontally with traditional programmers like Viacom or NBC and Disney. TV Everywhere, however, allocates the retail market to Comcast, with programmers effectively supplying content to Comcast's Fancast site. This eliminates competition between cable TV distributors' sites and cable programmers' sites online, which has existed for years.

Horizontal Collusion to Set Prices

TV Everywhere also manages to set prices across the industry in three ways. Horizontal price-fixing is generally *per se* illegal.[263] Indeed, horizontal fixing of particular terms, such as credit terms, is

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[260] The Supreme Court has stressed that market allocation "agreements are anticompetitive regardless of whether the parties split a market within which both do business or whether they merely reserve one market for one and another for the other." United States v. Topco Associates, 405 U.S. 596, 607-608 (1972) ("One of the classic examples of a per se violation of s 1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition"); Palmer v. BRG of Georgia, Inc., 498 U.S. 46, 49-50 (1990) ("Such agreements are anticompetitive regardless of whether the parties split a market within which both do business or whether they merely reserve one market for one and another for the other").

[261] Palmer, 498 U.S. at 49-50.

[262] "TV Everywhere Accelerates as Solutions Prove Effective," *ScreenPlays Magazine*, Aug. 31, 2009.

[263] *See, e.g.*, United States v. Aquafredda, 834 F.2d 915, 917 (11th Cir. 1987) (holding as a *per se* restriction of trade the defendants' agreement to stop free garbage service to customers).

also *per se* illegal;[264] so is an agreement to discontinue free service;[265] so is price-fixing among buyers.[266]

TV Everywhere sets industry-wide terms and prices both for consumers and between distributors and programmers. For consumers, it sets two prices — subscription and advertising. TV Everywhere sets the consumer price for watching much online TV at the price, at least, of a cable TV subscription. TV Everywhere sets the advertising price, as consumers "pay" for TV by watching advertisements. TV Everywhere collusion appears to quadruple the number of ads in online TV.[267] Thus, it increases the price on users.

Regarding programmers, TV Everywhere sets a term in the "price" that distributors pay programmers. Cable TV distributors have apparently agreed to require programmers to be a part of TV Everywhere, setting a term in the programming negotiations. It appears that distributors unanimously required one new term in recent negotiations: that programmers can make online content available only through authentication. More specific terms appear to be set through the "most favored nation" clauses.

For example, while all distributors require TV Everywhere, some distributors may negotiate to lock up the content behind an "authentication wall" for only 30 days and then permit programmers to make the content available online more widely; others for 60 days; some for one year; and others for forever. Yet the large distributors all have "most favored nation" provisions that would standardize this duration across the industry. If a programmer agrees to one distributors' demand to lock up the content for one year, that one-year lock-up will contractually apply for all other distributors, setting an industry-wide term in this new model. These contracts, for the most part, last at least seven years, enabling the distributors to impose their model on programmers — and consumers — for many years to come, even though the technology and consumer demand would favor competitive online business models far sooner.

Horizontal "Hub and Spoke" Group Boycott

Because TV Everywhere is an agreement among incumbent distributors and programmers to (continue to) deny supplying content to competing online distributors, TV Everywhere is a group boycott. For the group boycott to be *per se* illegal, three factors must be met: (1) the boycotting firms (here, cable programmers) must cut off access to a supply, facility, or market necessary for the boycotted firm (here, online TV distributors) to compete; (2) the boycotting firms possess a "dominant" position (which is less than a "monopoly") in the market; and (3) the boycott cannot be justified by plausible arguments that it was designed to enhance overall efficiency.[268]

This boycott can be considered a purely horizontal collusion — as the cable TV distributors and cable TV programmers both compete with one another horizontally in the online TV market. All these horizontal competitors have denied content to any online TV distributor that is *not* a legacy

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[264] *See* Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980).

[265] *See* Aquafredda, 834 F.2d at 915.

[266] *See, e.g.*, Cackling Acres, Inc. v. Olson Farms, Inc., 541 F.2d 242 (10th Cir. 1976); *cf.* Knevelbaard Dairies v. Kraft Foods, Inc. 232 F.3d 979 (9th Cr. 2000).

