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Seeking a Clearer Picture: Assessing the Appropriate Regulatory Framework for Broadband Video Distribution

Adam B. VanWagner

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SEEKING A CLEARER PICTURE: ASSESSING THE APPROPRIATE REGULATORY FRAMEWORK FOR BROADBAND VIDEO DISTRIBUTION

*Adam B. VanWagner**

This Note examines the appropriate regulatory framework for the distribution of commercial video content over broadband networks. As online video providers such as Netflix and Hulu expand, they are beginning to compete directly with the video services of major cable and telecommunications companies. Frequently, these companies also serve as a customer's Internet service provider, leaving them in the position of carrying these competitive services over their broadband networks. This conflict has led to calls for regulation that would protect nascent online video services from feared anticompetitive actions by the major providers.

In April 2010, against the backdrop of this expanding conflict, the U.S. Court of Appeals for the D.C. Circuit in Comcast Corporation v. FCC dealt a blow to the Federal Communications Commission's (FCC) ability to regulate in this arena. There, the circuit court invalidated the FCC's jurisdictional approach to regulating broadband Internet. Although the FCC has subsequently reasserted its jurisdiction over broadband, the fallout from Comcast has rekindled debates as to whether broadband is best governed by proscriptive FCC regulation, or whether oversight of this marketplace should be left to the general antitrust authorities—the Department of Justice and the Federal Trade Commission. This Note discusses the jurisdictional challenges to broadband oversight faced by each agency, and assesses the substantive and procedural merits of FCC and antitrust governance regimes. It then argues that, given the uncertainty regarding its authority, the FCC should abandon its efforts to regulate broadband video distribution in the absence of clear market harms. Finally, this Note proposes that this dynamic and rapidly evolving marketplace should develop outside the bounds of proscriptive regulations, with antitrust serving as a backstop if market intervention proves necessary.

* J.D. Candidate, 2012, Fordham University School of Law; B.A., 2004, University of Minnesota. Many thanks to my family, friends, and Amy for their support and patience, and to Professor Olivier Sylvain for his guidance. I would also like to acknowledge my use and enjoyment of many of the services discussed herein during the process of writing this Note.

TABLE OF CONTENTS

INTRODUCTION.....	2911
I. THE RISE OF BROADBAND VIDEO DISTRIBUTION.....	2914
A. <i>Broadband: An Introduction</i>	2914
B. <i>How Broadband Distribution Impacts the Business Models of the Film and Television Industries</i>	2916
1. The Collapse of Film Industry Windows.....	2916
2. The Threat to Pay Television.....	2918
C. <i>The Marketplace for Broadband Video Content</i>	2919
1. The Streamers	2920
a. <i>Netflix</i>	2920
b. <i>Hulu</i>	2921
2. From Brick and Mortar to Ones and Zeros	2922
3. The Digital Giants.....	2923
4. Set-Top Boxes and the Battle for the Living Room.....	2923
5. The MVPDs Respond: TV Everywhere.....	2925
D. <i>Two Representative Agreements</i>	2926
1. Comcast/NBC Universal.....	2926
2. Netflix/EPIX	2928
II. FEDERAL OVERSIGHT OF BROADBAND AND MEDIA INDUSTRIES	2929
A. <i>The FCC's Attempt To Regulate Broadband</i>	2930
1. Broadband Classification and Ancillary Jurisdiction.....	2931
2. <i>Comcast Corp. v. FCC</i> and Its Aftermath.....	2936
B. <i>Antitrust Oversight of Telecommunications and Media Industries</i>	2940
1. Department of Justice	2940
a. <i>AT&T Consent Decree</i>	2940
b. <i>Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP and the Future of Antitrust Oversight of Telecommunications and Media Industries</i>	2941
2. Federal Trade Commission	2943
C. <i>Dual Agency Review of Telecommunications Mergers</i>	2944
1. Antitrust Review Under the Hart-Scott-Rodino Antitrust Improvements Act.....	2944
2. FCC Review Under the Communications Act.....	2945
3. Recent Telecommunications and Media Mergers.....	2946
III. THE FCC AND ANTITRUST OPTIONS: SUBSTANTIVE AND PROCEDURAL DEBATES	2948
A. <i>Vertical Leveraging, Market Power, and the Incentive To Discriminate</i>	2948
B. <i>Beyond Economics: Public Interest Concerns and Broadband</i>	2952
1. The FCC's Public Interest Standard.....	2952

2. Media Ownership Rules and <i>Prometheus Radio Project v. FCC</i>	2954
3. Program Access Rules	2958
C. <i>Questions of Procedure: Finding an Optimal Approach to Broadband Oversight</i>	2959
IV. A DEREGULATORY POSTURE FOR A DEVELOPING MARKET.....	2961
A. <i>The FCC's Cloudy Jurisdictional Picture</i>	2962
B. <i>Beyond Jurisdiction: The Need for Regulation</i>	2964

INTRODUCTION

For three weeks in the spring of 2010, the Federal Communications Commission (FCC or Commission) seemed to have a firm regulatory grip on the future of broadband, a technology that the FCC described as “a foundation for economic growth, job creation, global competitiveness and a better way of life.”¹ On March 16, 2010, the FCC submitted to Congress the National Broadband Plan, a 376-page outline for improving the American “broadband ecosystem.”² Developed pursuant to a 2009 congressional mandate,³ the National Broadband Plan contains proposals for, among other things, providing universal broadband access to Americans, decreasing high-speed network costs, and establishing a broadband public safety infrastructure.⁴

The exuberance was short-lived. On April 6, 2010, in *Comcast Corp. v. FCC*,⁵ the U.S. Court of Appeals for the D.C. Circuit impugned the FCC’s regulatory authority over broadband Internet. The court invalidated the FCC’s use of its ancillary jurisdiction⁶ under the Communications Act of 1934⁷ (Communications Act) in its effort to prohibit Comcast Corporation (Comcast) from degrading its broadband customers’ use of peer-to-peer network applications.⁸ Because the FCC had relied solely on this ancillary jurisdiction to regulate broadband, the *Comcast* ruling cast doubt upon the Commission’s authority to oversee provisions of the National Broadband Plan, as well as the Commission’s ability to enforce its Internet Policy Statement, a set of network neutrality principles adopted by the Commission in 2005 that had guided its approach to supervising broadband

1. FED. COMM’NS COMM’N, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN, at xi (2010) [hereinafter NATIONAL BROADBAND PLAN], available at <http://download.broadband.gov/plan/national-broadband-plan.pdf>.

2. *Id.*; see also Matt Richtel & Brian Stelter, *F.C.C. Questioned on Its Far-Reaching Plan to Expand Broadband Access*, N.Y. TIMES, Mar. 17, 2010, at B4.

3. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 6001(k)(1)–(2), 2009 U.S.C.A.N. (123 Stat.) 115, 515–16 (to be codified at 47 U.S.C. § 1305).

4. NATIONAL BROADBAND PLAN, *supra* note 1, at xi–xv.

5. 600 F.3d 642 (D.C. Cir. 2010).

6. See *infra* Part II.A.1.

7. Pub. L. No. 416, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151–614 (2006)) (Communications Act).

8. *Comcast*, 600 F.3d at 661.

practices.⁹ In response to the D.C. Circuit's ruling, the FCC began a process to reassert its authority over broadband, which culminated in a December 2010 order wherein the Commission, for the first time, promulgated enforceable rules governing broadband network practice.¹⁰ This renewed action quickly came under legal and political attack, and the Commission's authority over broadband remains in active dispute.¹¹

While the immediate issue in *Comcast* concerned the FCC's ability to enforce specific network neutrality principles,¹² the broader import of the muddled jurisdictional picture left in the wake of the ruling is highlighted by the impact that broadband technology has had on a host of industries.¹³ The film and television industry is among the sectors most affected by broadband, as widespread adoption of high-speed Internet access has spawned a marketplace for the distribution of video content via broadband networks.¹⁴ Increasingly, the formerly discrete media used for delivering video content—broadcast television, cable, home video, etc.—are converging toward a system where all distribution occurs over the digital channels of the Internet.¹⁵ The established business models of the film and television industry are being fundamentally disrupted by a system that allows consumers to see their favorite films and television shows online.¹⁶ Accordingly, the Internet has become a forum for complex deal making and strategic positioning among content producers, traditional distributors, technology giants, and Internet upstarts, as each tries to stake a claim in this evolving distribution network.¹⁷ Conflicts in this marketplace inhere in the nature of broadband distribution: the cable and telecommunications companies that provide broadband access to consumers effectively deliver to their customers programming for online video distributors that compete with their traditional video businesses.¹⁸

9. See, e.g., Statement, Julius Genachowski, Chairman, Fed. Comm'n's Comm'n, *The Third Way: A Narrowly Tailored Broadband Framework*, 2–4 (May 6, 2010), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297944A1.pdf; see also *infra* notes 222–31 and accompanying text. For an explanation of the concept of network neutrality—a concept revolving around the notion that network operators should not be able to discriminate against network content, applications, or devices—by one of its leading proponents, see Tim Wu, *Network Neutrality FAQ*, http://www.timwu.org/network_neutrality.html (last visited Apr. 20, 2011).

10. See *infra* Part II.A.2.

11. See *infra* notes 273–81 and accompanying text.

12. See, e.g., Amy Schatz, *Court Backs Comcast Over FCC*, WALL ST. J., Apr. 7, 2010, at B1; Edward Wyatt, *U.S. Court Curbs F.C.C. Authority on Web Traffic*, N.Y. TIMES, Apr. 7, 2010, at A1.

13. See NATIONAL BROADBAND PLAN, *supra* note 1, at xi (discussing broadband's impact on, among others, the education, health care, and energy sectors).

14. See *infra* Part I.

15. See JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, *DIGITAL CROSSROADS: AMERICAN TELECOMMUNICATIONS POLICY IN THE INTERNET AGE* 155 (paperback ed. 2007).

16. See *infra* Part I.B.

17. See *infra* Part I.C–D. See generally *Online Television: Hogging the Remote*, ECONOMIST, Sept. 4, 2010, at 67, 70 (discussing tensions between online firms and media producers in connection with Internet video distribution).

18. See *infra* Part I.B.2.

As broadband video options increase, the competitive conflicts endemic to this marketplace have entered debates over the need for regulatory oversight of these new distribution channels.¹⁹ Typically, the federal regulator in this arena would be the FCC, which has long had express jurisdiction over broadcast television²⁰ and cable networks.²¹ However, *Comcast* casts doubt upon this default assumption, including whether the FCC has the authority to govern the distribution of video content over broadband networks.²² *Comcast* also provides fuel for an ongoing debate concerning whether broadband competition issues should be overseen by the FCC, or by the federal antitrust authorities—the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC).²³

This Note assesses the appropriate jurisdictional and substantive framework for the regulation of video distribution over broadband networks. Part I outlines the evolving marketplace for the broadband distribution of video content, and analyzes how online convergence impacts traditional distribution models in a manner that raises consumer access and competition policy concerns. In particular, Part I addresses two recent media transactions: Comcast’s acquisition of a controlling interest in NBC Universal (NBCU);²⁴ and a distribution agreement between Netflix, an online content distributor, and EPIX, a premium television network.²⁵ These agreements, which are representative of the competing interests and transactional complexities of the broadband media landscape, shed light on the potential contours of a regulatory regime for this evolving marketplace.²⁶

Part II discusses federal oversight of telecommunications and media industries, and focuses on the jurisdictional challenges that the FCC, the DOJ, and the FTC face in order to establish their authority over broadband. Part II begins with a discussion of the FCC’s attempt to regulate broadband practices, and then turns to the *Comcast* decision, its aftermath, and the FCC’s December 2010 broadband rulemaking. Part II also provides an overview of relevant media oversight by the DOJ and the FTC, specifically focusing on actions these agencies have taken in connection with the types of issues that have arisen in the marketplace for broadband video distribution. Finally, Part II addresses recent actions by the FCC, the DOJ, and the FTC in the context of media and telecommunications merger reviews.

19. See *infra* Part II.A.1.

20. See 47 U.S.C. §§ 301–399 (2006) (Title III of the Communications Act).

21. See *id.* §§ 521–573 (Title VI of the Communications Act).

22. See *infra* Part II.A.

23. See, e.g., NUECHTERLEIN & WEISER, *supra* note 15, at xxiii.

24. See Tim Arango, *G.E. Makes It Official: NBC Will Go to Comcast*, N.Y. TIMES, Dec. 4, 2009, at B3.

25. See Brian Stelter, *Netflix to Pay Nearly \$1 Billion to Add Films to On-Demand Service*, N.Y. TIMES, Aug. 11, 2010, at B3.

