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The Impact of Next Generation Television on Consumers and the First Amendment

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Consumers have access to an ever-increasing inventory of video content choices as a result of technological innovations, more readily available broadband, new business plans, inexpensive high capacity storage and the Internet's ability to serve as a single medium for a variety of previously standalone services delivered via different channels. They increasingly have little tolerance for "appointment television" that limits access to a particular time, channel and device. Access to video content is becoming a matter of using one of several software-configured

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interfaces capable of delivering live and recorded content anytime, anywhere, to any device and via many different transmission and presentation formats.

Technological and marketplace convergences eliminate the viability of judicial and regulatory models that apply varying degrees of First Amendment protection as a function of the medium delivering the content. With the Internet serving as a single conduit for a variety of information, communications and entertainment, ventures can offer a bundle of services that span two or more regulatory classifications, for example, the ability of wireless handsets to make telephone calls, to receive video programming and to access the Internet.

This Article will examine the ongoing migration from channels to software-configured platforms for accessing video content with an eye toward assessing the impact on consumers and the First Amendment. The Article identifies the need for significant amendment of the Communications Act of 1934 to provide a light-handed and limited, but explicit statutory basis for the Federal Communications Commission to resolve predictable disputes between stakeholders and to remedy anticompetitive practices.

INTRODUCTION

The ways to distribute video content to consumers have begun to diversify, as the Internet becomes an increasingly attractive option for delivering programming, and provides an alternative to broadcast, satellite and cable networks. Viewers no longer need to tolerate "appointment television,"[1] with access to content at a prescribed time, available on a single channel and delivered to a single receiving device using only one acceptable transmission format. Access primarily will become a matter of using one of several software-configured interfaces capable of decoding live

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[1] *See* John Clancy, *Why the Future of TV Is All About Personalization*, MASHABLE (Aug. 25, 2011), http://mashable.com/2011/08/25/tv-mobile-personalization ("Consumers are changing their viewing habits in favor of 'TV Everywhere.' They no longer make 'appointments' to sit down and view content, and are no longer limited by TV programming schedules. They want content whenever and wherever they are.").

and recorded content anytime, anywhere, to any device, and through many different transmission and presentation formats.[2]

Diversifying business models for delivering video content assumes that consumers can and will use multiple platforms to augment or replace traditional media.[3] Such diversification also challenges existing legal and regulatory models that support different degrees of government oversight and content regulation based on assumptions about a specific medium. For radio and television broadcasters, the Federal Communications Commission ("FCC") has imposed significant regulatory burdens based on assumptions that spectrum scarcity and the pervasiveness of the medium warrant mandatory and probably unprofitable public service obligations.[4] Even prior to receiving explicit statutory authority, the FCC regulated cable television operators,[5] including

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[2] *In re* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Fourteenth Report, 27 FCC Rcd. 8610, 8613 (2012) ("Online video, like the Internet itself, has migrated beyond the computer to a wide variety of devices since the last report. Consumers now can access [online video distributors' ("OVD")] service via computers, smartphones, tablets, gaming consoles, smart television sets, Blu-ray players, and a host of consumer electronics products.").

[3] *Id.* at 8702. ("To respond to viewers' desire to view video programming in more places at more times, broadcast station owners [and other content distributors] have developed online and mobile media platforms, using their websites as extensions of their local brands . . . .")

[4] *See, e.g.*, Red Lion Broad. Co. v. FCC, 395 U.S. 367, 386–90 (1969) ("Although broadcasting is clearly a medium affected by a First Amendment interest, differences in the characteristics of new media justify differences in the First Amendment standards applied to them." (citation omitted)).

[5] *See, e.g.*, United States v. Sw. Cable Co., 392 U.S. 157 (1968) (FCC can use its ancillary jurisdiction provided by Title I of the Communications Act to regulate a new technology that has the potential to harm broadcasting, a regulated medium); *see also* FCC v. Midwest Video Corp. (*Midwest Video II*), 440 U.S. 689, 691–95 (1979); United States v. Midwest Video Corp. (*Midwest Video I*), 406 U.S. 649, 650–73 (1972); Kevin Werbach, *Off the Hook*, 95 CORNELL L. REV. 535, 572 (2010) ("The FCC needed a hook to assert jurisdiction over cable. To reach that goal, it used a two-step process. First, the Commission found that cable was within its primary statutory grant of authority under section 152(a) of the [Communications] Act, which allows the FCC to regulate 'all interstate and foreign communication by wire or radio.' Second, the FCC invoked section 303(r) of the Act, which allows the Commission to issue 'such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law,' as 'public convenience, interest, or necessity requires.' The FCC also referenced section 154(i), which provides that '[t]he Commission may perform any and all acts, make such

the requirement that they deliver local broadcast signals but limit the number of "imported stations" outside the local market. The FCC constrained cable operators' programming freedom based on the assumption that without program carriage limitations, cable television viewing would fragment audiences and reduce broadcasters' ability to continue providing advertiser-supported service requiring no additional upfront payment from consumers.[6]

The FCC can lawfully constrain and subordinate the First Amendment speaker rights of broadcasters and cable television operators based on court-approved balancing of the public and government interests on one hand, and that of media and conduit providers on the other hand.[7] Generally, appellate courts have

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rules and regulations, and issue such orders, not inconsistent with [the Communications Act], as may be necessary in the execution of its functions.'" (citations omitted)).

[6] *See, e.g.*,Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 647 (1994) (affirming FCC rules requiring cable operators to carry significantly viewed broadcast station signals) ("By preventing cable operators from refusing carriage to broadcast television stations, the must-carry rules ensure that broadcast television stations will retain a large enough potential audience to earn necessary advertising revenue—or, in the case of noncommercial broadcasters, sufficient viewer contributions—to maintain their continued operation. In so doing, the provisions are designed to guarantee the survival of a medium that has become a vital part of the Nation's communication system, and to ensure that every individual with a television set can obtain access to free television programming." (citations omitted)).

[7] Marvin Ammori, *First Amendment Architecture*, WIS. L. REV. 1, 5–6 (2012) ("Courts routinely reject constitutional objections to government laws providing access to additional spaces beyond traditional public forums—both to physical and virtual spaces, on both public and private property. These spaces include shopping malls, phone networks, cable networks, and wireless networks, among others. Despite the standard model's guiding principle that government not interfere with speakers' decisions and respect their negative liberty, judicial doctrines have consistently permitted government interference to ensure affirmative access even to many spaces owned by private parties. The standard model must recognize doctrinal "exceptions" for regulating access—to phone systems, to broadcast systems, to cable systems, and to shopping malls—and different, sui generis exceptions applicable to each space."). *See generally*, Stuart Minor Benjamin, *Transmitting, Editing, and Communicating: Determining What "The Freedom of Speech" Encompasses*, 60 DUKE L.J. 1673, 1686–91 (2011) (examining whether and how conduits of speech trigger First Amendment implications when analyzing government activity); Gregory P. Magarian, *The Jurisprudence of Colliding First Amendment Interests: From the Dead End of Neutrality to the Open Road of Participation-Enhancing Review*, 83 NOTRE DAME L. REV. 185 (2007) (examining networks' colliding First Amendment interests and judicial avoidance of a resolution of such issues); Matthew L. Spitzer, *The Constitutionality of Licensing Broadcasters*, 64

deferred to the FCC's expert judgment that constraints on speech are reasonable and not targeted at specific types of content.[8] A substantial body of law now supports mutually exclusive and media-specific models that qualify the First Amendment speaker rights of broadcasters,[9] and even cable television operators whose closed-circuit networks do not use spectrum.[10] Additionally the jurisprudence applicable to telephone companies assumes that such ventures operate solely as neutral conduits for delivering the content of others.[11] This common carrier model[12] draws a parallel between the neutral conduit function of telephone companies with

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N.Y.U. L. REV. 990 (1989) (evaluating broadcasters' freedom of speech and press and critique of judicial decisions that restrict broadcasters' First Amendment rights).

[8] *See, e.g.*, United States v. Sw. Cable Co., 392 U.S. 157 (1968) (affirming FCC regulation of what broadcast television signals a cable television operator can import); United States v. Midwest Video Corp., 406 U.S. 649 (1972) (affirming FCC rules requiring most cable television operators to provide local programming origination and distribution opportunities).

[9] *See, e.g.*, CBS, Inc. v. FCC, 453 U.S. 367 (1981) (affirming FCC requirement that broadcast stations provide free air time for coverage of campaigns including presidential debates); FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775 (1978) (affirming FCC regulation and limits on combined ownership of broadcast stations and newspapers in the same local market); *Red Lion Broad. Co.*, 395 U.S. at 375 (affirming compulsory right of reply to personal attack); Nat'l Broad. Co. v. United States, 319 U.S. 190 (1943) (affirming FCC regulation of the commercial relationship between broadcast networks and local station affiliates).