[267] David Kaplan, "Advertising Everywhere: Comcast Broadband Trials Bring Fears Of Clutter To Web Video," *Reuters*, July 19, 2009; Claire Atkinson, "Analysis: TV Everywhere Could Remake Online Ad Model," *Broadcasting & Cable*, June 25, 2009.

[268] Toys "R" Us, Inc. v. FTC, 221 F.3d 928, 936 (7th Cir. 2000).

cable TV distributor. Purely online TV distributors, like Vuze, Vimeo, YouTube or Netflix, simply cannot take part in TV Everywhere and are boycotted.

If we consider cable TV distributors and programmers to have a vertical relationship, such collusion is often called a hub-and-spoke conspiracy, where the cable TV distributors (notably Time Warner Cable and Comcast) are the "hub," the vertical agreements among cable TV distributors and programmers are the "spokes," and horizontal collusion among programmers is the "rim." The programmers "cannot escape the *per se* rule simply because their collusion depended upon the participation of a 'middle-man' [like Time Warner Cable or Comcast], even if that middleman conceptualized the collusion, orchestrated it by bringing the distributors together around contracts it held with its buyers, and collected most of the booty."[269]

The three-factor test results in a *per se* violation. First, programming is clearly necessary for online TV distributors to compete; users often want access to particular shows, which are necessary for competition.[270] Second, the boycotting programming (and distribution) firms are dominant. Third, no efficiencies have been (or could be) proffered to justify the boycott — the main justifications already discussed publicly are maintaining market power (through undermining nascent, innovative competitors) and maintaining high revenues.

Several leading cases demonstrate the illegality of this boycott.[271] Consider the seminal case of *Associated Press v. United States.*[272] The Associated Press consisted of 1,200 incumbent members sharing content with one another and but not with rivals of the member newspapers. The Supreme Court concluded that this agreement to share content only among incumbents comprised a concerted restriction of trade. In addition, the Associated Press by-laws provided "a very simple and non-burdensome road for admission of a non-competing applicant," in "striking contrast" to the burdens imposed on "new members who do compete" with the existing

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[269] United States v. All Star Industries, 962 F.2d 465, 473 (5th Cir. 1992).

[270] *See* Molly Peterson, "FCC Rejects AT&T Program-Access Complaint Against Cox (Update2)," *Bloomberg*, March 9, 2009; John Eggerton, "Verizon Files Program Access Complaint Against Cablevision," *Broadcasting & Cable*, July 8, 2009. *Cf.* Toys "R" Us, 221 F.3d at 931 ("The little girl who wants Malibu Barbie is not likely to be satisfied with My First Barbie, and she certainly does not want Ken or Skipper. The boy who has his heart set on a figure of Anakin Skywalker will be disappointed if he receives Jar-Jar Binks, or a truck, or a baseball bat instead. Toy retailers naturally want to have available for their customers the season's hottest items, because toys are also a very faddish product, as those old enough to recall the mania over Cabbage Patch kids or Tickle Me Elmo dolls will attest.").

[271] Several cases have even involved the entertainment industry and collusion by distributors and/or content providers. *See, e.g.*, Harkins Amusement Enter. v. General Cinema Corp., 850 F.2d 477, 484 (9th Cir. 1988) (reversing summary judgment for defendant, finding issue of fact regarding conspiracy; noting "If the split members … also agreed to secure the cooperation of distributors in excluding [a competing exhibitor] from the first-run market, then such a combination would constitute a Sherman Act violation."); United States v. Crescent Amusement Co., 323 U.S. 173, 182 n.5 (1944) (noting a horizontal conspiracy remains among exhibitors is per se illegal even with the vertical component of the distributor colluding); United States v. Paramount Pictures, 334 U.S. 131, 155 (1948) (same). Several other cases have found "hub and spoke" conspiracies unlawful. *See* Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) (a combination of several manufacturers, distributors, and a retailer conspiring not to sell to a competing retailer, or to do so only at discriminatory prices and terms, constituted a cause of action under the Sherman Act); Fashion Originators' Guild of America v. FTC, 312 U.S. 457 (1941) (finding a program of textile and garment manufacturers that prohibited the sale of garments to certain stores and manufacturers is unlawful); Interstate Circuit, Inc. v. United States, 306 U.S. 208, 222-23 (1939) (finding a pattern of collusive conduct where an exhibitor coordinated nearly identical constraints from eight movie distributors to fix minimum movie admission ticket prices and limit the distribution of second-run feature films, noting the competitors were aware that "without substantially unanimous action … there was a risk of a substantial loss of the business and good will … but with it [unanimous action] there was the prospect of increased profits"). *See also* Toys "R" Us v. FTC, 221 F.3d 928 (7th Cir. 2000) (deferring to the FTC's application of rule of reason that Toys "R" Us, facing increasing competition from warehouse stores, negotiated a series of agreements with their suppliers to deny warehouse stores the products sold to Toys "R" Us); United States v. All Star Indus., 962 F.2d 465, 473 (5th Cir. 1992) (addressing a horizontal agreement with a vertical component).