26. See *infra* Part I.D.

Part III outlines various debates relating to the appropriate model for federal oversight of broadband markets. This part assesses whether preemptive steps are needed to address the set of conflicts that have arisen in the broadband video marketplace, and discusses the substantive and procedural efficacy of relying on either FCC or antitrust oversight of broadband video distribution.

Part IV argues that the FCC's continued jurisdictional approach to broadband regulation is untenable. While acknowledging potential jurisdictional and administrative concerns with an antitrust oversight regime, Part IV concludes that the marketplace for broadband video distribution is best served by a hands-off, antitrust approach.

I. THE RISE OF BROADBAND VIDEO DISTRIBUTION

The development of an online video distribution market is inextricably linked to the rapid deployment of broadband Internet service to millions of American consumers. This part discusses broadband deployment, and provides an overview of the current marketplace for the distribution of video content over broadband.²⁷ In addition, by focusing on two recent media transactions that involve online distribution—Comcast's acquisition of a majority stake in NBCU,²⁸ and a film distribution agreement between online distributor Netflix and pay TV channel EPIX²⁹—this part assesses the competitive conflicts that have animated calls for federal oversight of this marketplace.

A. *Broadband: An Introduction*

Speed matters. The commercial distribution of video content over the Internet requires a technology that transfers data at a speed sufficient to mimic the viewing experience of traditional media.³⁰ This technology is broadband, which, although somewhat nebulously defined, is often linked to a congressional dictate in the Telecommunications Act of 1996³¹ (1996 Act). There, Congress directed the FCC to encourage the adoption of "advanced telecommunications capability," which the 1996 Act defined as "high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology."³² As the technological

27. Because this marketplace is quickly evolving, this part does not purport to be authoritative, but attempts only to offer a snapshot of the developing broadband video landscape.

28. See Arango, *supra* note 24, at B3; see also *infra* Part I.D.1.

29. See Sam Schechner, *Netflix Adds to Web Films*, WALL ST. J., Aug. 11, 2010, at B4; see also *infra* Part I.D.2.

30. See 1 DANIEL L. BRENNER ET AL., CABLE TELEVISION AND OTHER NONBROADCAST VIDEO: LAW AND POLICY § 1:24, at 1-43 (Supp. 2010) (noting that the rate of data transfer is crucial to the online viewing experience).

31. Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.) (1996 Act).

32. *Id.* § 706 (codified at 47 U.S.C. § 157 note (1996) (Advanced Telecommunications Incentives)); see also Inquiry Concerning the Deployment of Advanced Telecomm.

infrastructure of the Internet has evolved, so too has the FCC's definition of what speed constitutes "broadband."³³ Increasingly, the average consumer broadband service runs at 4.0 megabits per second, the speed necessary for video to be transmitted successfully over Internet connections in order to create an enjoyable viewing experience.³⁴

Broadband in the United States is most often serviced via cable modems or digital subscriber lines (DSL), which run over the existing infrastructure of the cable and telecommunications industries.³⁵ The largest broadband providers in the United States are Comcast and AT&T, each with more than sixteen million subscribers.³⁶ Among the other major broadband providers are Verizon Communications (Verizon), with over eight million subscribers, and Time Warner Cable, with nearly ten million.³⁷ Over the past decade, broadband has grown considerably, from a service used by 8 million Americans in 2000 to nearly 200 million in 2009.³⁸

Broadband video content distribution can be categorized in several different ways. First, the Internet has spawned a variety of sites that aggregate user-generated content, of which YouTube is the most ubiquitous.³⁹ Second, peer-to-peer networks that rely on the BitTorrent

Capability to All Ams. in a Reasonable & Timely Fashion, & Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecomms. Act of 1996, 14 FCC Rcd. 2398, 2406 (1999) [hereinafter First Broadband Deployment Report] (contextualizing the Federal Communications Commission's (FCC or Commission) approach to broadband within the parameters of the 1996 Act).

33. Compare First Broadband Deployment Report, *supra* note 32, at 2406 ("[W]e define 'broadband' as having the capability of supporting . . . a speed . . . in excess of 200 kilobits per second (kbps) in the last mile."), with Inquiry Concerning the Deployment of Advanced Telecomms. Capability to All Ams. in a Reasonable & Timely Fashion, & Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecomms. Act of 1996, as Amended by the Broadband Data Improvement Act, 25 FCC Rcd. 9556, 9559-60 (2010) [hereinafter Sixth Broadband Deployment Report] (defining broadband as a connection with download speeds of at least 4.0 megabits per second (Mbps) and upload speeds of at least 1.0 Mbps).

34. See NATIONAL BROADBAND PLAN, *supra* note 1, at 21; Sixth Broadband Deployment Report, *supra* note 33, at 9559 (indicating that 4.0 Mbps "is the minimum speed required to stream a high-quality . . . video while leaving sufficient bandwidth for basic web browsing and e-mail").

35. See NUCHECHTERLEIN & WEISER, *supra* note 15, at 26.

36. See Press Release, Leichtman Research Grp., Over 800,000 Add Broadband in the Third Quarter of 2010 (Nov. 15, 2010), <http://www.leichtmanresearch.com/press/111510release.html> (noting subscriber figures as of September 30, 2010).

37. See *id.* Time Warner Cable has been a separate corporate entity from Time Warner since 2009. See *Time Warner Cable Spinoff To Finish Next Month*, N.Y. TIMES DEALBOOK (Feb. 27, 2009, 7:48 AM), <http://dealbook.nytimes.com/2009/02/27/time-warner-cable-spin-off-to-finish-next-month/>.

38. NATIONAL BROADBAND PLAN, *supra* note 1, at xi; see also Aaron Smith, *Home Broadband 2010*, PEW INTERNET & AM. LIFE PROJECT, 2 (Aug. 11, 2010), http://www.pewinternet.org/~media/Files/Reports/2010/Home_Broadband_2010.pdf (stating that two-thirds of American adults have access to broadband).

39. YOUTUBE, <http://www.youtube.com> (last visited Apr. 20, 2011); see also Press Release, comScore, comScore Releases September 2010 U.S. Online Video Rankings (Oct. 12, 2010), http://www.comscore.com/Press_Events/Press_Releases/2010/10/comScore_Releases_September_2010_U.S._Online_Video_Rankings/ (indicating that YouTube is the most visited video website on the Internet).

protocol allow broadband users to exchange a variety of data, including video files.⁴⁰ Although these distribution systems are a significant component of the Internet video landscape, this Note focuses solely on the regulatory implications for the commercial distribution of professional content via what the FCC has termed an Online Video Programming Distributor (OVPD).⁴¹

B. How Broadband Distribution Impacts the Business Models of the Film and Television Industries

While distinct, the businesses of content production and pay television are largely linked, and the rise of broadband video distribution has made their interrelations increasingly complex. For both content creators and traditional media distributors, digital convergence poses critical challenges to their traditional operational models in ways that implicate a potential regulatory scheme for this marketplace.

1. The Collapse of Film Industry Windows

The film industry's business model is based on marketing and releasing motion pictures through a series of media-specific steps known as "windows."⁴² Although patterns may vary depending upon the picture, a typical film is initially released in theaters, a window that lasts between two weeks and four months.⁴³ Home video sales and rentals represent the second window, which historically has started several months after the end of the theatrical release⁴⁴ and, in recent years, has been the biggest revenue generator for the industry.⁴⁵ The home video window now often coincides with video-on-demand (VOD), a service that allows consumers to access a program at any time through digital video systems.⁴⁶ Approximately one

40. *About BitTorrent*, BITTORRENT, <http://www.bittorrent.com/company/about> (last visited Apr. 20, 2011).

41. The FCC defines an Online Video Programming Distributor (OVPD) as "an entity which is engaged in the business of making available, either for free or for a charge, [p]rofessional [v]ideo programming delivered over the Internet to end users, through any means of online delivery including, but not limited to, a website, an online or mobile wireless portal, or an aggregator or syndicator of professional online video programming, such as Apple Company's iTunes, Comcast's FanCast XFINITY, NetFlix, and Hulu." *Information and Discovery Request for NBC Universal, Inc.*, FED. COMM'NS COMM'N, 15 (May 21, 2010) [hereinafter NBCU Questionnaire], http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-298335A2.pdf.

42. See 1 THOMAS D. SELZ ET AL., ENTERTAINMENT LAW 3D: LEGAL CONCEPTS AND BUSINESS PRACTICES § 1:17 (Supp. 2007) (describing the windowing release system); Alexis Garcia, Comment, *Finding the Unobstructed Window for Internet Film Viewing*, 9 UCLA ENT. L. REV. 243, 267 (2002) (same).

43. 1 SELZ ET AL., *supra* note 42, § 1:17.

44. *See id.*

45. *Id.*; see also Shira Ovide, *Is Hollywood Going Down With the Blockbuster Ship?*, WALL ST. J. DEAL J. (Sept. 21, 2010, 8:13 PM), <http://blogs.wsj.com/deals/2010/09/21/is-hollywood-going-down-with-the-blockbuster-ship> (citing statistics that DVD rentals and sales accounted for 56% of feature film revenues in 2004, and 44% in 2009).

46. 1 SELZ ET AL., *supra* note 42, § 1:17; see also SCHUYLER M. MOORE, THE BIZ: THE BASIC BUSINESS, LEGAL & FINANCIAL ASPECTS OF THE FILM INDUSTRY 205–11 (3d ed. 2007)

year following the end of the theatrical release, the pay TV window begins on premium cable channels such as HBO and Showtime.⁴⁷ This eighteen-month period is followed by non-pay TV distribution through broadcast networks or channels that are included in standard cable TV packages.⁴⁸ After this sequence ends, the film may be re-licensed to cable or broadcast networks.⁴⁹ This release system works to maximize profits by ensuring that the windows do not overlap, which encourages consumers to purchase the film twice. For example, a consumer may see a movie in theaters and then buy a DVD several months later.⁵⁰

Broadband distribution confounds the windows system, and has resulted in conflicts between content creators and their traditional distributors.⁵¹ Because the convergence of previously compartmentalized media to an all-digital model results in the collapse of discrete distribution windows,⁵² the principal challenge for content creators is finding a way to engage in price discrimination where the technology of distribution no longer naturally differentiates between the various media associated with the windows system.⁵³

As studios recognize that customers purchasing films through broadband networks no longer embrace a model that forces them to wait for a particular window, they have begun to tinker with release patterns. For example, DVD sales, which have been huge revenue generators for the industry, have typically enjoyed an exclusive window from thirty to forty-five days prior to the VOD release.⁵⁴ As physical DVD sales decline as a result of the rise of broadband distribution, this exclusive home video window has been reduced to an average of five days.⁵⁵ In addition, studios are considering releasing pictures via high-priced VOD services during the theatrical window, a development that would strain their relationship with theater owners and create further tension between the studios and traditional home video retailers.⁵⁶ Thus, as emergent broadband delivery models

(discussing video-on-demand technology and its implications for other distribution windows).

47. 1 SELZ ET AL., *supra* note 42, § 1:17.

48. *Id.*

49. *Id.*

50. See Garcia, *supra* note 42, at 267; Lauren A.E. Schuker & Ethan Smith, *Hollywood Eyes Shortcut to TV*, WALL ST. J., May 22, 2010, at A1.

51. See generally Seth Gilbert, *Cracking Release Windows: Apple, WB Shift the Movie Industry*, METUE (May 1, 2008), <http://metue.com/05-01-2008/itunes-warner-brothers-studios-dvd-day-and-date-releases> (discussing rising tensions in the industry as film studios embrace new technologies that disrupt traditional distribution windows).

52. See, e.g., Garcia, *supra* note 42, at 244; Julia Boorstin, *Warner Brothers Starts To Collapse Media Distribution Windows*, CNBC (Sept. 30, 2009, 12:40 PM), http://www.cnb.com/id/33091887/Warner_Brothers_Starts_to_Collapse_Movie_Distribution_Windows (describing a film studio's decision to release films via video-on-demand prior to the home video window).

53. See NUCHTERLEIN & WEISER, *supra* note 15, at 24–25.

54. Nat Worden, *Studios Seek Out Backup to DVDs*, WALL ST. J., Aug. 23, 2010, at B6.

55. See *id.* (noting that home video sales have been declining since 2007).

56. See Brooks Barnes, *In This War, Movie Studios Are Siding With Your Couch*, N.Y. TIMES, Sept. 26, 2010, at B1; Schuker & Smith, *supra* note 50.

further disrupt the windows system, film studios are increasingly confronted with a dilemma of embracing new avenues to reach consumers that will damage their relationships with their customary distributors.