[10] *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180 (1997) (affirming FCC mandated carriage of significantly viewed broadcast television stations by cable television ventures based on an intermediate scrutiny assessment of regulations deemed not directly impacting broadcasters' speaker rights); Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC, 525 F.2d 630, 641 (D.C. Cir. 1976) (the essential element of common carriage is the carrier's undertaking to carry for all people indifferently).

[11] Computer and Comm. Indus. Assoc. v. FCC, 693 F.2d 198, 209–10 (D.C. Cir. 1982) (common carriers provide a service whereby customers may transmit intelligence of their own design and choosing).

[12] 47 U.S.C.A. § 251 (West 2006) (Telecommunications carriers have "[t]he duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.").

other traditional public utilities providing electric, water, gas, sewage and other essential services.

Technological and marketplace convergences[13] in the communications industry have rendered, or soon will render, obsolete assumptions about how specific media operate and the rationales for applying discrete and mutually exclusive regulatory models. Content creators and packagers will no longer rely on channel-based distribution technologies to deliver content.[14] Instead consumers increasingly expect to have access at their convenience and on more flexible terms and conditions:

> Today, the major [multichannel video programming distributors ("MVPDs")] offer hundreds of linear television channels, which are streams of programming that offer video programs on a specific channel at a specific time of day. Many MVPDs also offer thousands of non-linear video-on-demand ("VOD") programs, including pay-per-view ("PPV") programs, which allow consumers to select and watch video programs whenever they request them. [15]

The terms Internet Protocol Television ("IPTV")[16] and Over-the-Top Television

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[13] Technological convergence refers to innovations that make it possible for a single medium to deliver several different types of content previously handled by separate networks. For example, the Internet's transmission of digital bitstreams makes it possible to handle voice, data, text and video content via a single network. Marketplace convergence refers to the ability of a single venture to offer a bundle of services previously offered by other companies.

[14] *See* Bloomberg L.P. v. Comcast Cable Commc'ns, 27 F.C.C. Rcd. 9488, 9489 (2012) (memorandum opinion and order), *aff'd* Bloomberg L.P. v. Comcast Cable Commc'ns, 59 Communications Reg. (P&F) 118 (F.C.C. Sept. 26, 2013) (memorandum opinion and order) (affirming Media Bureau interpretation of merger conditions requiring Comcast to position together in a sequence of channels all outlets of similar content, for example, news, when the company previously had opted to create such a "neighborhood" of some channels).

[15] *In re* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Fourteenth Report, 27 FCC Rcd. 8610, 8617 (2012).

[16] IPTV offers consumers with broadband connections options to download video files or view video content on an immediate "real time" basis. *In re* Sky Angel U.S., LLC, 25 F.C.C.R. 3879, 3879 (2010) (emergency petition for temporary standstill). Some of the

("OTT")[17] refer to the ability of content creators and new or existing content distributors to provide consumers with access via broadband links in lieu of, or in addition to, traditional media. Currently content creators and distributors are experimenting with new options, having perhaps reluctantly acknowledged that the status quo cannot persist in light of proliferating consumer self-help opportunities, many of which violate copyright laws and make it possible for consumers to access premium content for free.[18]

The Internet offers many legitimate, questionable and absolutely illegal opportunities to access both amateur and professional video content via the transmission of files for subsequent replay, through real time streaming of files and even the transmission of "live" programming, including pay-television sporting events. Consumers with access to high-speed broadband networks can launch applications and visit websites providing convenient techniques for acquiring movies and other premium content.[19]

Creators of content distributed via the Internet rightly expect to qualify for First Amendment protection, because the medium of distribution used should not impact their right to offer content in a

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available content duplicates what cable television subscribers receive therein triggering disputes over whether cable operators can secure exclusive distribution agreements and prevent an IPTV service provider from distributing the same content. *Id*. at 3879–80 ("Sky Angel has been providing its subscribers with certain Discovery networks for approximately two and a half years, including the Discovery Channel, Animal Planet, Discovery Kids Channel, Planet Green, and the Military Channel. Sky Angel submits that these channels are a significant part of its service offering."). For background on IPTV, see In-Sung Yoo, *The Regulatory Classification of Internet Protocol Television: How the Federal Communications Commission Should Abstain From Cable Service Regulation and Promote Broadband Deployment*, 18 COMMLAW CONSPECTUS 199, 202–205 (2009).

[17] *See In re* Preserving the Open Internet Broadband Indus. Practices, 25 F.C.C.R. 17905, n.48 (2010) (report and order) ("Over-the-top VoIP [and other] services require the end user to obtain broadband transmission from a third-party provider, and providers of over-the-top . . . [services] can vary in terms of the extent to which they rely on their own facilities.").

[18] *See The TWC TV App Will Allow You to Watch On Demand and Live Programming Outside Your Home*, TW CABLE UNTANGLED, http://www.twcableuntangled.com/2013/04/the-twc-tv-app-will-allow-you-to-watch-on-demand-and-live-programming-outside-your-home/ (last visited Nov. 14, 2013).

[19] *See, e.g.*, NETFLIX, http://www.neflix.com (last visited Nov. 13, 2013).

robustly competitive marketplace of ideas. However, distributors of such content using an Internet conduit do not have the same certainty of First Amendment protection or insulation from FCC regulatory oversight. On one hand, IPTV operators can make a persuasive argument that they operate as functional equivalents to cable television operators and other packagers of content. Similarly, the FCC has determined that any provider of Internet access provides an information service thereby qualifying for a largely unregulated status.[20] If the FCC has largely deregulated all broadband conduit providers, then it would stand to reason that creators and packagers of content riding on top of a broadband link similarly operate as information service providers.

On the other hand, the FCC has come to realize that some providers of broadband Internet access have both the ability and incentive to engage in anticompetitive conduct that could thwart an open and robustly competitive marketplace for new Internet-mediated competitive alternatives to existing services. The FCC secured a voluntary forfeiture of $15,000 and an agreement by a small, rural telephone company not to block its broadband subscribers from accessing competitive Voice over the Internet Protocol ("VoIP")[21] telephone service. [22] Determining that

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[20] *See* Time Warner Telecom., Inc. v. FCC, 507 F.3d 205 (3d Cir. 2007); *In re* Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks, 22 F.C.C.R. 5901, 5909–14 (2007) (declaratory ruling); *In re* United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service, 21 F.C.C.R. 13281, 13285–90 (2006) (memorandum opinion and order); *In re* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 F.C.C.R. 14853, 14863 (2005) (report and order and notice of proposed rulemaking) (reclassifying as an information service telephone company provided Internet access via Digital Subscriber Lines); *In re* Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, 17 F.C.C.R. 4798, 4821 (2002) (Cable Declaratory Ruling), *aff'd*, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 977–78 (2005) (affirming FCC determination that cable modem Internet access constitutes a largely unregulated information service).

[21] VoIP is the real-time carriage and delivery of data packets that correspond to voice. VoIP services range in quality, reliability, and price and can link both computers and ordinary telephone handsets. For technical background on how VoIP works, *see* Susan Spradley & Alan Stoddard, *Tutorial on Technical Challenges Associated with the Evolution to VoIP*, FCC (Sept. 22, 2003), http://www.fcc.gov/events/tutorial-technical-challenges-associated-evolution-voip.

Comcast, a major media venture, might seek to favor its own video content, or that of affiliates, the FCC sanctioned the company when it deliberately prevented certain broadband subscribers from downloading and sharing video files.[23] On appeal Comcast convinced a reviewing court that the FCC lacked direct statutory authority to regulate Comcast's information services.[24] Despite the potential for consumer harm, the court held that the FCC could not lawfully stretch its indirect authority to fashion a remedy.[25]

A contentious debate has run for many years on the need for government oversight of Internet access and the imposition of nondiscrimination, network neutrality[26] obligations on Internet Service Providers ("ISPs").[27] Such concerns for consumer

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[22] *In re* Madison River Commc'ns, LLC, 20 F.C.C.R. 4295, 4297 (2005). *See generally* Charles J. Cooper & Brian Stuart Koukoutchos, *Federalism and the Telephone: The Case for Preemptive Federal Deregulation in the New World of Intermodal Competition*, 6 J. TELECOMM. & HIGH TECH. L. 293, 332–37 (2008) (characterization of VoIP).

[23] *In re* Formal Complaint of Free Press and Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications, 23 F.C.C.R. 13028, 13028 (2008) (memorandum opinion and order), *vacated*, Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010).

[24] *Comcast Corp.*, 600 F.3d at 661 (D.C. Cir. 2010) (holding that the FCC lacked direct statutory authority to sanction an ISP for discriminatory practices).

[25] *Id.* at 644 ("The Commission has failed to make that showing. It relies principally on several Congressional statements of policy, but under Supreme Court and D.C. Circuit case law, statements of policy, by themselves, do not create 'statutorily mandated responsibilities.'"); *see also* Am. Library Ass'n v. FCC, 406 F.3d 689, 692 (D.C. Cir. 2005) ("The Commission may exercise this 'ancillary' authority only if it demonstrates that its action-here barring Comcast from interfering with its customers' use of peer-to-peer networking applications-is "reasonably ancillary to the . . . effective performance of its statutorily mandated responsibilities.").