[272] 326 U.S. 1 (1945).

incumbents in the Associated Press.[273] Essentially, existing members could exclude entrants, thereby denying content necessary for competition from entrant distributing papers. The similarities to TV Everywhere are plain. TV Everywhere includes numerous incumbents, which together completely dominate the market. They share content with one another for distribution, while denying that necessary content to non-member entrants.

Potentially Illegal Tying Violations

TV Everywhere also includes tying practices that are *per se* illegal. Tying refers to requiring consumers to buy a tied product only on condition of buying a different, tying, product.[274] Tying arrangements can be found illegal under Section 1 of the Sherman Act,[275] Section 2 of the Sherman Act,[276] Section 3 of the Clayton Act,[277] and under Section 5 of the FTC Act.[278]

While the Supreme Court has never provided a definitive list, tying arrangements tend to be subject to *per se* rules only if several key factors are met (1) two separate products or services; (2) the sale of one product or service conditioned on the purchase of the other (or conditioned on unreasonable terms making separate purchases viable)[279]; (3) the seller has sufficient market power (though not necessarily monopoly power) for the tying product to enable it to restrain trade in the market of the tied product; and (4) a not insubstantial amount of interstate commerce in the tied product is affected.[280]

TV Everywhere ties cable TV to online TV content in the consumer market. By forcing users to pay for the tied product of cable TV, consumers have to pay for a product they do not want. Consumers will switch to online TV and "cut the cord" if content is available online without the cable TV subscription.[281]

The *per se* test is met here: (1) online TV and pay TV are likely two separate markets, as different companies can compete in both markets on the supply side and many consumers still view the two products differently on the demand side[282]; (2) the sale of one product (online TV) is clearly conditioned on the purchase of another (cable TV subscription); (3) since the cable operators have access to the online TV programming while other online TV distributors do not, the cable

[273] 326 U.S. at 9-11.
[274] Tying can harm competition because it can "deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products." Northern Pacific Railway v. United States, 356 U.S. 1, 5 (1958).
[275] *See, e.g.*, Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 463 n.8 (1992) (suggesting tying is subject to Section 1, as not being solely unilateral conduct); Systemcare, Inc. v. Wang Laboratories Corp., 117 F.3d 1137 (10th Cir. 1997) (determining that tying is concerted activity).
[276] United States v. Microsoft Corp., 253 F.3d 34, 70 (D.C. Cir. 2001).
[277] 15 U.S.C. § 14.
[278] 15 U.S.C. § 45.
[279] *See, e.g.*, Amerinet, Inc. v. Xerox Corp., 972 F.2d 1483, 1500 (8th Cir. 1992) ("In cases where there is no explicit agreement which conditions the purchase of the tying product upon the purchase of the tied product, an illegal arrangement may still be shown if the defendant's policy makes the purchasing of the tying and tied products together the only viable economic option."). (internal quotations and citations omitted).
[280] *See, e.g.*, Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal, 63 F.3d 1540, 1546-47 (10th Cir. 1995); ABA Section on Antitrust, *Antitrust Developments*, at 179.
[281] Todd Spangler, "Breaking Free," *Multichannel News*, Nov. 2, 2008.
[282] Market definition turns on consumer demand. See Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 462 (1992); Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 21-22 (1984).

operators have considerable market power in the tying market; (4) a substantial amount of trade is clearly affected.