2. The Threat to Pay Television

The FCC defines the distributors of cable television services—cable operators, satellite broadcasters, and telecommunications companies—as multichannel video programming distributors (MVPDs).⁵⁷ MVPDs operate under a dual revenue model supported by both monthly subscriber fees and advertising.⁵⁸ The MVPDs dominate the television marketplace, with approximately ninety-seven percent of American households owning televisions subscribing to an MVPD.⁵⁹ The fees for these bundled packages have risen steadily, reaching an average of \$64.00 per month in 2009 compared to the 2004 average of \$47.50.⁶⁰ Subscription fees for MVPD service add up to approximately sixty billion dollars per year,⁶¹ while yearly advertising revenue now totals almost twenty-five billion dollars.⁶² Because MVPD service is often provided over the same physical infrastructure as broadband, the top MVPDs coincide with the market leaders in the broadband industry: Comcast again leads with almost twenty-three million customers, followed by DirectTV, Dish Network, and Time Warner Cable.⁶³

As with the film industry, broadband distribution upsets the traditional MVPD model. The advent of broadband systems that allow consumers to purchase a single television episode has led to concerns that consumers will “cut the cord” and cancel their monthly cable subscriptions in favor of a la carte online viewing.⁶⁴ This problem has become more visible because for two straight quarters in 2010, the MVPD industry suffered its first ever declines in overall subscribership.⁶⁵ Although other factors, such as a weak

57. See Annual Assessment of the Status of Competition in the Mkt. for the Delivery of Video Programming, 24 FCC Rcd. 542, 544 (2009) (13th ann. rep.).

58. See Tim Arango, *Cable TV's Big Goal: Web Profits*, N.Y. TIMES, Jun. 24, 2009, at B1; Jeff Bewkes, Opinion, *The Coming Golden Age of Television*, WALL ST. J., Oct. 6, 2010, at A21.

59. See Martin Peers, *I'm OK, You're Not OK, Say Television Executives*, WALL ST. J., Sept. 27, 2010, at C10.

60. See Douglas Quenqua, *Can a Mouse Cut the Cable?*, N.Y. TIMES, Mar. 11, 2010, at D1.

61. See Brad Stone & Brian Stelter, *Web TV, for Subscribers Only*, N.Y. TIMES, Mar. 30, 2009, at B1.

62. See *Cable Advertising Revenue 1999–2009*, NAT'L CABLE & TELECOMMS. ASS'N, <http://www.ncta.com/Stats/AdvertisingRevenue.aspx> (last visited Apr. 20, 2011).

63. See *Top 25 Multichannel Video Programming Distributors as of Sept. 2010*, NAT'L CABLE & TELECOMMS. ASS'N, <http://www.ncta.com/Stats/TopMSOs.aspx> (last visited Apr. 20, 2011).

64. See Aaron Rutkoff, *Tuning Out Cable*, WALL ST. J., Sept. 24, 2010, at A28 (defining cord-cutting as dropping a “cable subscription for entertainment delivered over the Internet”).

65. See Amer Barghouth, *US Subscription TV Posts Another Quarterly Subscriber Loss*, SCREEN DIGEST (Nov. 19, 2010), <http://www.screendigest.com/news/us-subscription-tv-posts-another-quarterly-subscriber-loss/view.html>.

economy, may have been significant contributors to these declines, there are indications that cord-cutting is contributing to the loss of subscribers.⁶⁶ As the threat of cord-cutting rises, and as content providers put more of their programs online, “the alternative of Web-based distribution, and additional ad revenues for programmers, raises a conflict with the desires of cable operators, who want programmers to provide TV episodes to their [VOD] service.”⁶⁷

To be sure, even as they respond to the growth of broadband distribution by placing more content online, content providers have a significant stake in the MVPD model; according to one estimate, the content companies earned thirty billion dollars in 2010 from their share of the revenue from monthly cable bills.⁶⁸ To further complicate the dynamic, MVPDs are often a customer’s broadband provider as well, which means that customers who cut the cord are likely using the broadband Internet service provided by their MVPD to go “over the top” of the MVPD’s own video services.⁶⁹ This conflict between MVPDs, content providers, and consumers is at the center of concerns that MVPDs might engage in anticompetitive practices against broadband video services in order to protect their core video business.⁷⁰

C. *The Marketplace for Broadband Video Content*

As the number of consumers connected to broadband increases,⁷¹ a variety of services has developed to deliver commercial video over broadband networks. This section outlines the major participants in this marketplace, and discusses how their emergence has generated conflicts with content producers and MVPDs. This section also discusses the market for set-top boxes, hardware devices that allow broadband video to be viewed directly on television sets, as well as the pay television industry’s response to online distribution.

66. See Brian Stelter, *Cord Cutting? Cable Subscriptions Drop Again*, N.Y. TIMES MEDIA DECODER (Nov. 17, 2010, 2:29 PM), <http://mediadecoder.blogs.nytimes.com/2010/11/17/cord-cutting-cable-subscriptions-drop-again> (quoting a cable industry analyst as saying that it is “becoming increasingly difficult to dismiss the impact of over-the-top substitution on video subscriber performance”). But see Ryan Nakashima, *Cable Companies Strike Back at Cord-Cutting Idea*, USA TODAY (Feb. 17, 2011, 10:18 AM), http://www.usatoday.com/tech/news/2011-02-17-cable-losses_N.htm (noting that the MVPD industry gained between 200,000 and 250,000 subscribers in the fourth quarter of 2010, and quoting an industry analyst as stating that “[t]he notion that people are disconnecting their pay TV connections in favor of Netflix has always been a good story but there’s been very little evidence that it’s actually happening in any material numbers”).

67. 1 BRENNER ET AL., *supra* note 30, § 1:24.

68. See Sam Schechner & Geoffrey A. Fowler, *Amazon Grabs the TV Remote*, WALL ST. J., Sept. 1, 2010, at B1.

69. See *supra* notes 36–37, 63 and accompanying text.

70. See Schatz, *supra* note 12.

71. See *supra* note 38 and accompanying text.

1. The Streamers

a. Netflix

Netflix, a company launched in 1999 as an Internet-based DVD rental service,⁷² is seen by some as the primary threat to the traditional film and television distribution models.⁷³ In its early years, Netflix fended off challenges from home video leaders Blockbuster and Walmart, both of which attempted to establish web-based rental services.⁷⁴ The company entered the broadband distribution market in 2007 with Watch Instantly, a service that initially allowed subscribers to Netflix's DVD rental service to stream video content over computers, mobile phones, or televisions connected to a Netflix-enabled device.⁷⁵ In November 2010, Netflix announced a streaming-only subscription service for \$7.99 per month.⁷⁶ Netflix has experienced significant growth since it launched Watch Instantly, boasting over twenty million subscribers at the end of 2010.⁷⁷ As CEO Reed Hastings stated, "This growth is clearly driven by the strength of our streaming offering. In fact, by every measure, we are now primarily a streaming company that also offers DVD-by-mail."⁷⁸ The impact of Watch Instantly suggests that Netflix could become a replacement for traditional pay TV services, although Netflix maintains that it is merely a complementary service that will not lead to cord-cutting.⁷⁹

Netflix's streaming service has had a dramatic effect on the broadband landscape. According to one study, during peak hours, Watch Instantly accounts for one-fifth of the broadband traffic in the United States.⁸⁰ The increasing strength of the company manifested itself in November 2010,

72. See Saul Hansell, *Wal-Mart Ends Online Video Rentals and Promotes Netflix*, N.Y. TIMES, May 20, 2005, at C3.

73. See, e.g., ECONOMIST, *supra* note 17, at 70; Nat Worden, *Netflix Gains as Online Video Wins Fans*, WALL ST. J. (Feb. 14, 2011, 5:38 PM), <http://online.wsj.com/article/SB10001424052748703584804576144371093782778.html> (describing Netflix as a "disruptive force in the TV and film industry").

74. See Hansell, *supra* note 72.

75. See Miguel Helft, *The Shifting Business of Renting Movies, by the Disc or the Click*, N.Y. TIMES, Jan. 16, 2007, at C1; Press Release, Netflix, Netflix Offers Subscribers the Option of Instantly Watching Movies on Their PCs (Jan. 16, 2007), <http://netflix.mediaroom.com/index.php?s=43&item=201>.

76. Press Release, Netflix, Netflix Launches U.S. Subscription Plan for Streaming Movies & TV Shows Over the Internet for \$7.99 a Month (Nov. 22, 2010), <http://netflix.mediaroom.com/index.php?s=43&item=376>.

77. See Press Release, Netflix, Netflix Releases Fourth-Quarter 2010 Financial Results (Jan. 26, 2011), <http://netflix.mediaroom.com/index.php?s=43&item=383>; see also Nick Wingfield, *Netflix Sees Surge in Subscribers*, WALL ST. J., Jan. 27, 2011, at B9 (noting that Netflix added 7.7 million subscribers in 2010).

78. Press Release, Netflix, Netflix Announces Q3 2010 Financial Results (Oct. 20, 2010), <http://netflix.mediaroom.com/index.php?s=43&item=373>.

79. See Schechner, *supra* note 29.

80. See Fall 2010 Global Internet Phenomena, SANDVINE, http://www.sandvine.com/news/global_broadband_trends.asp (last visited Apr. 20, 2011).

when Level 3 Communications (Level 3), an Internet backbone provider⁸¹ that handles data transport service for Watch Instantly, complained publicly that Comcast had demanded a recurring fee from Level 3 in order to transport data over Comcast's broadband networks.⁸² Level 3 intimated that Comcast imposed the fee in an effort to hinder Netflix's ability to compete with Comcast's MVPD business, but Comcast claimed that the fee was imposed only because of the dramatic increase in Level 3 traffic being carried over Comcast's network.⁸³ Regardless of the motivation, the episode highlighted a core concern of those pressing for federal intervention into this developing marketplace: that an MVPD/broadband provider such as Comcast would be incentivized and able to disrupt the flow of competitive broadband video services over its networks.⁸⁴

b. Hulu

Launched in March 2008, Hulu is the most prominent online broadband distributor of broadcast television programming.⁸⁵ Hulu is a joint venture among NBCU, News Corporation, and The Walt Disney Company,⁸⁶ the parent companies of broadcast networks NBC, Fox, and ABC, respectively.⁸⁷ The site distributes programming from the three networks, as well as a host of other content producers.⁸⁸ Created in part as a response to the rise of content aggregators such as YouTube,⁸⁹ Hulu's free, ad-based model allows users to stream a limited number of recently aired television episodes.⁹⁰ In 2010, under pressure to increase revenue, the company launched Hulu Plus, a subscription service that provides users with access to full seasons of current television shows,⁹¹ at a cost of \$7.99 per month.⁹²

81. Internet backbone providers are companies that supply the data transport services necessary to connect regional networks to one another. See NUCHESTERLEIN & WEISER, *supra* note 15, at 131-34.

82. See Brian Stelter, *Netflix Partner Says Comcast "Toll" Threatens Online Video Delivery*, N.Y. TIMES MEDIA DECODER (Nov. 29, 2010, 9:45 PM), <http://mediadecoder.blogs.nytimes.com/2010/11/29/netflix-partner-says-comcast-toll-threatens-online-video-delivery>.

83. See *id.*; see also Daniel Golding, *The Real Story Behind the Comcast-Level 3 Battle*, GIGAOM (Dec. 1, 2010, 1:07 PM), <http://gigaom.com/2010/12/01/comcast-level-3-battle>.

84. See Stelter, *supra* note 82.

85. See Chuck Salter, *The Unlikely Mogul*, FAST COMPANY, Nov. 2009, at 98, 100; Jason Kilar, *Welcome to Hulu*, HULU BLOG (Mar. 12, 2008), <http://blog.hulu.com/2008/03/12/welcome-to-hulu> (the author is the current CEO of Hulu).

86. *About*, HULU, <http://www.hulu.com/about> (last visited Apr. 20, 2011).

87. Of the major broadcast networks, only CBS does not have a presence on Hulu. See Brad Stone & Brian Stelter, *ABC To Add Its Shows to Videos on Hulu*, N.Y. TIMES, May 1, 2009, at B7.

88. *Content*, HULU, <http://www.hulu.com/partners> (last visited Apr. 20, 2011).

89. See 1 BRENNER ET AL., *supra* note 30, § 1:24 & n.5; see also Salter, *supra* note 85, at 103 (discussing the creation of Hulu as, in part, a reaction to the posting of broadcast network content on YouTube).