[26] Network neutrality refers to government mandated nondiscrimination, transparency and other requirements on ISPs designed to foster a level competitive playing field among content providers and to establish consumer safeguards so that Internet users have unrestricted access limited only by legitimate concerns, such as ISP network management and national security. *See* Rob Frieden, *A Primer on Network Neutrality*, 43 INTERECONOMICS: REV. EUR. ECON. POL'Y, 4, 5 (2008).

[27] *See* Marvin Ammori, *Beyond Content Neutrality: Understanding Content-Based Promotion of Democratic Speech*, 61 FED. COMM. L.J. 273 (2009); Bill D. Herman, *Opening Bottlenecks: On Behalf of Mandated Network Neutrality*, 59 FED. COMM. L.J. 103 (2006); Mark A. Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. REV. 925 (2001); Lawrence Lessig, *In Support of Network Neutrality*, 3 ISJLP 185 (2007); Sascha D.

protection and a level competitive playing field have a direct impact on the scope and nature of First Amendment protection available not only for ISPs, but possibly also for ventures using an ISP conduit to deliver video content. ISPs may overstate the scope of their content creation, management and packaging function, particularly in light of their primary function as neutral conduits and their incentive to operate mostly as a neutral party. By claiming only to operate as neutral conduits, ISPs secure a near complete exemption from liability for the criminal and tortious conduct of subscribers, for example, the delivery of defamatory statements,[28] as well as their copyright infringement, for example, the delivery of pirated video content.[29] Nevertheless the nature and scope of First Amendment protection and insulation from regulatory oversight remains uncertain.

This Article will examine the ongoing migration from channels to software-configured platforms for accessing video content with

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Meinrath & Victor W. Pickard, *Transcending Net Neutrality: Ten Steps Toward an Open Internet*, J. INTERNET L., Dec. 2008, at 1; Jennifer L. Newman, *Keeping the Internet Neutral: Net Neutrality and Its Role in Protecting Political Expression on the Internet*, 31 HASTINGS COMM. & ENT. L.J. 153 (2008); Amit M. Schejter, *"Justice, and Only Justice, You Shall Pursue": Network Neutrality, the First Amendment and John Rawls's Theory of Justice*, 14 MICH. TELECOMM. & TECH. L. REV. 137 (2007); Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. TELECOMM. & HIGH TECH L. 141 (2003).

[28] *See* Communications Decency Act, 47 U.S.C. § 230(c)(1) (2010) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."). Courts have construed the immunity provisions in section 230 broadly in all cases arising from the publication of user-generated content. *See, e.g.*, Green v. Am. Online (AOL), 318 F.3d 465, 470 (3d Cir. 2003) (finding statutory immunity from tort claims within provisions of § 230); Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1123–24 (9th Cir. 2003) (concluding after examination of prior judicial decisions that statutory immunity was granted from torts under § 230); Batzel v. Smith, 333 F.3d 1018, 1026–31, 1031 n.19 (9th Cir. 2003) (determining that § 230 confers immunity on providers and users of interactive computer services); Ben Ezra, Weinstein, & Co. v. Am. Online Inc., 206 F.3d 980, 984–86 (10th Cir. 2000) (finding defendant immune to suit under § 230 for merely relaying information of a third party); Zeran v. Am. Online, Inc., 129 F.3d 327, 330–32 (4th Cir. 1997) (distributor liability foreclosed under § 230).

[29] *See* Digital Millennium Copyright Act, 17 U.S.C.A. § 512(c) (2010) exempts ISPs from liability for the infringement of a subscriber if the ISPs, upon notice, take down the content in a timely manner; *see, e.g.*, IO Group, Inc. v. Veoh Networks, Inc., 586 F. Supp. 2d 1132 (N.D. Cal. 2008) (supporting safe harbor provision for service providers under § 512(c)).

an eye toward identifying near-term and longer-term impact on the commercial video marketplace and the First Amendment-supported marketplace of ideas. This Article identifies the need for significant amendment of the Communications Act of 1934 to provide a light-handed and limited, but explicit statutory basis for the FCC to resolve predictable disputes between stakeholders and to remedy anticompetitive practices. Because the currently fractious and politicized Congress is not likely to act, this Article provides suggestions on what the FCC can lawfully do now to provide greater regulatory clarity and specific, limited safeguards.

I. BROADBAND TELEVISION

OTT refers to the use of broadband transmission networks to deliver video bitstreams "on top of" other services such as Internet access and email.[30] Consumers must subscribe to fast, high

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[30] *See* Communications Assistance for Law Enforcement Act and Broadband Access and Services, 19 FCC Rcd. 15676, 15713 n.181 (2004) ("In the Open System Interconnection ('OSI') model, layered network architecture for packet networks typically consists of seven layers: physical, data link, network, transport, session, presentation and application. The model calls for the independent operation of the layers, and supports the interaction of various applications and equipment that is designed to address separately each layer in a product offering. In the Transport Control Protocol ('TCP')-IP model, only four levels are used; link (combines OSI physical and data link levels), network, transport and application (combines OSI session, presentation and application levels). The functions supported at each layer are as follows: *physical*–represents electrical signaling, modulation, etc.; *data link*–moves packets (also called 'datagrams') between hosts based on a protocol such as Ethernet, Asynchronous Transfer Mode, frame relay; *network*–defines how data is routed between hosts over one or several networks, often based on IP; *transport*–establishes the connection between two hosts, creating a 'virtual' network, often based on TCP or Universal Datagram Protocol; *session*–controls the setup and termination of communications sessions; *presentation*–defines the format of the data exchanged (*e.g.*, text, graphic); *application*–defines how applications communicate with each other over the network (*e.g.*, e-mail) using various protocols."). *See generally* Joshua L. Mindel & Douglas C. Sicker, *Leveraging the EU Regulatory Framework to Improve a Layered Policy Model for US Telecommunications Markets*, 30 TELECOMM. POL'Y 136, 137 (2006); David P. Reed, *Critiquing the Layered Regulatory Model*, 4 J. ON TELECOMM. & HIGH TECH. L. 281 (2006) (detailing and critiquing the layered model, highlighting potential inherent economic consequences); Douglas C. Sicker & Lisa Blumensaadt, *Misunderstanding the Layered Model(s)*, 4 J. ON TELECOMM. & HIGH TECH. L. 299 (2006) (describing the layered model and its subsequent misinterpretation while emphasizing its continued utility); Lawrence B. Solum & Minn Chung, *The Layers Principle; Internet Architecture and the*

capacity broadband services, because video service requires networks that can transmit content on an instantaneous "real time" basis. Even low quality video files, which are highly compressed and have comparatively lower resolution, require broadband networks that can deliver traffic at about one megabit per second or higher.[31]

OTT can enhance the value proposition offered by ISPs as subscribers increase their video content downloading and uploading activity thanks to the synergistic and serendipitous opportunities available from broadband networking. Internet protocols support the loading, switching and routing of different kinds of traffic through the networks that interconnect to form the Internet cloud.[32] This means that Internet routers can handle video traffic in much the same way as they manage other less intensive bandwidth applications. So long as the networks providing bitstream transmission can handle higher capacity streams and files, they can provide a medium for the delivery of video. The term IPTV refers to the ability of the Internet, and specifically its Internet Protocol addressing scheme and its Transmission Control Protocol bitstream management formats, to provide broadband users with user-friendly ways to access video content.[33]

Law, 79 NOTRE DAME L. REV. 815 (2004) (describing and supporting internet regulation via a layered model); Richard S. Whitt, *A Horizontal Leap Forward; Formulating a New Communications Public Policy Framework Based on the Network Layers Model*, 56 FED. COMM. L.J. 587 (2004) (detailing the current regulatory framework and advocating an approach that regulates along horizontal network layers).

[31] *See Broadband Speed Guide*, FEDERAL COMMUNICATIONS COMMISSION, http://www.fcc.gov/guides/broadband-speed-guide (last visited Sept. 22, 2013).

[32] The Internet cloud refers to the vast array of interconnected networks that make up the Internet and provide users with seamless connectivity to these networks and the content available via these networks. *See* William Jeremy Robison, *Free at What Cost?: Cloud Computing Privacy Under The Stored Communications Act*, 98 GEO. L.J. 1195, 1199 (2010) ("The increasing functionality of the Internet is decreasing the role of the personal computer. This shift is being led by the growth of 'cloud computing'—the ability to run applications and store data on a service provider's computers over the Internet, rather than on a person's desktop computer.").