Rule of Reason Test: Monopolization by Cable Operators

In addition to the *per se* test, TV Everywhere, and the content-lockout implicit in the collusion, would consist of illegal monopolization by cable operators. The antitrust authorities can also bring cases based on the rule of reason, arguing that some concerted, and some independent, activity on balance harms competition. While the rule of reason analysis would require a full-blown market analysis, courts would defer to agency conclusions of rule-of-reason violations where an agency merely has substantial evidence.[283]

Even if the cable TV distributors are not colluding (and it appears from reports that they are), the rule of reason could prohibit TV Everywhere and its content-lockout practices. Cable operators, like Time Warner Cable and Comcast, generally have monopolistic market share, with one cable operator having around 70% share in most local markets. The antitrust authorities should investigate the local markets for cable TV distribution, determine whether cable operators are local monopolists, and determine that TV Everywhere and content-lockout (even as unilateral conduct) are exclusionary violations of section 2 of the Sherman Act. An analogous case is *Lorain Journal Co. v. United States*,[284] where a monopolistic newspaper attempted to thwart competition from a new medium — radio — by refusing to accept advertising from any company advertising on the new local radio station. This was ruled a violation of Section 2 of the Sherman Act, partly because the newspaper's goal was to eliminate the local station. Similarly, here, a dominant incumbent distributor threatens to exclude — or merely stop paying — programmers who distributed content through a new competing medium, the Internet, to eliminate competition from that new medium.

Remedies

While the key focus of this paper is to raise awareness of TV Everywhere and request an immediate investigation for potential antitrust violations, we briefly discuss some appropriate remedies.

The antitrust authorities should consider existing, well-understood remedies generally used to address similar antitrust violations, namely denying mergers, imposing considerable fines and other criminal penalties, and imposing compulsory licensing regimes.

Oppose new mergers. The TV industry is highly concentrated, setting conditions ripe for collusion. Cable TV distributors that own programmers also have incentives to favor their own programmers and foreclose distribution access for rival programmers. Many distributors own programming companies. While requiring divestitures may seem aggressive to some, denying further mergers — such as one proposed between NBC Universal and Comcast — is absolutely necessary.[285]

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[283] Toys "R" Us, Inc. v. FTC, 221 F.3d 928, 935 (7th Cir. 2000) ("we apply the substantial evidence test … Our only function is to determine whether the Commission's analysis of the probable effects … is so implausible, so feebly supported by the record, that it flunks even the deferential test of substantial evidence.") (applying rule of reason).
[284] 342 U.S. 143 (1951).
[285] According to Kaufman Bros. analyst Todd Mitchell, buying NBC is "a defensive move to some extent by Comcast," to transform Hulu from a competitor to just "another choice of Comcast's pay-TV buffet." Adegoke, "Web TV Could Come With a Price Tag After Comcast-NBC." CNBC reported, similarly, "Comcast is eager to diversify its holdings amid an encroaching threat from online video" and other sources. (David Faber, "GE, Comcast Deal Over NBC Universal Is Complete: Source," CNBC, Dec. 1, 2009 (emphasis added).) According to *Wired*, "The merger could stymie the increasing migration of television and

Criminal penalties for collusion. Criminal penalties are the usual remedy for illegal collusion.[286]

Compulsory license. The government could require the incumbents to license all TV Everywhere content to online competitors. Compulsory licenses are common remedies where an incumbent distributor is denying content to an entrant distributor to destroy competition.[287] A compulsory license requires copyright holders to license their content to all comers, setting a maximum price. This license thus ensures parity among content distributors, ending anti-competitive content-lockout by incumbents that are denying content to rival distributors, while also ensuring copyright holders are compensated for their works. Regulators ranging from Congress to antitrust courts have applied the familiar remedy of compulsory license where incumbents use copyright denial strategies to kill entrant competitors.[288]