90. See Brian Stelter, *Hulu Offers a \$9.99 Subscription to Full Season of Current TV Shows*, N.Y. TIMES, June 30, 2010, at B4.

91. *Id.*

92. See Jason Kilar, *Hulu Plus Launches Out of Preview for \$7.99/month*, HULU BLOG (Nov. 17, 2010), <http://blog.hulu.com/2010/11/17/hulu-plus-launches-out-of-preview-for-7->

Hulu has been a focal point of tension between consumers, content creators, and MVPDs. In a recent example, Fox pulled its shows from Hulu in the New York City area during a fall 2010 battle over redistribution fees with Cablevision, a MVPD.⁹³ During the dispute, Fox programming was not available to Cablevision's MVPD customers, but many of those customers still had access to Fox programs via Hulu and Fox.com.⁹⁴ Accordingly, Fox removed the content from Hulu in an apparent attempt to gain leverage in the ongoing negotiations.⁹⁵ After viewer outcry, Fox restored its content on Hulu, but the action nevertheless highlighted the growing tension that Internet-based distribution imposes on the relationship between MVPDs and content providers.⁹⁶

2. From Brick and Mortar to Ones and Zeros

The broadband distribution of video content has raised concerns for the companies who have dominated the marketplace for physical home video sales: retailers such as Walmart, Target, and Best Buy.⁹⁷ As DVD sales slip, these chains have reduced their in-store sales, and have looked for digital options as replacements.⁹⁸ After losing an earlier battle with Netflix for web-based DVD rentals,⁹⁹ Walmart re-entered the broadband market with its February 2010 purchase of Vudu, a streaming video service that offers new release movie rentals and sales over broadband-connected devices.¹⁰⁰ Best Buy made its broadband push in November 2009 by entering into an agreement with CinemaNow, a streaming service that allows customers to purchase films and television shows on the same day they are released in the home video window, and also offers streaming movie rentals.¹⁰¹

99month; Todd Spangler, *Hulu Chops Premium Plan to \$7.99*, MULTICHANNEL NEWS (Nov. 17, 2010, 8:09 AM), http://www.multichannel.com/article/459992-Hulu_Chops_Premium_Plan_to_7_99.php.

93. See Brian Stelter, *In Brief Blackout, Web Becomes a Weapon in Fox-Cablevision War*, N.Y. TIMES, Oct. 20, 2010, at B3.

94. *Id.*

95. *Id.*

96. *Id.*

97. See Miguel Bustillo, *Wal-Mart to Resume Online Movie Sales*, WALL ST. J., Feb. 23, 2010, at B2; Sarah McBride & Merissa Marr, *Target, a Big DVD Seller, Warns Studios over Download Pricing*, WALL ST. J., Oct. 9, 2006, at A1.

98. See Bustillo, *supra* note 97.

99. See *supra* note 74 and accompanying text.

100. See Bustillo, *supra* note 97.

101. See Ben Fritz, *Best Buy Launching Digital Movie Service with CinemaNow*, L.A. TIMES COMPANY TOWN (Nov. 2, 2009, 9:00 PM), <http://latimesblogs.latimes.com/entertainmentnewsbuzz/2009/11/best-buy-launching-digital-movie-service-with-cinemanow.html>; Richard Lawler, *Best Buy's Internet Movie Store Launches This Month Under the CinemaNow Brand*, ENGADGET (May 18, 2010, 8:17 AM), <http://www.engadget.com/2010/05/18/best-buys-internet-movie-store-launches-this-month-under-the-ci>.

3. The Digital Giants

Both Amazon.com and Apple have entered the market for broadband video distribution over the past several years. In 2008, Amazon launched a web-based streaming service called Amazon Video on Demand that sells and rents feature films and television episodes.¹⁰² Consumers do not need to download files in order to make a purchase through Amazon Video on Demand; the system provides online storage for titles and allows customers to access these at any time, from any device.¹⁰³ In February 2011, Amazon announced that it was adding a complimentary video streaming service to Amazon Prime, the company's premium package shipment service, which costs \$79.00 per year.¹⁰⁴ The move is seen as directly targeting Netflix as the two jockey for leadership in the online streaming market.¹⁰⁵ Apple's digital distribution of video content also began in 2008 through its iTunes marketplace, which requires customers to purchase and download individual films and television episodes prior to viewing on computers or mobile devices.¹⁰⁶ Like Amazon, Apple's service offers both sales and rentals of films and television shows.¹⁰⁷ Apple is currently the market leader for on-demand broadband video distribution, handling approximately fifty-seven percent of video transactions and fifty-three percent of online television show purchases, far outstripping Amazon's five percent and six percent share in these respective markets.¹⁰⁸

4. Set-Top Boxes and the Battle for the Living Room

The distribution channels discussed above offer consumers an array of options to replace the bundles of programming sold by MVPDs with free, inexpensive, or a la carte broadband viewing. For an average consumer to duplicate the traditional home video and television experience, however, cord-cutting requires accessing disparate online services and signing up for multiple subscription contracts, all while experiencing these programs on a computer screen or mobile device.¹⁰⁹ These factors suggest that, on their own, the evolving broadband distribution models are unlikely to compete

102. See Brad Stone, *Amazon Plans an Online Store for Movies and TV Shows*, N.Y. TIMES, July 17, 2008, at C8.

103. See *id.*

104. Jacqui Cheng, *Amazon Takes on Netflix with Movie Streaming Service for Prime*, ARS TECHNICA (Feb. 22, 2011, 9:37 AM), <http://arstechnica.com/media/news/2011/02/amazon-takes-on-netflix-with-movie-streaming-service-for-prime.ars>.

105. *Id.*

106. Saul Hansell, *iTunes Movies: A Tuna Sandwich*, N.Y. TIMES BITS (Jan. 15, 2008, 2:09 PM), <http://bits.blogs.nytimes.com/2008/01/15/itunes-movies-a-tuna-sandwich>; see also *What's on iTunes?*, iTUNES, <http://www.apple.com/itunes/whats-on> (last visited Apr. 20, 2011).

107. See Yukari Iwatani Kane & Shira Ovide, *Apple Tries Again at TV*, WALL ST. J., Sept. 2, 2010, at B1.

108. See Geoffrey A. Fowler & Sam Schechner, *A New Digital Battlefield*, WALL ST. J., Sept. 3, 2010, at B1.

109. See, e.g., *supra* notes 76, 92 and accompanying text.

with a bundled MVPD service that can be accessed with a remote control from the comfort of one's living room sofa.¹¹⁰

That analysis changes with a set-top box, a hardware device that allows broadband video services to be viewed through a television.¹¹¹ Many of the broadband video services discussed above have made agreements with these manufacturers so that consumers will be able to access the service through a television interface,¹¹² access that is often featured prominently on the websites of OVPDs.¹¹³

Set-top boxes exist in a number of forms. Several companies sell a dedicated external device that connects Internet-based media services to a television, of which AppleTV,¹¹⁴ Roku¹¹⁵ and Boxee¹¹⁶ are the most prominent. In addition, electronics manufacturers are beginning to build broadband video connectivity into products such as televisions, Blu-ray players, and gaming consoles.¹¹⁷ As an indication of the importance of this functionality, Best Buy's agreement with CinemaNow¹¹⁸ allows the retailer to market the video streaming service in connection with electronics equipment sales.¹¹⁹

In the fall of 2010, Google launched its iteration of a set-top box, a video searching system called Google TV that is currently integrated into three products: a television and Blu-ray player from Sony and a set-top box from Logitech.¹²⁰ Through a television interface, Google TV allows users to search for video content from the Internet, MVPD services, and local storage devices, such as DVRs.¹²¹ Google has received support from a number of cable networks, including Time Warner—owner of HBO, TNT, TBS and CNN—to optimize their web portals for viewing through Google TV-enabled televisions.¹²² However, Google TV cannot access all Internet video programming, as broadcast networks ABC, CBS, and NBC

110. See Quenqua, *supra* note 60.

111. See generally Kelli B. Grant, *Apple TV: The Latest of Many Viewing Options*, WALL ST. J. (Sept. 5, 2010), <http://online.wsj.com/article/SB128363245566734521.html>.

112. See *id.*; see also 1 RICHARD RAYSMAN ET AL., *EMERGING TECHNOLOGIES AND THE LAW: FORMS AND ANALYSIS* § 1.03[4][e], at 1-32–32.1 (Supp. 2010).

113. See, e.g., *Hulu Plus: Devices*, HULU, <http://www.hulu.com/plus?src=masthead#devices> (last visited Apr. 20, 2011); *Netflix Ready Devices*, NETFLIX, <http://www.netflix.com/NetflixReadyDevices> (last visited Apr. 20, 2011).

114. See Kane & Ovide, *supra* note 107.

115. ROKU, <http://www.roku.com> (last visited Apr. 20, 2011).

116. BOXEE, <http://www.boxee.tv> (last visited Apr. 20, 2011).

117. See Grant, *supra* note 111.

118. See *supra* note 101 and accompanying text.

119. *Direct to Your Living Room*, CINEMANOW, <http://www.cinemanow.com/Devices.aspx> (last visited Apr. 20, 2011).

120. *Get It – Google TV*, GOOGLE, <http://www.google.com/tv/getit.html> (last visited Apr. 20, 2011).

121. See Verne G. Kopytoff, *Sony Unveils the First Google TV*, N.Y. TIMES BITS (Oct. 12, 2010, 8:33 PM), <http://bits.blogs.nytimes.com/2010/10/12/sony-unveils-the-first-google-tv>.

122. See Todd Spangler, *Google TV Tunes to Turner, HBO, CNBC, Netflix and Others*, MULTICHANNEL NEWS (Oct. 4, 2010, 1:00 PM), http://www.multichannel.com/article/458030-Google_TV_Tunes_To_Turner_HBO_CNBC_Netflix_And_Others.php.

specifically have blocked Google TV's software from accessing video content on their websites, as has Hulu.¹²³

Hulu is indicative of the conflicts that arise when broadband video content is merged with the traditional television experience through a set-top box. The broadcast networks that own Hulu exert control over how Hulu uses their content, and have not allowed set-top boxes to connect to Hulu's free, ad-supported content.¹²⁴ The problem for the networks is that, if consumers can use a set-top box to access a free, high-quality stream through Hulu's website and watch it on a television, the networks' ability to charge heightened pricing for retransmission fees from cable services might be jeopardized.¹²⁵ However, Hulu Plus is accessible through several set-top boxes, likely because the subscription model allows the networks to offset any proceeds they might lose from MVPDs.¹²⁶

5. The MVPDs Respond: TV Everywhere

The advance of broadband delivery of video programming has triggered a dynamic response from cable networks and MVPDs, driven by their concerns over cord-cutting.¹²⁷ That response is TV Everywhere, a service that provides online access to MVPD programming, but only to customers who purchase standard bundled cable service packages from an MVPD.¹²⁸ TV Everywhere service includes access to online MVPD content from any broadband-connected device, such as computers, tablets, and mobile phones.¹²⁹ Time Warner CEO Jeff Bewkes and Comcast CEO Brian Roberts were the principal developers of TV Everywhere.¹³⁰ Bewkes, whose company produces a significant amount of cable content through its ownership of TNT, TBS, CNN and other networks, has promoted TV Everywhere as a means of competing directly for the broadband space by enhancing the experience of traditional cable television users.¹³¹ Others have expressed a more cynical view, arguing that TV Everywhere is an attempt to force the outmoded business model of the MVPDs onto the developing system of online distribution.¹³²

123. See Sam Schechner & Amir Efrati, *Networks, Google Spar Over Web TV*, WALL ST. J., Oct. 22, 2010, at B1.

124. See, e.g., Marvin Ammori, *Copyright's Latest Communications Policy: Content-Lock-Out and Compulsory Licensing for Internet Television*, 18 COMM'LAW CONSP'CTUS 375, 375-76 (2010) (describing that pressure from Hulu's content partners resulted in Hulu blocking its content from Boxee, the set-top box service); Jason Kilar, *Doing Hard Things*, HULU BLOG (Feb. 18, 2009), <http://blog.hulu.com/2009/02/18/doing-hard-things>.

125. See Ammori, *supra* note 124, at 376-77.

126. See Schechner & Fowler, *supra* note 68.

127. See generally Stone & Stelter, *supra* note 61.

128. See Ronald Grover et al., *Revenge of the Cable Guys*, BUS. WK., Mar. 22 & 29, 2010, at 38, 40.

129. See David Carr, *Faith in Its Shows, on Any Medium*, N.Y. TIMES, Aug. 23, 2010, at B1.

130. See Grover et al., *supra* note 128, at 40.

131. See *id.* at 40-44.

132. See, e.g., Karl Bode, *Will Cable's "TV Everywhere" Be a Big Pile of Fail?*, BROADBAND DSL REPORTS (Mar. 24, 2010), <http://www.dslreports.com/shownews/107516>.