[33] *See* Konrad L. Trope, *Voice Over Internet Protocol: The Revolution in America's Telecommunications Infrastructure*, 22 COMPUTER & INTERNET LAW 1, 3 (2005) ("The Internet is a vast network of individual computers and computer networks that communicate with each other using the same communications language, Transmission Control Protocol/Internet Protocol (TCP/IP). The Internet consists of approximately more

Many broadband subscribers of both wired and wireless services have discovered the benefit of using their subscriptions to access video. In doing so, these subscribers may substantially increase the total volume of content they download. Broadband carriers, particularly wireless operators, have become concerned that such downloading will trigger network congestion and exhaust existing capacity, requiring an ever growing investment in broadband plant.[34] By offering subscribers unmetered, "all you can eat" ("AYCE") service, broadband carriers have encouraged experimentation and access without regard to the operational and cost burdens incurred by ISPs. Now many broadband carriers have abandoned AYCE pricing and offer metered service at different monthly rates based on the amount of permissible content downloading.[35] In lieu of tiered service, many ISPs invoke traffic

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than 100 million computers around the world using TCP/IP protocols. Along with the development of TCP/IP, the open network architecture of the Internet has the following characteristics or parameters: 1. Each distinct network stands on its own with its own specific environment and user requirements, notwithstanding the use of TCP/IP to connect to other parts of the Internet. Communications are not directed in a unilateral fashion. Rather, communications are routed throughout the Internet on a best efforts basis in which some packets of information may go through one series of computer networks and other packets of information go through a different permutation or combination of computer networks, with all of these information packets eventually arriving at their intended destination. 2. Black boxes, for lack of a better term, connect the various networks; these boxes are called "gateways" and "routers." The gateways and routers do not retain information but merely provide access and flow for the packets being transmitted. 3. There is no global control of the Internet.").

[34] *See* Stacey Higginbotham, *Spectrum Shortage Will Strike in 2013*, GIGAOM (Feb. 17, 2010, 1:00 PM), http://gigaom.com/2010/02/17/analyst-spectrum-shortage-will-strike-in-2013 ("The demand for mobile broadband will surpass the spectrum available to meet it in mid-2013, according to Peter Rysavy, a wireless analyst. In a report on the looming spectrum crisis that was sponsored by Research in Motion for the Mobile World Congress in Barcelona, Rysavy explains how the demand for bandwidth-consuming services used by more and more people will lead to a crappy user experience, or heavy-handed pricing . . . and limitations on mobile application from carriers absent new spectrum allocations.").

[35] *See* Brian Stelter, *Sweeping Effects as Broadband Moves to Meters*, N.Y. TIMES, June 26, 2012, http://www.nytimes.com/2012/06/27/business/media/internet-providers-testing-metered-plans-for-broadband.html ("The broadband era began with the expectation that Internet connections were like buffets—all you can eat, 24 hours a day. But users are now being prodded to think about how much they're consuming . . . . Usage-based billing is seen by some as a fairer alternative to broadband caps, a term most

management necessity as justification for deliberately slowing down ("throttling") the delivery of traffic to subscribers exceeding a quota of permissible downloading volume.[36]

Prior to the elimination of AYCE service, ISPs branded the highest volume subscribers "bandwidth hogs" in light of their potential to cause network congestion. ISPs consider these heavy users of broadband networks as a problem instead of an opportunity. While heavy demand for data service contributes to short term congestion and the need to increase transmission capacity, subscribers' expanded demand for broadband provides ISPs with the enviable long term opportunity to serve a growing market rather than one that has become static or declining.

OTT distribution includes two primary ways to deliver content: (1) the immediate, "real time" streaming of programs simultaneously available via other traditional media, such as satellite, cable and broadcast television; and (2) the streaming or downloading of files containing video content, some of which was initially available only from incumbent media outlets. Different commercial models have evolved to simulcast live content, download content and stream content without allowing consumers to store the file. Incumbents recognize the need to offer more convenient access, but they do not want to make it possible for nonsubscribers to access the content, or for subscribers to record and redistribute it.[37]

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closely associated with Comcast, which had been enforcing a limit of 250 gigabytes per Internet customer per month.").

[36] *See* Tim Greene, *Verizon Wireless Puts Bandwidth Hogs On A Data Diet*, NETWORK WORLD (Feb. 3, 2011), http://www.networkworld.com/news/2011/020311-verizon-wireless-bandwidth-hogs.html ("Verizon will throttle back bandwidth available to the biggest data hogs on its wireless network in what it calls an effort to keep up service quality for everybody else.").

[37] *See* Brian Stelter, *Campaign Trains Viewers for 'TV Everywhere*, N.Y. TIMES, Sep. 11, 2011, http://www.nytimes.com/2011/09/12/business/media/campaign-trains-viewers-for-tv-everywhere.html?_r=2&smid=tw-NYTimesAd&seid=auto. For example, some major cable television operators have begun to offer subscribers the opportunity to access premium content via computers, tablets and smartphones away from the home television set. *Id.* This "television everywhere" concept seeks to maintain the cable television subscription as prerequisite for access via other video content platforms. *Id.* ("[Putting] in place TV Everywhere, a long-promised system for online television, calls for new

II. REGULATORY STATUS AND FIRST AMENDMENT SPEAKER RIGHTS OF IPTV SERVICE PROVIDERS

When IPTV service providers limit their activity to creating content, they qualify as uncontested First Amendment-protected speakers.[38] The controversy over First Amendment protection occurs when a video content provider also manages the delivery process using owned or acquired broadband capacity. When content and conduit combine, questions arise as to whether and how First Amendment protections apply to the blended service, or if it remains limited to the content.

First Amendment jurisprudence clearly supports the extension of some, although not all, First Amendment protection to ventures that do not create content, but instead package and distribute it. For example, operators of book stores qualify for First Amendment protection against government censorship and confiscation of content, even though the owner did not write the books and may not even know the nature of the content contained in any specific publication on the shelf.[39] Similarly, cable and satellite television

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contracts between channels and distributors and for new technology to check that viewers have paid their cable bills. And it takes something else: training. Viewers, after all, are not accustomed to being able to go online and see a library's worth of television on demand.").

[38] *See* Reno v. ACLU, 521 U.S. 844 (1997). In *Reno v. ACLU*, the Supreme Court held that restrictions on Internet-mediated content should trigger strict scrutiny because of the potential for harm to First Amendment protected speech:

> We are persuaded that the CDA [a law imposing sanctions for making content available via the Internet that can harm children] lacks the precision that the First Amendment requires when a statute regulates the content of speech. In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.

Id. at 874.

[39] *See* Smith v. California, 361 U.S. 147, 153–55 (1959) (declaring unconstitutional a city ordinance making it illegal for bookstore operators to have obscene books, even unknowingly); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 65 n.6 (1963) (citing Lovell v. City of Griffin, 303 U.S. 444, 452 (1938)) ("The constitutional guarantee of freedom of the press embraces the circulation of books as well as their publication . . . .").

operators acquire First Amendment protections in their capacity as packagers and distributors of content created by affiliates and even unaffiliated ventures.[40]

However First Amendment rights can be qualified and conditioned as applied to ventures that do not create content, but instead operate in one of the distribution channels that eventually reach consumers. Courts have affirmed the FCC's lawful authority to impose restrictions and limitations on cable[41] and satellite operators'[42] speech. Cable operators must offer to subscribers all significantly viewed local television stations whose management elects to forego copyright compensation in exchange for mandatory carriage.[43] Additionally the FCC can impose caps on the national market penetration achieved by a single operator [44] and establish well-reasoned safeguards against domination of the market for the creation of video content.[45] Satellite operators have to allocate a portion of their channel capacity for the carriage of

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[40] *See, e.g.*, United States v. Playboy Entm't Grp. Inc., 529 U.S. 803, 806–07 (2000) (invalidating a federal statute that required cable companies to either scramble or limit non-obscene pornography channels to certain hours). In *United States v. Playboy Entm't Grp., Inc.*, the Court held that Congress needed to generate the least restrictive option among equally effective alternatives, such as having parent request scrambling or use filtering technology. *Id.* at 814–15. Because content-based restrictions to protect minors from harmful materials must pass a rigorous "strict scrutiny" standard of judicial review, the Court opted not to burden cable television operators with mandatory filtering duties. *Id.* at 825–27.

[41] *See* cases cited *supra* note 5.

[42] *See, e.g.*, Time Warner Entm't Co. v. FCC, 93 F.3d 957, 973–77 (D.C. Cir. 1996) (applying intermediate scrutiny to affirm congressionally mandated channel set aside by Direct Broadcast Satellite for noncommercial educational and informational programming).

[43] *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 647 (1994).

[44] *See* Daniels Cablevision, Inc. v. United States, 835 F. Supp. 1 (D.D.C.1993), *rev'd in part sub nom*. Time Warner Entm't Co. v. United States, 211 F.3d 1313, 1316–20 (D.C. Cir. 2000) (holding cap on national market penetration passes intermediate scrutiny). *But see*, Comcast Corp. v. FCC, 579 F.3d 1, 8 (D.C. Cir. 2009) (finding FCC failed to provide sufficient justification for a 30% national market penetration cap).