Programmers, smaller cable TV distributors, independent studios, and online TV distributors all benefit from a compulsory license for online TV distribution. For *programmers*, the license would ensure that they garner revenues from new distributors without retribution from cable operators or other cable TV distributors. Cable TV distributors would be unable to punish specific programmers for making their content available online, as the programmers would have no option to deny online distribution. The fee, however, could be set to adequately reward the content-provider. In addition, the advent of legal online distribution would likely curtail piracy, as it did in the online music market, also benefiting programmers. For *smaller cable TV distributors*, which now fear discrimination in the terms and conditions of accessing the TV Everywhere content, a nondiscriminatory compulsory license would permit small distributors to pay the same fees as their largest competitors for online TV.[289] In addition, *independent studios and screenwriters* would have a level playing field in trying to distribute content through third-party online TV distributors. Distributors would not need to make concessions to the largest incumbents, such as buying or highlighting less popular content at the expense of independent studios' programming. In addition, independent studios would benefit from a competitive online TV space, which would likely curtail piracy in their works. Finally, *online TV distributors* should certainly support a compulsory license, which would permit them to distribute the premium content now denied them by TV Everywhere.

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cable content to online services such as the popular, and NBC-owned Hulu.com. The new company could move that content inside Comcast's network so that it is only available to ISP subscribers that also subscribe to cable." (Ryan Singel, "Comcast Buys NBC, Clouding Online TV's Future," *Wired*, Dec. 3, 2009.) Free Press has argued that the merger would help Comcast "suffocate online TV like Netflix, Miro and iTunes." (Free Press, "No Merger," http://www.freepress.net/comcast). Other consumer groups have raised similar concerns. (John Eggerton, "Comcast-NBCU Will Face Opposition in DC," *Multichannel News*, Dec. 3, 2009; Shields and Stern, "Comcast Hasn't Made 'Best Offer' to U.S. on NBC Deal"; Amy Schatz, "Comcast Deal Faces Regulatory Scrutiny," *Wall Street Journal*, Dec. 3, 2009 ("[T]he deal also introduces a variety of novel Internet issues, such as worries about net neutrality and online video competition."); Sarah Reedy, "What Comcast/NBCU Means for Competition," *Telephony Online*, Dec. 4, 2009 (With Hulu, Comcast have "powerful motives" "starve competing online video sources by denying them access to vital content," according to Mark Cooper of Consumer Federation of America); Cecilia Kang, "Merger Plans for Comcast, NBC Ignite Battle Over Television Access," *Washington Post*, Dec. 4, 2009.) Comcast's head regulatory official concedes that the government may require Comcast to divest ownership in Hulu." Todd Shields and Christopher Stern, "Comcast Hasn't Made 'Best Offer' to U.S. on NBC Deal," *Bloomberg*, Dec. 4, 2009.

[286] Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Div., U.S. Dep't of Justice, Presentation Before the ABA Section of Antitrust Law, March 26, 2008, at 9, *available at* http://www.usdoj.gov/atr/public/speeches/232716.pdf.

[287] Tim Wu, "Copyright's Communications Policy," 103 *Mich. L. Rev.* 278, 303 (2004).

[288] Tim Wu, "Copyright's Communications Policy," 103 *Mich. L. Rev.* 278, 303 (2004).

[289] Traci Patterson, "Cox Ups Internet Speeds, Boards ESPN360.com Train," *CedMagazine.com*, Sept. 24, 2009 (Small cable operators complain they "are not so lucky [regarding ESPN360 terms], putting them at a distinct competitive disadvantage").

Other remedies. In addition, other remedies could be necessary, such as "program access" rules, wholesale unbundling rules, and eliminating bundling of TV and Internet services.

Conclusion

Online TV is this nation's best shot at breaking up the cable TV industry oligopolies and cartels. Permitting online distributors to compete vigorously on the merits for computer screens and TV screens will result in increased user choice, more rapid innovation, lower prices and a more robust digital democracy.

TV Everywhere is the latest attempt of cable TV distributors to destroy the innovative disruption of online TV distribution. And according to both press reports and the circumstantial evidence, TV Everywhere rests on an illegal collusion and other potential violations of the antitrust laws. The government should begin an immediate, aggressive investigation of TV Everywhere to determine the extent and nature of the agreement. If the investigation confirms the apparent collusion, the government should impose structural rules like compulsory licenses to protect consumers.

The government must deliver to consumers what they have long sought and would likely already have without collusion and abuse of market power — the benefits of competition and innovation in online TV.