Comcast officially launched its version of TV Everywhere, Xfinity TV, in October 2010.¹³³ According to Comcast, Xfinity TV contains video from ninety content providers, including 25,000 TV episodes and 30,000 movies.¹³⁴ The service also offers rental of TV shows and movies through a VOD section.¹³⁵ Although the bulk of the content on Xfinity TV is accessible only to Comcast cable service subscribers, the site contains a significant amount of free content, much of which Hulu supplies to the Xfinity portal.¹³⁶

As sites such as Xfinity TV roll out to consumers, the backers of TV Everywhere acknowledge that the service is an attempt to preserve the MVPD's dual revenue stream as television moves into the broadband age.¹³⁷ Public interest groups have requested that the DOJ and the FTC inquire into whether TV Everywhere violates antitrust laws, suggesting that the MVPDs have colluded to divide up the online video marketplace among the incumbent MVPDs, and that TV Everywhere will operate to end competition from upstart broadband distributors.¹³⁸ Regardless of the merits of these allegations, the development of TV Everywhere suggests that stakeholders in the MVPD business have acknowledged the rise of broadband distribution and intend to fight for this new distribution space.¹³⁹

D. Two Representative Agreements

Companies with stakes in the future of video distribution have recently made collaborative agreements that highlight the increasing importance of broadband distribution, as well as the growing tensions between broadband and traditional distribution models. This section outlines two of these recent agreements and their implications for broadband video.

1. Comcast/NBC Universal

In December 2009, Comcast reached an agreement to acquire fifty-one percent of NBCU, the media conglomerate that General Electric and Vivendi had jointly controlled.¹⁴⁰ The agreement was consummated in January 2011 following an FCC and DOJ merger review process that lasted over a year.¹⁴¹ For \$13.75 billion, Comcast gained control of the NBC

133. See Todd Spangler, *Comcast Opens Xfinity TV Online to All Video Subs*, MULTICHANNEL NEWS (Oct. 25, 2010, 5:28 PM), http://www.multichannel.com/article/458973-Comcast_Opens_Xfinity_TV_Online_To_All_Video_Subs.php.

134. See *id.*

135. *Id.*

136. *Id.*

137. See Bewkes, *supra* note 58.

138. See Cecilia Kang, *Public Interest Groups Call for Antitrust Probe of TV Everywhere*, WASH. POST, Jan. 4, 2010, at A9.

139. See Bewkes, *supra* note 58.

140. See Arango, *supra* note 24.

141. See Brian Stelter & Tim Arango, *Comcast-NBC Deal Wins Federal Approval*, N.Y. TIMES MEDIA DECODER (Jan. 18, 2011, 2:03 PM), <http://mediadecoder.blogs.nytimes.com/2011/01/18/f-c-c-approves-comcast-nbc-deal>. For a discussion on dual merger review by the FCC and the antitrust authorities, see *infra* Part II.C.

broadcast network, several NBC-owned local broadcasters, multiple cable television networks, and the Universal movie studio.¹⁴²

The acquisition of NBCU provides Comcast with the type of content that it can potentially use to leverage its TV Everywhere service against unaffiliated online distributors.¹⁴³ As a result, the FCC and DOJ reviews focused, in particular, on the rise of broadband video distribution, and the impact that the merged entity would have on this developing marketplace.¹⁴⁴ The FCC, for example, inquired into allegations that Comcast would withhold NBCU content from online distributors in order to preserve its dominant position in the MVPD business.¹⁴⁵ In a May 2010 questionnaire, the FCC asked Comcast to “[d]escribe in detail all discussions, deliberations, analyses, and decisions related to providing or not providing [NBCU] [v]ideo [p]rogramming to unaffiliated Online Video Programming Distributors, including but not limited to Boxee, YouTube, Amazon, and iTunes.”¹⁴⁶ During the review process, the DOJ made similar inquiries with respect to the merged entity’s ability to hold exclusive sway over online content.¹⁴⁷ In response, Comcast argued that the reviewing agencies should not impose rules regarding the “rapidly evolving” online video market.¹⁴⁸

In approving the merger, both the FCC and DOJ imposed a significant number of conditions that concerned broadband video distribution.¹⁴⁹ For example, the FCC restricted Comcast’s ability to withhold NBCU content from online competitors and barred Comcast from degrading or blocking the flow of competitive video content over its broadband networks.¹⁵⁰ For its part, the DOJ forced Comcast to divest itself of managerial oversight of Hulu.¹⁵¹ In addition, the DOJ barred Comcast from requiring content providers to agree to license terms that would limit broadband distributors’ access to video content.¹⁵² The combined effect of these conditions constitutes an attempt by the reviewing agencies to provide online

142. See Arango, *supra* note 24.

143. See *supra* note 139 and accompanying text.

144. See, e.g., Martin Peers, *Comcast Could Suffer From Universal Access*, WALL ST. J., Sept. 30, 2010, at C12; Joe Flint, *FCC is Digging Deep as It Reviews Comcast-NBC Universal Deal*, L.A. TIMES COMPANY TOWN (May 25, 2010, 3:46 PM), <http://latimesblogs.latimes.com/entertainmentnewsbuzz/2010/05/fcc-is-digging-deep-as-its-reviews-comcast-nbc-universal-deal.html>.

145. See Flint, *supra* note 144.

146. NBCU Questionnaire, *supra* note 41, at 7.

147. See Amy Schatz et al., *Comcast NBC Deal Review Quickens*, WALL ST. J., Nov. 15, 2010, at B11.

148. See *id.*

149. Stelter & Arango, *supra* note 141.

150. News, Fed. Comm’n, FCC Grants Approval of Comcast-NBCU Transaction, (Jan. 18, 2011), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-304134A1.pdf; see also Stelter & Arango, *supra* note 141.

151. Press Release, U.S. Dep’t of Justice, Justice Department Allows Comcast-NBCU Joint Venture To Proceed with Conditions (Jan. 18, 2011), <http://www.justice.gov/opa/pr/2011/January/11-at-061.html>.

152. *Id.*

distributors with a strong foundation upon which to compete against incumbent MVPDs.¹⁵³

2. Netflix/EPIX

Netflix's Watch Instantly streaming video collection was primarily comprised of older films for the first few years of its existence.¹⁵⁴ Streaming rights to newer, more popular titles typically were locked up in agreements with premium cable channels like HBO and Showtime.¹⁵⁵ That changed in August 2010, when Netflix entered into an exclusive five-year streaming agreement with EPIX, a premium TV channel that controls rights to movies from Paramount, Lionsgate, and MGM.¹⁵⁶ The agreement provides Netflix with access to 1500 titles from the studios, and could potentially cost Netflix up to one billion dollars in licensing fees.¹⁵⁷ Pursuant to the agreement, the films will be available on Netflix following a ninety-day period of exclusivity on EPIX's pay TV channel.¹⁵⁸ The agreement complements an extant 2008 deal between Netflix and the pay TV channel Starz, which gives Netflix streaming rights to content from Sony and Disney, rights that Starz controls through its pay TV license with the film studios.¹⁵⁹ The magnitude of the EPIX deal further demonstrates that Netflix has staked its future on online streaming and is moving away from its core business of mailing DVDs to customers.¹⁶⁰

For a number of reasons, the Netflix-EPIX deal presages rising tensions between broadband distributors, content providers, and MVPDs. First, the deal suggests the increasing value of delivering content over broadband.¹⁶¹ The Starz deal that Netflix signed in 2008 costs Netflix \$30 million per year; the EPIX deal carries an anticipated \$200 million annual fee.¹⁶²

153. Joelle Tessler, *Comcast, NBC Deal Opens Door for Online Video*, USA TODAY (Feb. 28, 2011, 9:54 AM), http://www.usatoday.com/tech/news/2011-02-28-comcast-online-video_N.htm. These conditions are further discussed in Part II.C *infra*.

154. See Saul Hansell, *iTunes Movie Rentals and Netflix Online: Different Markets*, N.Y. TIMES BITS (Jan. 16, 2008, 5:13 PM), <http://bits.blogs.nytimes.com/2008/01/16/itunes-movie-rentals-and-netflix-online-different-markets>.

155. See Brian Stelter, *Netflix To Stream Films From Paramount, Lions Gate, MGM*, N.Y. TIMES MEDIA DECODER (Aug. 10, 2010, 8:13 AM), <http://mediadecoder.blogs.nytimes.com/2010/08/10/netflix-to-stream-films-from-paramount-lionsgate-mgm>.

156. See Schechner, *supra* note 29.

157. See *id.*; Barry Silverstein, *Netflix-Epix Deal Puts TV Biz on Notice*, BRANDCHANNEL (Aug. 11, 2010, 11:00 AM), <http://brandchannel.com/home/post/2010/08/11/Netflix-Epix-Moves-Needle.aspx>.

158. See Schechner, *supra* note 29; see also Press Release, EPIX, Epix And Netflix Announce Exclusive Internet-Only Deal to Instantly Stream EPIX Movies to Netflix Members (Aug. 10, 2010), <http://epixnews.tumblr.com/post/931723470/epix-and-netflix-announce-exclusive-internet-only-deal>.

159. See Stelter, *supra* note 155.

160. See Silverstein, *supra* note 157.

161. See Michael Corkery, *Netflix's Achilles Heel: Content Costs?*, WALL ST. J. DEAL J. (Aug. 10, 2010, 2:50 PM), <http://blogs.wsj.com/deals/2010/08/10/netflixs-achilles-heel-content-costs>.

162. *Id.*

These figures indicate to content producers that broadband distribution windows can compensate for the demise of traditional windows.¹⁶³ Second, the deal provides Netflix with access to new releases in a far earlier window than it had previously enjoyed, which suggests that it now directly competes in these windows with premium channels such as HBO and Showtime, and with bundled MVPD services more generally.¹⁶⁴ Indeed, Time Warner Cable has indicated that it will not carry EPIX as part of its cable service packages, in large part because of the Netflix-EPIX deal.¹⁶⁵ Contrary to Netflix's assertions,¹⁶⁶ the EPIX agreement suggests that the online distributor is increasingly becoming a substitute for the entrenched models of the MVPDs.¹⁶⁷ Netflix also engenders conflict with its content providers, who recognize that Netflix's effect on film and MVPD distribution channels may diminish their own revenue streams.¹⁶⁸ As a result, these content providers may become wary about licensing their content to Netflix and other online distributors on the same financial terms as they have in the past, if indeed they continue to license to them at all.¹⁶⁹

II. FEDERAL OVERSIGHT OF BROADBAND AND MEDIA INDUSTRIES

As the discussion in Part I suggests, the prevalence of broadband distribution strains the relationship between MVPDs, online distributors, content producers, and consumers. These tensions are developing against a broadband regulatory environment in a state of flux. Although the recent growth of broadband occurred under deregulatory conditions, its increasing centrality to everyday life has led to calls for oversight.¹⁷⁰ For commentators addressing the question of federal oversight of broadband—a

163. See Worden, *supra* note 54 (quoting Viacom's COO Tom Dooley as stating, "The [Netflix-EPIX] deal clearly demonstrated that these new players are going to represent significant revenue streams to studios. . . . There is a new market developing that's beginning to replace the physical DVD business.").

164. See Stelter, *supra* note 155.

165. See Brett Lang, *Time Warner Cable Just Says No to Epix*, THE WRAP (Sept. 15, 2010, 2:07 PM), <http://www.thewrap.com/television/article/time-warner-wont-carry-epix-20883>.

166. See *supra* note 79 and accompanying text.

167. See Stelter, *supra* note 155 (quoting Netflix executive who, when asked about content that Netflix was still unable to acquire because of content providers' agreements with HBO, responded, "Every deal expires . . . and every deal has to be renewed"). Netflix's recent entry into original programming further highlights its ability to compete directly with premium TV channels and MVPDs. See Brian Stelter, *Netflix Gets Into the TV Business*, N.Y. TIMES MEDIA DECODER (Mar. 18, 2011, 1:22 PM), <http://mediadecoder.blogs.nytimes.com/2011/03/18/netflix-gets-into-the-tv-business-with-fischer-deal>. For a discussion on other efforts by broadband distributors to produce original content, see Sam Schechner, *Web Shows Get Ambitious*, WALL ST. J., Mar. 21, 2011, at B4 (noting that broadband distributors would be able to compete more effectively with traditional MVPD services if the first release window occurred through the online service).