[45] *See, e.g.*, Prometheus Radio Project v. FCC, 652 F.3d 431 (3d Cir. 2011) (affirming some FCC restrictions on market penetration and reversing others).

children's programming[46] and provide advertising capacity to candidates for elected office.[47]

Some IPTV ventures offer content only while others combine content and conduit in much the same manner as cable television operators. Content-only IPTV ventures require users to secure a broadband pathway to the content using the broadband facilities of one or more ISPs. The combination of content and conduit occurs seamlessly, but different companies participate. For example, a subscriber to the Netflix movie streaming service secures two necessary subscriptions—one with Netflix for access to content and one with a retail ISP that provides access to and from the Internet cloud.[48] Upstream from the retail ISP, additional ventures provide the link to Netflix.[49] Some of these carriers operate as Content Distribution Networks ("CDNs") that have agreed to provide downstream delivery of content from Netflix directly to the retail ISP that delivers the streaming content to a subscriber. In some instances Netflix's CDN interconnects with one or more ISPs before the traffic reaches the retail ISP making the final link to a viewer.

Some ISPs have claimed First Amendment speaker status in FCC proceedings and in litigation.[50] These claims provide a basis

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[46] *See* 47 C.F.R. § 25.701(f)(1) (2013) ("DBS providers shall reserve four percent of their channel capacity exclusively for use by qualified programmers for noncommercial programming of an educational or informational nature.").

[47] *See* 47 C.F.R. § 25.701(b) (mandating political broadcasting requirements).

[48] *See* How Does Netflix Work?, *Watching Netflix*, NETFLIX, https://support.netflix.com/en/node/412.

[49] *See* Kevin Fitchard, *Forget the CDN players, Netflix is caching its own video*, GIGAOM (June 4, 2012, 5:35 PM), http://gigaom.com/2012/06/04/forget-the-cdn-players-netflix-is-caching-its-own-video/; Todd Spangler, *Netflix Uncouples 'Super HD' from Content-Delivery Network Program*, VARIETY MAGAZINE, (Sep. 26, 2013, 2:58 PM). http://variety.com/2013/digital/news/netflix-stops-trying-to-use-super-hd-to-push-content-delivery-network-program-1200671376/.

[50] *See* Preserving the Open Internet Broadband Indus. Practices, 25 FCC Rcd. 17905, 17981–83 (2010) (report and order); *see also* Paul Barbagallo, *Verizon First Amendment Challenge Of Net Neutrality Tests Century of Regulation*, BLOOMBERG BNA (Jan. 24, 2013), http://www.bna.com/verizon-first-amendment-n17179872014 (discussing implications pending *Verizon* case, indicating that "[i]f the court agrees with Verizon, the FCC rules would be repealed, and every company that provides a pipeline through which consumers gain access to the internet, including Verizon, would be free to block websites

for objecting to efforts by the FCC to impose network neutrality requirements in addition to invoking the *Comcast* case precedent. More broadly they support the premise that the FCC should impose no regulations whatsoever. By subordinating the conduit function and emphasizing the speaker function, ISPs seek to maintain or broaden their unregulated status as either information service providers, First Amendment speakers, or both.

This two-track strategy may prevail, despite significant deficiencies. While an appellate court did reverse the FCC when it attempted to sanction Comcast,[51] another panel in the very same court affirmed the Commission's imposition of interconnection obligations on wireless carriers providing information services. In *Cellco Partnership v. FCC*,[52] the court accepted the FCC's rationale that it could regulate aspects of how wireless carriers provide data service.[53] The FCC ordered all cellular radiotelephone companies to interconnect their wireless data networking capabilities, so that users temporarily located outside their home service territory could continue to access Internet services.[54] Previously, the FCC had ordered these companies to provide voice telephone service to such "roaming" users so that these visitors would continue to make and receive calls.[55] The FCC could mandate voice roaming interconnection because Title II of the Communications Act directly applies to these carriers operating as common carriers and offering Title II regulated

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or treat their own web content better than that of rivals."). *See generally* Benjamin, *supra* note 7 (rejecting the premise that ISP conduit function warrants First Amendment protection); Christopher S. Yoo, *Free Speech and the Myth of the Internet as an Unintermediated Experience*, 78 GEO. WASH. L. REV. 697 (2010) (arguing that ISP's editorial discretion fosters rather than impedes free speech values).

51 *See In re* Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, 23 F.C.C.R 13028, 13028 (2008) (memorandum opinion and order), *vacated*, Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010).

52 700 F.3d 534 (D.C. Cir. 2012)

53 *Id.* at 537.

54 *Id.* at 539.

55 *See In re* Inquiry into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems, 86 F.C.C.2d 469, 482 (1981) (report and order).

telecommunications services.[56] The duty to interconnect with other carriers constitutes one of the basic nondiscrimination and accessibility requirements contained in Title II of the Communications Act.[57]

On the other hand cellphone company provision of wireless broadband data services does not trigger Title II FCC regulatory authority because the Commission determined that such an undertaking constitutes an information service.[58] Notwithstanding the FCC's clear inability to impose Title II common carrier responsibilities, the court accepted the FCC's assertion that compulsory roaming service was reasonable and did not constitute the unlawful imposition of a common carrier responsibility when it applies to wireless data service.

The court deferred to the FCC's expertise and ability to differentiate between common carrier responsibilities and what one could call quasi-common carrier responsibilities that impose a duty to deal: "[C]ommon carriage is not all or nothing—there is a gray area in which although a given regulation might be applied to common carriers, the obligations imposed are not common carriage *per se*."[59] The court noted that the FCC had not required the wireless carriers to offer roaming access on a uniform basis. Instead the FCC required only that the carriers negotiate "commercially reasonable" agreements that could take into consideration specific circumstances presented by each roaming access request, including the possibility of not having to provide service if technically infeasible.[60]

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[56] *See Cellco P'ship*, 700 F.3d at 538. The Communications Act of 1934 defines a common carrier as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter." Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended at 47 U.S.C. § 153(h) (2006)).

[57] 47 U.S.C. §§ 201–276 (2006).

[58] *Cellco P'ship*, 700 F.3d at 538.

[59] *Id.* at 547.

[60] *Id.* at 537 ("[A]lthough the rule bears some marks of common carriage, we defer to the Commission's determination that the rule imposes no common carrier obligations on mobile-internet providers.").

The D.C. Circuit Court of Appeals appears comfortable with the application of different Titles of the Communications Act to a single carrier when it provides different services resulting in "a bifurcated regulatory scheme."[61] The FCC has evidenced less comfort in subjecting a single venture to varying degrees of regulatory oversight.[62] The Commission may have concluded that any and all retail broadband service qualifies as an information service based on its disinclination to make a nuanced decision whether and how to impose narrow requirements such as data roaming. Now having made such a decision and having received judicial approval, the FCC might have a renewed inclination to expand selectively its regulatory wingspan.

III. EVOLVING TRENDS IN VIDEO DISTRIBUTION

Consumers now have added flexibility and choices made possible by the evolution of three content display devices. In addition to the conventional television set, which delivers one of many channels in sequence, computer monitors, wireless smartphones, and tablets offer a second, third, and fourth screen. These devices can display Internet-based content along with additional or duplicative content packaged by the carriers providing broadband access. Consumers appear willing to tolerate significant difference in the visual and audio quality of service when viewed on different sized screens. They also appear "technology agnostic" regarding which medium delivers the content.

Consumers have become less tolerant of attempts by content distributors, in particular, to restrict access from alternative, non-incumbent platforms. Many appear to have few qualms about accessing content that may violate copyright laws. A significant percentage of early adopters of new video access platforms may pursue illegal self-help options should content creators and

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61 *Id*. at 538.

62 *In re* Federal-State Joint Board on Universal Service, 13 F.C.C.R. 11501, 11522 (1998) (report to Congress).

distributors opt to reduce opportunities to access highly desirable, "must see" television. [63]

In conjunction with expanded display options, three models for video access have evolved:

(1)Illegal, copyright infringing access to content via efficient peer-to-peer file transfer, or other direct links, as well as real time streaming of video content files and live television;

(2) New, lawful access to live television or video files via new intermediaries such as Amazon, Apple, Hulu, Netflix, Roku and YouTube;[64] and

(3) Efforts by incumbent broadcasters, broadcast networks, Direct Broadcast Satellite operators and cable television systems to offer new "television everywhere" options that provide additional access options to conventional appointment television and programmed recording of content.

In the transition to platform-delivered content access incumbents and market entrants will compete for audiences. Market entrants will provide new, more flexible options that in turn will force incumbents to provide greater value and access options lest they lose market share. Heretofore content creators have explored new distribution options without abandoning traditional channels. Currently successful content creators appreciate that the status quo has generated substantial returns, largely because the models lock in and guarantee predictable, recurring payments from consumers. For example, the cable and

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[63] *See Frequently Asked Questions (and Answers) about Piracy or Copyright Infringement*, CHILLING EFFECTS, http://chillingeffects.org/piracy/faq.cgi (last visited Nov. 15, 2013) ("Digital technology allows perfect copies and easy distribution of some works. That makes it easier for people to make and get copies of songs or videogames, and more difficult for copyright holders (record companies, etc.) to control the works once they are released to the public. This new technology has changed the way content distributors relate with their customers, and law and business models are just trying to catch up.").

[64] AMAZON INSTANT VIDEO, http://www.amazon.com/Instant-Video/b?ie=UTF8&node=2858778011 (last visited Nov. 9, 2013); HULU, http://www.hulu.com (last visited Nov. 9, 2013); NETFLIX, https://signup.netflix.com (last visited Nov. 9, 2013); ROKU, http://www.roku.com/?gclid=CL6P-eKQ2LoCFeHm7AodQhkAfg (last visited Nov. 9, 2013); YOUTUBE, http://www.youtube.com (last visited Nov. 9, 2013).

satellite television model requires monthly subscription payments from subscribers who receive many channels, not all of which any single subscriber would want. By aggregating channels and prohibiting subscribers from choosing which individual channels they want on an individual, "à la carte" basis,[65] cable television operators can accrue higher revenues for more costly service tiers that package both desirable and unwanted channels. Sources of content appreciate that the aggregate revenues from an entire population of video subscribers will exceed the higher payments from a smaller subset of that population who select a specific channel of content. For example, ESPN likely accrues more revenue from a smaller per-subscriber payment applicable to every cable and satellite subscriber than from a higher per-subscriber payment applicable only to à la carte subscribers who specify the desire to receive ESPN. Similarly, even lightly viewed networks can impose small monthly fees for all subscribers purchasing a tier of programming comprising dozens of channels.[66]

Incumbent content creators and distributors appreciate that new distribution platforms can offer additional revenue generating opportunities. However, the potential exists for these options not to accrue added revenues in light of the need to enhance the value proposition of monthly content subscriptions by offering greater flexibility for accessing and replaying content. In the worst case scenario, a significant number of viewers can find ways to access content—even premium, pay per view offerings—at little or no cost, because an unauthorized party has pirated the content. With

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[65] *In re* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Fourteenth Report, 27 FCC Rcd. 8610, 8759 (2012) (footnotes omitted) ("According to Nielsen, Americans watched on average 32 hours and 47 minutes a week of traditional television and two hours and 21 minutes a week of time-shifted television, compared to 27 minutes a week of video on the Internet, and only 7 minutes a week of video on a mobile phone. Screen Digest estimated that all of the à la carte sales of television shows from Apple, Amazon, and other OVD competitors would amount to only $407 million in 2010, compared to what PriceWaterhouseCoopers estimates would be the $143 billion spent on television advertising and subscriptions.")

[66] For example, Viacom typically offers cable television operators a bundle of networks that combine preferred programming, such as MTV and Nickelodeon, with obscure and less desired content, such as MTV2 and VH1 Classic. *See Viacom Brands*, VIACOM, http://www.viacom.com/brands/pages/default.aspx (last visited Nov. 13, 2013).

lower cost or free access to desirable content, consumers may become more inclined to "cut the cord" and abandon subscriptions with existing intermediaries.

Incumbent distributors such as DBS and cable television operators risk "disintermediation," that is, elimination as middlemen in a chain of distribution if OTT and other access options offer a better value proposition for access to desired content. Even if new distribution options impose pay-per-view charges, or monthly subscription rates, consumers might have available new, à la carte options that provide access to desired content with a much lower total out of pocket cost. The loss of access to even many channels may not matter if consumers had little interest in much of the content included in a package of channels. Accordingly incumbent video distribution operators may have to respond to new access options with efforts to enhance the value proposition of their monthly and sizeable subscription charges based on an unmetered AYCE model.

Content creators may financially benefit from new distribution options and windows of availability, particularly if they achieve greater control over access and do not have to share as much revenue with distribution partners. However, the greater risk of piracy and strained relationships with long standing distribution partners, such as DBS and cable television, also motivate content creators to experiment cautiously.[67]

IV. ILLEGAL, COPYRIGHT INFRINGING MODELS

The earliest video content access opportunities resulted from an adaptation of existing peer-to-peer file sharing techniques such as BitTorrent that started as music sharing sites. Because file sharing software and the Internet generally make no distinction between file types, users found it easy to add video files. Similarly, Internet protocols support the "real time" delivery of video programming as

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[67] *See* Nika Aldrich, *An Exploration of Rights Management Technologies Used in the Music Industry*, 2007 B.C. INTELL. PROP. & TECH. F. 051001 (2007), *available at* http://bciptf.org/wp-content/uploads/2011/07/25-AN-EXPLORATION-OF-RIGHTS-MANAGEMENT-TECHNOLOGIES-USED-IN-THE-MUSIC-INDUSTRY.pdf.

well as the downloading of video content files.[68] A variety of websites currently offer lawful and legally suspect, "simulcast" access to live television, including premium channels.[69]

Absent a license to redistribute video content and the expected agreement to compensate the copyright holder, these sites violate the intellectual property of content creators and distributors. Ample case law supports the conclusion that web-based providers of access to content can be held secondarily liable for copyright infringement even though the software and Internet-routing used directly links the source of the content to the recipient.[70] Intermediaries that knowingly facilitate or induce copyright infringement bear the legal responsibility for damages caused by others.[71] This means that web-based sites that help promote infringement will be deemed legally responsible for the financial damages resulting from the distribution of file sharing software

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[68] *See* In re Sky Angel U.S., LLC, 25 FCC Rcd. 3879, 3879–80 (2010) (IPTV offers consumers with broadband connections options to download video files or view (streaming) video content on an immediate "real time" basis. Some of the available content duplicates what cable television subscribers receive therein triggering disputes over whether cable operators can secure exclusive distribution agreements and prevent an IPTV service provider from distributing the same content. "Sky Angel has been providing its subscribers with certain Discovery networks for approximately two and a half years, including the Discovery Channel, Animal Planet, Discovery Kids Channel, Planet Green, and the Military Channel. Sky Angel submits that these channels are a significant part of its service offering."). For background on IPTV, *see* In-Sung Yoo, *The Regulatory Classification of Internet Protocol Television: How the Federal Communications Commission Should Abstain from Cable Service Regulation and Promote Broadband Deployment*, 18 COMMLAW CONSPECTUS 199 (2009).

[69] *See, e.g.*,NO SUBSCRIPTION REQUIRED, http://www.nosubscriptionrequired.net/ (last visited Nov. 13, 2013); *see also*, WPIX, Inc. v. ivi, Inc., 691 F.3d 275 (2d. Cir. 2012) (affirming the grant of a preliminary injunction based the holding that Internet-based venture did not qualify as a cable television operator); Am. Broad. Cos., Inc. v. AEREO, Inc., 874 F.Supp.2d 373 (S.D.N.Y. 2012) (preliminary injunction denied thereby allowing a venture to deliver broadcast channels via the Internet), *aff'd sub nom*,WNET v. Aereo, Inc. Docket Nos. 712 F.3d 676 (2d Cir. 2013), *cert. granted sub nom.* Am. Broad. Cos., Inc. v. AEREO, 571 U.S. ___ (U.S. Jan. 10, 2014) (No. 13-461).

[70] *See, e.g.*, Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005) (holding a knowing distributor of copyrighted material liable for resulting third party acts of infringement).

[71] *See* 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 12.04 (2009).

and from offering a web-based platform for access to sources of copyright infringing content.

IPTV techniques and much of the currently available OTT content promote copyright infringement, largely because relatively few content providers and distributors have authorized access through nontraditional media. Rather than considering alternative distribution as a possible source of supplemental income, incumbents initially concluded that these new options largely promoted piracy without any upside financial opportunities.

V. NEW IPTV INTERMEDIARIES

Incumbents subsequently reconsidered the conclusion that they should try to thwart IPTV by refusing to offer content access alternatives. New and legal IPTV options, such as YouTube, gained traction and visibility thereby demonstrating that even amateur video could generate substantial audiences. Content sources have cautiously and incrementally explored directly distributing their content via their own branded sites or via new intermediaries such as Amazon, Apple, Hulu, Netflix, Roku and YouTube.[72] Most broadcast networks and many cable/satellite networks now consider the web as offering an opportunity to reach more viewers, thereby generating higher market penetration and advertising revenues. These content sources typically provide access after initial distribution via traditional media outlets so that consumers do not abandon or regularly substitute traditional distribution intermediaries.[73]

Content distribution intermediaries can provide an interface between video content consumers and sources. By serving as an intermediary, these sites can enforce digital rights management[74] limitations on access, recording and redistribution as well as collect payments for premium content or superior access options.

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[72] *See* relevant websites cited *supra* note 64.

[73] *E.g.*, HBO GO, http://www.hbogo.com (last visited Nov.9, 2013).

[74] Digital Rights Management refers to the use of technological tools by copyright owners and distributors to regulate the uses of their works, and in particular to restrict or prohibit copying.