168. See Tim Arango, *Time Warner Views Netflix as a Fading Star*, N.Y. TIMES, Dec. 13, 2010, at B1 (discussing the shifting perceptions of content providers toward Netflix as its broadband distribution dominance has risen).

169. See *id.*

170. See, e.g., Philip J. Weiser, *The Future of Internet Regulation*, 43 U.C. DAVIS L. REV. 529, 531 (2009).

debate often associated with network neutrality—a fault line exists between those who believe presumptive FCC regulation is necessary, and those who feel that antitrust law should be the arbiter of competitive issues in broadband markets.¹⁷¹ As a general matter, the governance of the Internet would seem to fall within the default regulatory ambit of the FCC.¹⁷² After years of taking a mostly hands-off approach, the FCC has made efforts to assert its authority over broadband.¹⁷³ However, in *Comcast Corp. v. FCC*,¹⁷⁴ the D.C. Circuit delivered a significant setback to the FCC's ability to regulate broadband by rejecting the FCC's jurisdictional approach to an order forcing Comcast to alter its broadband network practices.¹⁷⁵ The FCC pressed on from the *Comcast* decision and, in a December 2010 order (Net Neutrality Order), adopted enforceable rules for broadband network practices, in which the continuing proliferation of broadband video played a central role.¹⁷⁶ However, because of the significant jurisdictional ambiguity following *Comcast*, and the political furor of the network neutrality debate, whether the FCC's December order becomes a permanent oversight regime remains to be seen.¹⁷⁷ Consequently, the question as to whether the FCC or the antitrust authorities should have jurisdiction over broadband remains open.

This part discusses federal oversight of broadband and media industries, and, in particular, addresses questions concerning FCC, DOJ, and FTC jurisdictional authority over broadband. Part II.A discusses the FCC's attempt to regulate broadband, the *Comcast* decision, and its aftermath. Part II.B highlights the antitrust response to competition concerns in broadband and other media industries. Part II.C discusses the process of dual agency review of telecommunications and media industry mergers, and highlights several recent mergers that have affected broadband.

A. The FCC's Attempt To Regulate Broadband

The FCC might have had broadband to itself. At first blush, broadband appears to fall within the general jurisdictional grant of the

171. Compare Barbara van Schewick, *Towards an Economic Framework for Network Neutrality Regulation*, 5 J. ON TELECOMM. & HIGH TECH. L. 329, 329 (2007) (arguing that proscriptive regulation is necessary), with Jonathan E. Nuechterlein, *Antitrust Oversight of an Antitrust Dispute: An Institutional Perspective on the Net Neutrality Debate*, 7 J. ON TELECOMM. & HIGH TECH. L. 19, 21 (2009) (arguing that broadband competition concerns are best addressed through antitrust law).

172. See Nuechterlein, *supra* note 171, at 50 ("It was undisputed until recently that, at the federal level, the FCC exclusively occupied the field of commercial telecommunications regulation, supplemented only by the antitrust oversight of the Justice Department.").

173. See *infra* Part II.A.2.

174. 600 F.3d 642 (D.C. Cir. 2010).

175. *Id.* at 644.

176. FED COMM'NS COMM'N, *Preserving the Open Internet*, 8–9, 13 (Dec. 21, 2010), [hereinafter Net Neutrality Order] (rep. and order), http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-201A1.pdf; Ryan Lawler, *Online Video at the Heart of Net Neutrality Order*, GIGAOM (Dec. 28, 2010, 10:00 AM), <http://gigaom.com/video/online-video-net-neutrality>.

177. See *infra* notes 273–81 and accompanying text.

Communications Act, which applies to “all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio.”¹⁷⁸ Pursuant to this grant and the specific authority given to the FCC in the Communications Act, the FCC has been the principal regulator of the American communications system since the Commission’s creation in 1934, and it was believed that the FCC would possess regulatory authority over broadband by default.¹⁷⁹ However, Commission decisions made during the 2000s regarding the classification of broadband sowed the seeds for its jurisdictional defeat in *Comcast*. The *Comcast* ruling not only disrupts the default assumption regarding the FCC’s jurisdiction over the Internet, but also invites an inquiry into whether the FCC should be the agency governing broadband practices, including the developing market for broadband video distribution discussed in Part I.

1. Broadband Classification and Ancillary Jurisdiction

Although the FCC is given a broad jurisdictional grant, the substantive provisions of the Communications Act demarcate the FCC’s express authority over the various components of the communications system.¹⁸⁰ The Communications Act confers upon the FCC specific authority over three substantive areas: common carrier services, including wireline telephone networks under Title II;¹⁸¹ radio, including broadcast television and cellular telephone networks under Title III;¹⁸² and cable services under Title VI.¹⁸³ Instead of grounding broadband regulation in any of these express provisions, the Commission tethered its broadband authority to its “ancillary jurisdiction” under the general provisions of Title I of the Communications Act.¹⁸⁴ Three Supreme Court decisions carved out the contours of this ancillary authority: *United States v. Southwestern Cable Co.*;¹⁸⁵ *United States v. Midwest Video Corp. (Midwest I)*;¹⁸⁶ and *FCC v. Midwest Video Corp. (Midwest II)*.¹⁸⁷

Southwestern Cable, like the other two foundational cases associated with ancillary jurisdiction, was decided prior to the addition of “cable services” regulations to the Communications Act.¹⁸⁸ In 1966, after the

178. 47 U.S.C. § 152(a) (2006); *see also Comcast*, 600 F.3d at 646–47 (“Comcast concedes that . . . the company’s Internet service qualifies as ‘interstate and foreign communication by wire’ within the meaning of Title I of the Communications Act.”).

179. *See supra* note 172 and accompanying text.

180. *See Comcast*, 600 F.3d at 645.

181. 47 U.S.C. §§ 201–276 (2006).

182. *Id.* §§ 301–399.

183. *Id.* §§ 521–573.

184. *See supra* notes 207–09 and accompanying text.

185. 392 U.S. 157 (1968).

186. 406 U.S. 649 (1972).

187. 440 U.S. 689 (1979).

188. *See Comcast Corp. v. FCC*, 600 F.3d 642, 646 (D.C. Cir. 2010). Title VI, which gives the FCC express authority over cable services, was added in 1984. *See Cable Communications Policy Act of 1984*, Pub. L. No. 98-549, 98 Stat. 2779 (codified as amended at 47 U.S.C. §§ 521–573 (2006)).

FCC ordered community antenna television (CATV)¹⁸⁹ providers to stop redistributing out-of-market broadcasts indiscriminately into local markets, several CATV providers petitioned for review, arguing that the FCC lacked authority under the Communications Act to issue the order.¹⁹⁰ The Commission asserted that the regulation was necessary to protect the interests of local television broadcasts, over which it had express authority to regulate under Title III.¹⁹¹ The Court agreed, holding that the FCC could exercise jurisdiction over the CATV practice where it was “reasonably ancillary to the effective performance of the Commission’s various responsibilities for the regulation of television broadcasting.”¹⁹² In establishing this “ancillary jurisdiction,” the *Southwestern Cable* Court emphasized the congressional desire to provide the FCC with flexibility in its regulation of broadcasting and, referring to the broad jurisdictional language in Title I, stated, “We have found no reason to believe that § 152 does not, as its terms suggest, confer regulatory authority over ‘all interstate . . . communication by wire or radio.’”¹⁹³ *Midwest I* continued *Southwestern Cable*’s use of Title I where such authority was “reasonably ancillary” to the FCC’s express responsibilities.¹⁹⁴ A plurality of the Court determined that the FCC had authority to require cable providers to create new programs for transmission alongside the broadcast stations they retransmitted.¹⁹⁵ However, in *Midwest II*, the Court rejected the FCC’s use of ancillary jurisdiction, striking down an order requiring cable systems to provide public access to a requisite number of channels.¹⁹⁶ The *Midwest II* Court limited the scope of the FCC’s ancillary jurisdiction, stating that the *Southwestern Cable* doctrine “confer[s] on the Commission a circumscribed range of power to regulate cable television.”¹⁹⁷

This line of ancillary jurisdiction cases became critical for the question of broadband regulation. In assessing how to classify cable broadband service, the FCC lacked statutory direction, as the Communications Act does not expressly govern broadband.¹⁹⁸ The 1996 Act gave the FCC a choice between “telecommunications service”¹⁹⁹ and “information service”²⁰⁰ for the classification of broadband cable modem service.²⁰¹ The

189. CATV networks were the forerunners of modern cable systems. See *Comcast*, 600 F.3d at 646.

190. *Sw. Cable*, 392 U.S. at 160–61.

191. *Id.* at 165.

192. *Id.* at 178.

193. *Id.* at 173 (alteration in original).

194. 406 U.S. 649, 651 (1972).

195. *Id.* at 670.

196. 440 U.S. 689, 708–09 (1979).

197. *Id.* at 696.

198. See *Comcast Corp. v. FCC*, 600 F.3d 642, 645 (D.C. Cir. 2010); NUECHTERLEIN & WEISER, *supra* note 15, at 162–64.

199. 47 U.S.C. § 153(46) (2006).

200. *Id.* § 153(20).

201. In its classification proceeding, the FCC also considered whether to classify cable broadband as a “cable service” under Title VI. However, the Commission dispensed with this option, in part because the Communications Act defines “cable service” as a “one-way transmission to subscribers,” while Internet activity necessarily involves a two-way

choice was significant because the Communications Act provides that, while information services are generally unregulated, telecommunications services hold themselves out to consumers as common carriers.²⁰² Common carriers—principally associated with local telephone monopolies²⁰³—are subject to mandatory regulation under Title II, and must, among other things, charge just and reasonable rates²⁰⁴ that are nondiscriminatory,²⁰⁵ and allow competitors to interconnect to their networks.²⁰⁶

In 2002, the Commission ruled that broadband cable modem service should be classified as an information service under the Communications Act (Cable Modem Order).²⁰⁷ The FCC was explicit in its deregulatory motivation, stating that “broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market.”²⁰⁸ The ruling meant that any authority the FCC exercised over cable broadband would be pursuant to its Title I ancillary jurisdiction.²⁰⁹ A number of parties challenged the FCC’s classification of broadband, and the issue reached the Supreme Court in *National Cable & Telecommunications Ass’n v. Brand X Internet Services*.²¹⁰ The Court affirmed the Commission’s classification, holding that “the Commission’s construction was ‘a reasonable policy choice for the [Commission] to make.’”²¹¹ The Court’s reasoning was grounded in the deferential standard it had adopted in *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*²¹²

The plaintiffs urged that the FCC’s determination that cable broadband constituted an information service was unreasonable in that it contradicted the Commission’s 1998 conclusion that high-speed DSL service was a

interaction. Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities, 17 FCC Rcd. 4798, 4836–37 (2002) [hereinafter Cable Modem Order] (quoting 47 U.S.C. § 522(6)(A) (2006)).

202. 47 U.S.C. § 153(44); *see also* Nat’l Cable & Telecomms. Assoc. v. Brand X Internet Servs., 545 U.S. 967, 975–76 (2005).

203. *See* NUCHECHTERLEIN & WEISER, *supra* note 15, at 23.

204. 47 U.S.C. § 201(b).

205. *Id.* § 202(a).

206. *Id.* § 251(a)(1).

207. Cable Modem Order, *supra* note 201, at 4802.

208. *Id.* (quoting Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Universal Serv. Obligations of Broadband Providers, 17 FCC Rcd. 3019, 3022 (2002)).

209. *Id.* at 4801–02.

210. 545 U.S. 967 (2005).

211. *Id.* at 997. (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 845 (1984) (alteration in original)).