However, content creators can only go so far in their exploration because of existing and highly lucrative distribution contracts with incumbent media. While it might appear enticing to eliminate "middlemen" intermediaries, the proliferation of new ones evidences resiliency and continuing viability of this model. Content sources will have to calibrate closely the blend of access options they offer directly, via incumbent outlets and via new intermediaries.

VI. DIVERGING INCENTIVES AND INCREASED RISKS

Before the onset of new and experimental content distribution models, content creators and distributors had established a mutually beneficial model. This model consisted of setting up several sequential windows of access based on the time since initial release, and the willingness of consumers to pay for access. Movies followed a predictable track with initial access solely in theaters, followed by pay-per-view and other premium channel access, followed by release of a Digital Video Disk (DVD), after which the content becomes less a lure for direct payments from consumers and more an advertiser supported attraction with content typically available first on premium cable/DBS networks and subsequently on non-premium, basic tier networks, followed even later in time by broadcast television.

Cable programming has been tiered into categories of content access with premium content, such as movies and high budget original programming, located on higher cost tiers, offered as a stand-alone premium channel, or even pay-per-view access. New distribution models provide consumers with access to some premium content earlier in time on an à la carte, pay-per-view basis. Additionally some content creators have opted to provide access to even premium content, via new access platforms operated by incumbent distributors, or upon proof that the consumer has already paid for a subscription, for example, to a cable television operator.

Video program creators see new distribution platforms as possibly offering new revenue growth opportunities and greater market penetration. However, content creators must operate with

caution so that they do not lose control over access to their product and also do not harm revenue stream flowing to traditional distribution partners. If a content creator decides to serve consumers directly via new distribution platforms, incumbent distributors might attempt to retaliate by favoring other content sources.

Content distributors want to maintain the highly profitable status quo, but the traditional locked-down, largely one-way distribution model based on their status as unavoidable intermediaries appears unsustainable in light of new options available to consumers. Incumbents have reluctantly concluded that they must provide greater access flexibility to subscribers, including the opportunity to watch the same content multiple times without additional payment. Incumbent video distributors so far do not seem to think it imperative to offer vastly more content in addition to greater flexibility in accessing existing content. With the exception of a new cable television network managed by talk show host Oprah Winfrey,[75] the industry has not introduced many new networks in the last few years. Likewise, all of the top twenty networks, in terms of number of subscribers, entered the market years ago.[76]

As new access options provide both flexibility and more content, incumbents might recognize the need to increase options, despite having previously assumed that they need only serve as the gateway to designated must-see television. Consumers are questioning in growing numbers a subscription model that regularly increases monthly rates well above measures of overall cost of living. Cable and DBS operators may have grown complacent in that an AYCE model can remain dominant, because consumers heretofore lacked options that offered the combination of must see and niche content. Now the Internet operates as a

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[75] *See* OWN NETWORK, http://www.oprah.com/own (last visited Nov. 9, 2013).

[76] *Compare* Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, 15 FCC Rcd. 978 (2000) (sixth annual report detailing increase in market of networks and providers) *with In re* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Fourteenth Report, 27 FCC Rcd. 8610 (2012) (detailing expansion of current networks into new mediums).

medium for access to much of the same must-see television along with often free access to niche content.

VII. EFFECTS ON CONSUMERS

Consumers stand to benefit from proliferating video content access opportunities, with two caveats. First, the options cannot subvert existing and new payment models by offering free access to pirated content. Second, incumbents should not be able to collude with an eye toward preventing consumers from enjoying lawful alternative access opportunities. We can expect incumbent cable and satellite carriers to pressure content creators not to pursue options that eliminate them as intermediaries, whether through direct access, or through replacement intermediaries. Likewise, the possibility exists that incumbent intermediaries and content sources may seek to use new digital rights management techniques to reduce the opportunities subscribers have to copy and share content even in lawful ways.[77] The copyright laws of many nations provide opportunities for copying and sharing content on a limited basis without liability for infringement.

The concept of fair use refers to the ability of consumers, under specific and limited circumstances, to reproduce and share copyrighted content.[78] The limits to fair use emphasize that social benefits accrue from limited copying without significant financial harm to the content creator. Some of the technological innovations that make it possible to track consumers' wants, needs and desires also provide ways to identify and block fair use opportunities. One such technology called deep packet inspection ("DPI") provides a way to identify the nature and type of content a specific subscriber

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[77] *See* Rob Frieden, *Internet Packet Sniffing and Its Impact on the Network Neutrality Debate and the Balance of Power Between Intellectual Property Creators and Consumers*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 633, 670–71 (2008).

[78] *See, e.g.*, Michael Pote, *Mashed-Up In Between: The Delicate Balance Of Artists' Interests Lost Amidst The War On Copyright*, 88 N.C. L. REV. 639, 669–83 (2010) (fair use enables users to reproduce copyrighted musical content under a balancing of multiple factors to foster creativity); Fred von Lohmann, *Fair Use as Innovation Policy*, 23 BERKELEY TECH. L.J. 829 (2008) (describing fair use and arguing that it plays an important and underappreciated role in national technology and innovation policy).

is accessing.[79] The power to track usage by subscribers can combine with the ability to block such access immediately.[80] Fair use typically involves copying first and defending the copying later in court. With DPI, content creators and distributors can block first and never have to pursue a judicial remedy.[81] This means that even instances of fair use cannot occur because a carrier or content creator has opted to use techniques that block suspicious activity, regardless of whether it turns out to be an instance of fair use instead of piracy.

End users will suffer from new content access options if incumbents can freely condition access based on their interpretation of what constitutes fair use. A limited view of this user right, backed up by technologies that can block access immediately, can further lock down content rather than provide more diverse and lawful ways to enjoy it.

VIII. EFFECT ON EXISTING MEDIA-SPECIFIC LEGAL AND REGULATORY MODELS

Technological and marketplace convergences make it possible for the Internet to become the single, preferred medium for the delivery of information, communications and entertainment ("ICE") services to consumers. Both incumbent and market entrants have the opportunity to accrue economies of scale and scope and to increase their size, revenue and profitability by using the Internet cloud as a medium for delivering content to television sets, computer monitors, tablets and smartphone screens. Technological and marketplace convergences have become a reality with the Internet increasingly becoming the single preferred medium for delivery of previously separate broadcast, cable, satellite and telecommunication services. Subscribers of a wired or wireless ISP can use their broadband link to the Internet cloud for

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[79] *See* Peter Whoriskey, *Every Click You Make*, WASH. POST (Apr. 4, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/04/03/AR2008040304052.html.

[80] *See id.*

[81] *See* Timothy K. Armstrong, *Digital Rights Management and the Process of Fair Use*, 20 HARV. J.L. & TECH. 49, 60–68 (2006).

access to a plethora of content previously available only via broadcast, cable or satellite media.

Both the FCC[82] and reviewing courts[83] have evidenced a reluctance to deviate from applying medium-specific, single regulatory classifications even for services that display convergent characteristics.[84] For example, the FCC has determined that all forms of broadband Internet access constitutes a substantially unregulated information service,[85] despite the fact that

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[82] The FCC appears to believe that it must apply only one regulatory classification to a service that may combine two or more functions. *See In re* Federal-State Joint Board on Universal Service, Report to Congress, 13 F.C.C.R 11501, 11522 (1998) (report to Congress) ("[T]he language and legislative history of [the Communications Act of 1996] indicate that the drafters . . . regarded telecommunications services and information services as mutually exclusive categories."); *see also* Vonage Holdings Corp., 290 F. Supp. 2d 993, 1000 (D. Minn. 2003) (applying the FCC's dichotomy). Perceiving the need to apply one classification the FCC appears to favor using the less restrictive one. For example, the Commission treats all types of broadband access as information services. *See, e.g., In re* Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities,17 F.C.C.R. 4798, 4802 (2002) (declaratory ruling and notice of proposed rulemaking) (asserting that cable modem service is appropriately classified as an internet service and not a cable service), *aff'd* Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 977–86 (2005) (affirming the classification that does not subject cable modem service to Title II common-carrier regulation).

[83] *Compare* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) (state law mandating right of reply to editorial deemed to violate newspaper publisher's First Amendment speaker rights) *with* Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969) (upholding FCC-mandated right of reply to broadcast personal attack in light of comparatively greater listeners' First Amendment rights over that available to broadcasters).

[84] The Court of Appeals for the District of Columbia recently evidenced an appreciation that a single carrier can offer two or more services triggering different regulatory classifications. In *Cellco Partnership*, the court affirmed the FCC's requirement that wireless carriers must provide "data roaming" Internet access to temporary visitors. Cellco P'ship v. FCC, 700 F.3d 534 (D.C. Cir. 2012). To achieve such access the FCC required all carriers to negotiate commercial interconnection agreements if technologically feasible, despite the fact that the FCC had classified Internet access as an information service not subject to Title II common carrier regulation. *Id.* at 535. The court expressed appreciation that some services combine features and characteristics: "[C]ommon carriage is not all or nothing—there is a grey area in which although a given regulation might be applied to common carriers, the obligations imposed are not common carriage *per se*." *Id.* at 547.

[85] Information service is defined as:

> [T]he offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available

telecommunications networks provide the transmission needed to link subscribers in many geographical locations with content and services located elsewhere.[86]

ISPs qualify for largely unregulated status based mainly on the view that government has no legal basis for regulating the content traversing the various networks that make up the Internet. Additionally, Congress and the FCC assume ISPs operate in a robustly competitive marketplace, or alternatively that these

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> information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

47 U.S.C. § 153(20) (2010).

[86] The FCC treats information services and telecommunications services as mutually exclusive. *See In re* Federal-State Joint Board on Universal Service, Report to Congress, 13 F.C.C.R. 11501, 11522 (1998) ("[T]he language and legislative history of [the Communications Act of 1996] indicate that the drafters . . . regarded telecommunications services and information services as mutually exclusive categories."); *see also* Vonage Holdings Corp., 290 F. Supp. 2d at 994, 1000 (following the guidelines of the Stevens Report). This self-imposed constraint has forced the FCC to apply a single regulatory classification to services that combine telecommunications and information services. In solely applying the information services classification to broadband, the FCC opted to ignore or subordinate the telecommunications function. *See* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 FCC Rcd. 14853, 14910–11 (2005) (report and order and notice of proposed rulemaking) ("We conclude, consistent with Brand X, that such a transmission component [in a DSL service] is mere 'telecommunications' and not a 'telecommunications service.' As stated above, the Act defines telecommunications service as 'the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.' Thus, whether a telecommunications service is being provided turns on what the entity is 'offering . . . to the public,' and customers' understanding of that service. End users subscribing to wireline broadband Internet access service expect to receive (and pay for) a finished, functionally integrated service that provides access to the Internet. End users do not expect to receive (or pay for) two distinct services—both Internet access service and a distinct transmission service, for example. Thus, the transmission capability is part and parcel of, and integral to, the Internet access service capabilities. Accordingly, we conclude that wireline broadband Internet access service does not include the provision of a telecommunications service to the end user irrespective of how the service provider may decide to offer the transmission component to other service providers."); *see also* Rob Frieden, *What Do Pizza Delivery and Information Services Have in Common? Lessons From Recent Judicial and Regulatory Struggles with Convergence*, 32 RUTGERS COMPUTER & TECH. L.J. 247 (2006).

ventures do not provide essential public utility service necessitating heavy-handed regulatory oversight to ensure fair and nondiscriminatory access to these services at reasonable prices. Under either scenario, the FCC must have assumed that it would not need to resolve interconnection disputes between Internet-ventures, or to remedy anticompetitive practices of an ISP. The FCC's confidence in a self-regulating Internet has proven unjustified, because the Commission has received complaints about predatory and discriminatory practices for which it lacks a direct statutory basis to remedy.[87] Having deemed the Internet as worthy of deregulation as an information service, the FCC cannot subsequently re-regulate it, absent judicial deference or new legislation.

Courts have allowed the Commission to regulate VoIP telephone service alternatives,[88] but not to sanction Comcast for what appeared to be an anticompetitive practice.[89] In the former, the FCC successfully invoked the need to maintain regulatory parity between legacy telephone service and VoIP, without even having to specify that VoIP constitutes a telecommunications

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[87] *See In re* Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, 23 F.C.C.R. 13028, 13028 (2008) (memorandum opinion and order), *vacated*, Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010) (the FCC determined that Comcast deliberately thwarted file sharing from and to subscribers with an eye toward creating disincentives for broadband subscribers to use alternatives to the company's pay per view, video on demand services).

[88] *See* Vonage Holding Corp. v. FCC, 489 F.3d 1232, 1235 (D.C. Cir. 2007) (affirming FCC regulatory oversight of VoIP and preempting state deregulation or inconsistent regulation and FCC's decision to require VoIP operators to contribute to universal service funds); Nuvio Corp. v. FCC, 473 F.3d 302, 303 (D.C. Cir. 2006) (requiring interconnected VoIP service providers to supply 911 emergency calling capabilities); The Proposed Extension of Part 4 of the Commission's Rules Regarding Outage Reporting to Interconnected Voice Over Internet Protocol Service Providers and Broadband Internet Service Providers, 27 FCC Rcd. 2650, 2655 (2012) (report and order) (requiring VoIP carriers to report service outages); Local Number Portability Porting Interval and Validation Requirements, 25 FCC Rcd. 6953, 6966–68 (2010) (report and order) (establishing fast deadlines for migrating a telephone service subscriber to and from VoIP service); Implementation of the Telecommunications Act of 1996, 22 FCC Rcd. 6927, 6929 (2007) (report and order and further notice of proposed rulemaking) (extending customer proprietary network information obligations to interconnected VoIP service providers).

[89] *See Comcast Corp.*, 600 F.3d at 661.

service.[90] In the latter, the FCC abandoned direct statutory authority to regulate Internet-based services by determining that all broadband services qualify for a "safe harbor" from regulation as information services.[91]

Convergence and the ascendency of the Internet make it certain that a single venture will offer both regulated telecommunications services and largely unregulated information services, possibly combined into a hybrid or composite. For example, wireless carriers provide subscribers with the option of using their handsets for basic voice telephone service, a telecommunications service, but also to access the Internet, an information service. Many subscribers quickly and frequently toggle between both services, yet the FCC has made no effort to respond to this reality. The Commission continues to treat voice and data services as separate, despite the fact that the same carrier provides both.

The FCC and courts should explicitly recognize that single ventures could provide an array of different services that trigger different regulatory classifications and First Amendment protection. Failing to do so means that a venture can try to invoke a single classification that accrues the best regulatory and marketplace posture, with the option of changing that election at any time. For example, an ISP can claim to operate as a First Amendment speaker, entitled to robust insulation from government intrusion, but then change its posture to neutral conduit if doing so qualifies it for even better entitlements, for example, safe harbor exemption from liability for subscribers' copyright infringement, or other harmful activities including defamation.[92]

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90 *See Vonage Holding Corp.*, 489 F.3d at 1240–41.

91 *See* Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, 23 FCC Rcd. 13028, 13034–36 (2008).

92 *See* Rob Frieden, *Invoking and Avoiding the First Amendment: How Internet Service Providers Leverage Their Status as Both Content Creators and Neutral Conduits*, 12 U. PA. J. CONST. L. 1279, 1279 (2010).

IX. RECOMMENDATIONS

Ideally Congress should amend the Communications Act of 1934 to establish the conditions under which the FCC would have jurisdiction to resolve complaints and to remedy anticompetitive practices. Convergent services using the Internet do not sufficiently track any of the existing broadcasting, telecommunications and video services. Accordingly a new Title for Internet Services should specify that the FCC has statutory authority to intervene when commercial negotiations cannot resolve interconnection and other disputes among ventures and when competition proves unsustainable to prevent anticompetitive practices.

This Title should reverse the FCC's conclusion that any and all Internet services constitute information services by explicitly acknowledging that limited regulatory safeguards are necessary. Specifically, the Title should ensure that carriers providing the telecommunications link between end users and the sources of content and software are subject to FCC oversight to ensure that their commercially negotiated interconnection terms and conditions for service are transparent and nondiscriminatory. This Title should not mandate common carriage, but put private carriers on notice that they cannot impose non-neutral rules and access conditions that have the effect of retarding competition and robust access.

The new Internet Services Title should explicitly state that the limited regulatory safeguards created do not extend to ventures that acquire or lease transmission capacity on top of which they add services, applications and software. This Title should provide no basis for regulating content, or the protocols and operating standards Internet ventures use to manage their networks. Likewise the Title should mandate network neutrality only to the extent needed to prevent ISPs from deliberately throttling, delaying or blocking traffic that causes no harm even as it might compete with services provided by the ISP or an affiliate. The vast majority of instances where the FCC should intervene should result from a complaint about the terms and conditions under which two or more ISPs interconnect lines and facilities.

The FCC should have lawful statutory authority to remedy disputes among carriers and between carriers and subscribers when the parties cannot reach a timely settlement.[93] This authority covers both telecommunications services and information services. However, the Commission must act with restraint in light of limited statutory authority to act prospectively instead of responding to a complaint. The possibility exists that many, if not most disputes can get resolved through commercial negotiations. On the other hand, intractable disputes may increase, particularly ones where stalling favors one side. For these types of problems, the FCC should have lawful authority to investigate and remedy anticompetitive and discriminatory practices.

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[93] Sometimes FCC inaction will result in temporary inconvenience to consumers, for example, when desirable television channels are eliminated in retransmission consent negotiations between broadcasters and cable television operators. *See* Meg Burton, *Reforming Retransmission Consent*, 64 FED. COMM. L.J. 617, 618–19 (2012). However premature regulatory intervention might cause greater harm.