212. 467 U.S. 837 (1984). In *Chevron*, the Court held that, where statutory language is ambiguous, a reviewing court asks only whether the agency construction was permissible, and does not overturn the agency determination even if the court would interpret the statute differently. *Id.* at 843 & n.11. The Court reasoned that, because an agency’s work often involves questions of policy that the political branches delegate to it, the agency is more suited to perform the interpretive function—and more accountable to the political process—than are the courts. *Id.* at 865–66.

common carrier service governed under Title II.²¹³ The *Brand X* Court rejected this argument, noting first that the FCC was considering reclassifying DSL as an information service,²¹⁴ and concluding “that the Commission provided a reasoned explanation for treating cable modem service differently from DSL service” in light of the FCC’s analysis of changed market circumstances.²¹⁵

Notably, in several instances in dicta, the *Brand X* Court appeared to confirm that the Commission possessed Title I ancillary authority over broadband. In discussing the statutory distinctions between telecommunications services and information services in the 1996 Act, the Court wrote that “[i]nformation-service providers, by contrast, are not subject to mandatory common-carrier regulation under Title II, though the Commission has jurisdiction to impose additional regulatory obligations under its Title I ancillary jurisdiction to regulate interstate and foreign communications.”²¹⁶

Shortly after the *Brand X* decision, the FCC reclassified DSL service as an information service in its Wireline Broadband Order,²¹⁷ a decision that the U.S. Court of Appeals for the Third Circuit affirmed in *Time Warner Telecom, Inc. v. FCC*.²¹⁸ Subsequently, the Commission extended information service classification to broadband service over power lines²¹⁹ and wireless networks.²²⁰ Through these classification decisions, the FCC established a deregulatory regime with respect to its authority over broadband. As the FCC stated in the Wireline Broadband Order, “[t]his framework establishes a minimal regulatory environment for wireline broadband Internet access services to benefit American consumers and promote innovative and efficient communications.”²²¹

Despite the deregulatory posture of its classification orders, the FCC asserted its regulatory authority over the Internet in September 2005 with its

213. See *Brand X*, 545 U.S. at 1000–01; see also Deployment of Wireline Servs. Offering Advanced Telecomms., 13 FCC Rcd. 24,011, 24,029–31 (1998) (defining DSL service as a “telecommunications service”).

214. *Brand X*, 545 U.S. at 1002 (citing Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, 17 FCC Rcd. 3019, 3030 (2002) (notice of proposed rulemaking)).

215. *Id.* at 1000–01.

216. *Id.* at 976; see also *id.* at 996 (“[T]he Commission remains free to impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction.”).

217. Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, 20 FCC Rcd. 14,853, 14,856 (2005) [hereinafter Wireline Broadband Order] (rep. and order & notice of proposed rulemaking).

218. 507 F.3d 205, 208 (3d Cir. 2007).

219. United Power Line Council’s Petition for Declaratory Ruling Regarding the Classification of Broadband Over Power Line Internet Access Serv. as an Info. Serv., 21 FCC Rcd. 13,281, 13,281 (2006) (mem. op. and order).

220. Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, 22 FCC Rcd. 5901, 5901 (2007) (declaratory ruling).

221. Wireline Broadband Order, *supra* note 217, at 14,855.

Internet Policy Statement,²²² released on the same day as the FCC ordered the reclassification of DSL as an information service.²²³ The Internet Policy Statement articulated four principles that would guide the Commission in its approach to Internet activity.²²⁴ These principles provide that consumers using the Internet should be entitled to access legal content of their choosing, to run applications and use services of their choice, to connect devices to the network, and to enjoy competition among network, application, and service providers.²²⁵ The Internet Policy Statement incorporates the FCC's classification decisions and its reliance on its Title I ancillary authority.²²⁶ In particular, the FCC relied on the *Brand X* dicta discussed above, asserting that the Commission "has jurisdiction to impose additional regulatory obligations under its Title I ancillary jurisdiction to regulate interstate and foreign communications."²²⁷ In the Internet Policy Statement, the Commission hinged its ancillary authority as governed by the *Southwestern Cable* standard on two policy provisions embedded in the Communications Act.²²⁸ Section 230(b) of the Communications Act states that "[i]t is the policy of the United States . . . to promote the continued development of the Internet and other interactive computer services and other interactive media."²²⁹ Further, Section 706(a) of the 1996 Act provides that the "Commission . . . shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."²³⁰ The FCC asserted that the Internet Policy Statement was not an enforceable set of rules, but a group of principles that would guide the FCC in its approach to Internet practices.²³¹

In addition to the Internet Policy Statement, the FCC indicated its intent to oversee broadband practices in October 2009 when it adopted a Notice of Proposed Rulemaking (2009 NPRM) with respect to "preserving the open Internet."²³² In the 2009 NPRM, the FCC sought comment on whether it

222. Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, 20 FCC Rcd. 14,986 (2005) [hereinafter Internet Policy Statement] (policy statement).

223. See *id.* at 14,986; Wireline Broadband Order, *supra* note 217, at 14,853.

224. Internet Policy Statement, *supra* note 222, at 14,988.

225. *Id.*

226. *Id.* at 14,987–88.

227. *Id.* (quoting Nat'l Cable & Telecomms. Assoc. v. Brand X Internet Servs., 545 U.S. 967, 976 (2005)).

228. *Id.* at 14,987.

229. 47 U.S.C. § 230(b) (2006). Section 230 was added to the Communications Act as part of the Communications Decency Act of 1996, Pub. L. No. 104-104, § 509, 110 Stat. 133, 137–39. Section 230 was codified in order to give providers and users of interactive services immunity both from publishing harmful content provided by others and from taking steps to restrict access to such content. 47 U.S.C. § 230(c)(1)–(2).

230. 47 U.S.C. § 157 note (1996) (Advanced Telecommunications Incentives).

231. Internet Policy Statement, *supra* note 222, at 14,988 & n.15.

232. Preserving the Open Internet, 24 FCC Rcd. 13,064 (2009) [hereinafter 2009 NPRM]. Pursuant to the Administrative Procedure Act, the FCC promulgates notices of proposed rulemaking, allowing for notice to, and comment from, interested parties prior to the adoption of Commission rules. See 5 U.S.C. § 553(b)–(c) (2006).

should codify into rules the four principles enunciated in the Internet Policy Statement.²³³ The Commission also proposed two additional rules. The first would impose “nondiscrimination” on broadband providers, meaning that they would not be able to enter into agreements with content or applications providers to prioritize certain network traffic.²³⁴ Second, the FCC proposed a rule of “transparency,” which would require broadband providers to disclose their network management practices to users.²³⁵ The FCC also sought comment on whether it should proceed against violations of the principles contained in the Internet Policy Statement on a case-by-case basis, as opposed to enacting prophylactic rules.²³⁶

2. *Comcast Corp. v. FCC* and Its Aftermath

The FCC’s first foray into enforcing the broadband policies delineated in the Internet Policy Statement occurred, oddly enough, prior to the adoption of the Internet Policy Statement. In 2005, the Commission entered into a consent decree with Madison River Communications (Madison River).²³⁷ There, Madison River, a local telephone company that also provided broadband service, agreed to discontinue its practice of blocking access to voice over Internet Protocol (VoIP) service,²³⁸ which Madison River viewed as a competitor to its local telephone operations.²³⁹ Although the actions concerned practices involving Madison River’s broadband network, the FCC grounded the ruling not in its ancillary jurisdiction, but in the common carrier provisions of Title II of the Communications Act.²⁴⁰ Despite this, the Commission used the Madison River consent decree as a basis for its authority to adopt the Internet Policy Statement.²⁴¹

In 2007, the Associated Press discovered that Comcast was interfering with its broadband customers’ use of peer-to-peer networks, including BitTorrent.²⁴² A public interest organization filed a complaint with the FCC, asking the Commission to enforce its Internet Policy Statement and to stop Comcast from engaging in these practices.²⁴³ The FCC obliged and in August 2008 ordered Comcast to cease and desist its actions against peer-to-peer networks by the end of 2008, and to provide the FCC with details of its revised network management practices.²⁴⁴ Comcast complied with the

233. 2009 NPRM, *supra* note 232, at 13,101.

234. *Id.* at 13,104–08.

235. *Id.* at 13,108–11.

236. *Id.* at 13,067–68.

237. Madison River Comm’ns, LLC, 20 FCC Rcd. 4295 (2005) [hereinafter Madison River].

238. VoIP is an Internet-based application that allows customers to place telephone calls over broadband networks. *See* NUCHECHTERLEIN & WEISER, *supra* note 15, at 191–93.

239. Madison River, *supra* note 237, at 4296.

240. *See id.*

241. Internet Policy Statement, *supra* note 222, at 14,988 n.12.

242. Formal Complaint of Free Press & Pub. Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications, 23 FCC Rcd. 13,028, 13,031 (2008) (mem. op. and order).

243. *Id.* at 13,032.

244. *Id.* at 13,028.

FCC's requirements, but nevertheless petitioned the D.C. Circuit for review.²⁴⁵ Comcast challenged the FCC's order on three grounds: (1) the FCC lacked jurisdiction over Comcast's broadband network management practices, (2) the Commission circumvented the appropriate rulemaking requirements of the Administrative Procedure Act, and (3) the order was arbitrary and capricious.²⁴⁶ The D.C. Circuit ruled only with respect to the jurisdictional question.²⁴⁷ The court vacated the order against Comcast, holding that the FCC had failed to establish proper ancillary jurisdiction to intervene in the underlying dispute.²⁴⁸

In so deciding, the D.C. Circuit rejected a host of arguments that the FCC advanced in support of its jurisdiction. The court recognized that the continuing viability of the Cable Modem Order meant that jurisdiction could only be based on the FCC's ancillary authority.²⁴⁹ However, the court concluded that the sections of the Communications Act that the FCC had relied upon in adopting the Internet Policy Statement were inadequate to confer ancillary jurisdiction.²⁵⁰ The FCC argued that Sections 1 and 230(b) of the Communications Act established congressional policy that gave the FCC authority to regulate with respect to broadband, but the D.C. Circuit rejected this policy-based approach to the Commission's Title I authority, concluding that "statements of policy, by themselves, do not create 'statutorily mandated responsibilities.'"²⁵¹

In addition to rejecting the FCC's substantive approach to ancillary jurisdiction, the court dealt the Commission a significant procedural blow. The FCC argued that the Supreme Court's dicta in *Brand X*, which had seemingly confirmed the FCC's ancillary jurisdiction over broadband,²⁵² should be dispositive of its authority to issue the Comcast Order. The D.C. Circuit rejected this argument, but went beyond a finding that *Brand X* was not controlling.²⁵³ In distilling the scope of the FCC's ancillary authority through an analysis of the Supreme Court rulings in *Southwestern Cable*, *Midwest I*, and *Midwest II*,²⁵⁴ the D.C. Circuit determined that those cases stood for the proposition that each assertion of Title I power needed to be justified separately.²⁵⁵ Accordingly, even if the *Brand X* dicta controlled with respect to the particular network management practices at issue in *Brand X*, it was not subject to any weight in the proceeding against Comcast because "the Commission must defend its exercise of ancillary authority on a case-by-case basis."²⁵⁶

245. *Comcast Corp. v. FCC*, 600 F.3d 642, 645 (D.C. Cir. 2010).

246. *Id.*

247. *Id.*

248. *Id.* at 661.

249. *Id.* at 645–46.

250. *Id.* at 644.

251. *Id.* (quoting *Am. Library Ass'n v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005)).

252. *See supra* note 216 and accompanying text.

253. *Comcast*, 600 F.3d at 649–51.

254. *See supra* notes 185–97.

255. *Comcast*, 600 F.3d at 651.

256. *Id.*

The *Comcast* decision brought an abrupt halt to the FCC's new regulatory regime for the Internet, with the Commission itself acknowledging that the ruling cast doubt upon its ability to further enforce the Internet Policy Statement.²⁵⁷ Although it recognized that the *Comcast* decision invalidated the particular ancillary jurisdiction approach it had attempted to exercise, the FCC asserted that the "[D.C. Circuit] in no way disagreed with the importance of preserving a free and open Internet; nor did it close the door to other methods for achieving this important end."²⁵⁸ For its part, Comcast claimed that it fully supported the principles espoused in the Internet Policy Statement, and that its petition before the D.C. Circuit was intended merely to clear its name.²⁵⁹

On May 6, 2010, one month after the *Comcast* ruling, FCC Chairman Julius Genachowski announced the Commission's intent to reassert its jurisdiction over broadband, outlining three potential avenues for the Commission to proceed, including the possibility of reclassifying broadband service as a telecommunications service under Title II.²⁶⁰ The FCC's goal, said Genachowski, was to determine "the best method for restoring the shared understanding of FCC authority that existed before the *Comcast* decision."²⁶¹ On June 17, 2010, the FCC adopted a formal notice of inquiry that sought public comment regarding the broadband reclassification question.²⁶² However, on December 21, 2010, the Commission officially marked a departure from broadband reclassification, and issued a report and order (Net Neutrality Order) that established formal rules governing broadband provider practices.²⁶³ The Net Neutrality Order codified three "prophylactic"²⁶⁴ rules governing broadband provider activity that were culled from the rules outlined in the 2009 NPRM²⁶⁵: (1) a "transparency" rule requiring broadband providers to disclose their network management practices; (2) a ban on the blocking of legal content, applications, and services by fixed (i.e., non-wireless) providers; and (3) a modified version of the non-discrimination policy proposed in the 2009 NPRM, also applicable only to fixed broadband providers.²⁶⁶ The last two rules are subject to exceptions for broadband providers' "reasonable network management," the determination of which will be subject to case-by-case adjudications.²⁶⁷ The non-discrimination rule adopted in the Net

257. See Genachowski, *supra* note 9, at 3–4.

258. Advisory, Fed. Comm'n's Comm'n, FCC Statement on Comcast v. FCC, (Apr. 6, 2010), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297355A1.pdf.

259. Press Release, Comcast Corp., Comcast Statement on U.S. Court of Appeals Decision on Comcast v. FCC (Apr. 6, 2010), <http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=984>.

260. See Genachowski, *supra* note 9, at 3–6.

261. *Id.* at 6.

262. Framework for Broadband Internet Serv., 25 FCC Rcd. 7866 (2010) (notice of inquiry).

263. Net Neutrality Order, *supra* note 176.

264. *Id.* at 3.

265. See *supra* notes 232–36 and accompanying text.

266. Net Neutrality Order, *supra* note 176, at 2.

267. *Id.* at 24, 82.

Neutrality Order diverged from the rule proposed in the 2009 NPRM in that, instead of a flat ban on discriminatory practices, the FCC's latest rule bars only "unreasonable discrimination."²⁶⁸ However, although the FCC did not affirmatively rule out commercial arrangements between broadband providers and online services to prioritize particular network traffic—agreements that lie at the core of concerns regarding Comcast's ability to leverage NBCU content through broadband services such as TV Everywhere²⁶⁹—the Commission made it clear that these agreements would be subject to heightened scrutiny, and likely disallowed.²⁷⁰

In adopting the Net Neutrality Order, the FCC again asserted its ancillary authority to promulgate the rules, justifying its jurisdiction over broadband as a necessary exercise of its Title I power to effectuate a host of provisions in Titles II, III, and VI of the Communications Act, as well as on the policy-based authority in Section 230(b) of the Communications Act and Section 706(a) of the 1996 Act that it had used to promulgate the Internet Policy Statement.²⁷¹ As to enforcement, the FCC adopted mechanisms for informal and formal complaints by "any person," in addition to a complaint process that could be initiated by the Commission.²⁷²

The Net Neutrality Order, although adopted by a majority of the FCC, certainly is not the final statement on the question of the FCC's authority to regulate broadband. Dissenting Commissioner Robert McDowell predicted that courts would overturn the Net Neutrality Order on jurisdictional grounds as the D.C. Circuit had in *Comcast*.²⁷³ Indeed, shortly after the rules were announced, Verizon challenged the FCC's authority to promulgate them, seeking appeal before the same three judges in the D.C. Circuit that had ruled against the Commission in *Comcast*.²⁷⁴ The D.C. Circuit dismissed the Verizon lawsuit in April 2011 because the company had appealed prior to publication of the rules in the Federal Register, but Verizon expressed its intent to re-file once such publication occurs.²⁷⁵

Shortly after the FCC adopted the new rules, congressional Republicans promised to introduce resolutions that would curtail the FCC's ability to implement the Net Neutrality Order.²⁷⁶ The first attack along these lines occurred in February 2011, when the House of Representatives voted to

268. *Id.* at 24.

269. *See supra* notes 144–47 and accompanying text.

270. Net Neutrality Order, *supra* note 176, at 43–44.

271. *Id.* at 62–77, 87; *see also supra* note 230 and accompanying text.

272. Net Neutrality Order, *supra* note 176, at 82–85.

273. *Id.* at 148–50 (McDowell, Comm'r, dissenting).

274. Juliana Gruenwald, *Verizon Files Appeal of FCC Net Neutrality Order*, NAT'L J. TECH DAILY DOSE (Jan. 20, 2011, 4:17 PM), <http://techdailydose.nationaljournal.com/2011/01/verizon-files-appeal-of-fcc-ne.php>; Ryan Singel, *Verizon Files Suit Against FCC Net Neutrality Rules*, WIRED EPICENTER (Jan. 20, 2011, 5:26 PM), <http://www.wired.com/epicenter/2011/01/verizon-sues-fcc>.

275. *See* Amy Schatz, *Internet-Rule Suits Rejected by Appeals Court*, WALL ST. J., Apr. 5, 2011, at B11.

276. *See* David Hatch et al., *FCC's Split Vote on Network-Neutrality Rules Only Inflames Debate*, NAT'L J. (Dec. 21, 2010, 7:00 PM), <http://www.nationaljournal.com/fcc-s-split-vote-on-network-neutrality-rules-only-inflames-debate-20101221>.

defund any FCC allotments that would be utilized to implement the provisions of the Net Neutrality Order,²⁷⁷ a resolution that the Senate subsequently rejected.²⁷⁸ In March 2011, the House Subcommittee on Communications and Technology voted a bill up to the full House Energy and Commerce Committee that would invalidate the Net Neutrality Order,²⁷⁹ a resolution that the full House passed a month later.²⁸⁰ The bill faces considerable hurdles, as it would need to be approved by the Senate and President Barack Obama before the Net Neutrality Order could be overturned.²⁸¹ Nevertheless, even if these actions only amount to political posturing, they illustrate that the Net Neutrality Order is merely the most recent point of contention in the expanding argument over the proper method of oversight of broadband practices.

B. Antitrust Oversight of Telecommunications and Media Industries

Although their interaction with broadband has not been as substantial as the FCC's, the DOJ and the FTC have a considerable history of overseeing competitive issues in the telecommunications and media sectors. These agencies, which conduct reviews on a case-by-case basis and focus almost entirely on the competitive effects of market practices,²⁸² have been proffered as the principal alternatives to the FCC in supervising broadband-related issues.²⁸³ This section outlines the relevant history of the DOJ and the FTC with respect to broadband and telecommunications, and discusses the jurisdictional authority issues facing an antitrust broadband video oversight regime.

1. Department of Justice

a. AT&T Consent Decree

The most prominent telecommunications oversight action of the past half-century was the consent decree entered into between the DOJ and AT&T, which resulted in the divestiture of local telephone monopolies—

277. Cecilia Kang, *House Votes To Stop FCC Funding for Net Neutrality*, WASH. POST POST TECH. (Feb. 17, 2011, 7:05 PM), http://voices.washingtonpost.com/posttech/2011/02/house_votes_to_stop_funds_for.html.

278. John Eggerton, *Senate Rejects House CR with FCC, CPB Cuts*, BROAD. & CABLE (Mar. 9, 2011, 6:32 PM), http://www.broadcastingcable.com/article/465034-Senate_Rejects_House_CR_with_FCC_CPB_Cuts.php.

279. Cecilia Kang, *House Panel Votes To Invalidate Net Neutrality Rules*, WASH. POST POST TECH. (Mar. 9, 2011, 5:49 PM), http://voices.washingtonpost.com/posttech/2011/03/house_panel_votes_to_invalidat.html.

280. Cecilia Kang, *House Approves Measure To Overturn FCC Net Neutrality Rules*, WASH. POST POST TECH. (Apr. 08, 2011, 5:15 PM), http://www.washingtonpost.com/blogs/post-tech/post/house-approves-measure-to-overturn-fcc-net-neutrality-rules/2011/04/08/AFBQCc3C_blog.html.

281. *Id.*

282. See James R. Weiss & Martin L. Stern, *Serving Two Masters: The Dual Jurisdiction of the FCC and the Justice Department over Telecommunications Transactions*, 6 COMMLAW CONSPECTUS 195, 195, 197 (1998).

283. See *supra* note 171 and accompanying text.

called regional Bell operating companies (RBOCs)—from the corporate AT&T parent,²⁸⁴ a case in which antitrust oversight took precedence over continued FCC regulation. There, the DOJ convinced Judge Harold Greene that the FCC was incapable of effective regulatory enforcement over AT&T's monopoly in local and long-distance telephone service.²⁸⁵ In addition to the divestiture of AT&T's local telephone business, the consent decree placed line-of-business restrictions upon the newly created RBOCs. First, the RBOCs were prohibited from engaging in telecommunications equipment manufacturing, addressing concerns that the RBOCs could leverage equipment prices to boost profits where they could not have done so under local telephone rate regulations.²⁸⁶ Another important restriction in the decree precluded RBOCs from entering the long-distance market unless they convinced the DOJ that doing so would not be an anticompetitive act.²⁸⁷

After the consent decree took effect in 1984, Judge Greene presided over the DOJ's enforcement of the decree until passage of the 1996 Act.²⁸⁸ Indeed, one purpose of the 1996 Act, which directly abolished the AT&T consent decree,²⁸⁹ was to eliminate the control that Judge Greene held over the telecommunications industry.²⁹⁰

b. Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP and the Future of Antitrust Oversight of Telecommunications and Media Industries

While the DOJ dominated the regulation of the telecommunications industry in the years following the AT&T divestiture, the continued reliance on antitrust authorities to administer competition policy in this sector has been called into question both by provisions of the 1996 Act and by the Supreme Court's decision in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*.²⁹¹ As noted above, the 1996 Act specifically eliminated further enforcement of the AT&T consent decree, replacing this with a series of competition policies subject to FCC enforcement.²⁹² In addition, the 1996 Act eliminated many of the line-of-business restrictions that had been imposed under the consent decree, including RBOC entry into

284. See *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

285. *Id.* at 168; see also NUECHTERLEIN & WEISER, *supra* note 15, at 417.

286. NUECHTERLEIN & WEISER, *supra* note 15, at 59.

287. *Id.* at 62.

288. *Id.* at 417.

289. Pub. L. No. 104-104, § 601(a)(1), 110 Stat. 56, 143 (1996) (codified as amended at 47 U.S.C. § 152 note (2006)).

290. James B. Speta, *FCC Authority To Regulate the Internet: Creating It and Limiting It*, 35 LOY. U. CHI. L.J. 15, 28 & n.68 (2003).

291. 540 U.S. 398 (2004).

292. See NUECHTERLEIN & WEISER, *supra* note 15, at 417.

the long distance and equipment manufacturing business.²⁹³ The regulatory provisions in the 1996 Act specifically directed the FCC to oversee many of the antitrust-like concerns that had been handled by the DOJ and Judge Greene during the dozen years of enforcement of the AT&T consent decree.²⁹⁴ Although these provisions suggest that Congress placed oversight of telecommunications firmly in the hands of the FCC, the 1996 Act also includes an antitrust savings clause (Savings Clause) that, aside from the elimination of consent decrees, purports to maintain the status quo with respect to antitrust law.²⁹⁵

In *Trinko*, the Supreme Court cast further doubt upon the continued reliance on antitrust law to enforce competition in the telecommunications industry. There, AT&T customers within Verizon's monopolized New York City local telephone market brought an antitrust action against Verizon under Section 2 of the Sherman Antitrust Act, alleging that Verizon had failed to properly connect its network to competitive entrants, including AT&T.²⁹⁶ Prior to this private antitrust action, Verizon had entered into a consent decree with the FCC that forced Verizon to better conform to requirements that it interconnect its wireline facilities to competitive local operators in exchange for the right to enter the long distance business.²⁹⁷ First, the Court concluded that the alleged activity did not raise a claim under section 2.²⁹⁸ The Court proceeded to determine that antitrust remedies generally would be limited in the situation presented because, where there exists "a regulatory structure designed to deter and remedy anticompetitive harm," then "the additional benefit to competition provided by antitrust enforcement will tend to be small."²⁹⁹ The Court found that the regulatory scheme enacted by the 1996 Act was one that likely would preclude the existence of any separate antitrust harm.³⁰⁰

The fallout from *Trinko* remains uncertain, as there are various interpretations of the Court's seeming rejection of antitrust intervention into regulated industries.³⁰¹ But at the minimum, it appears that *Trinko* reflected the continued rise of FCC enforcement over telecommunications

293. See Joseph D. Kearney, *From the Fall of the Bell System to the Telecommunications Act: Regulation of Telecommunications Under Judge Greene*, 50 HASTINGS L.J. 1395, 1457-58 (1999).

294. See Nuechterlein, *supra* note 171, at 43-44.

295. 47 U.S.C. § 152 note (2006) (Applicability of Consent Decrees and Other Law) ("[N]othing in this Act . . . shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.").

296. *Trinko*, 540 U.S. at 402-03, 405.

297. *Id.* at 403.

298. *Id.* at 410-11.

299. *Id.* at 412; see also NUECHTERLEIN & WEISER, *supra* note 15, at 417 (stating that the *Trinko* decision "concluded that antitrust courts are generally inappropriate forums for the ongoing management of telecommunications competition policy, at least so long as the industry remains subject to pervasive regulation").

300. *Trinko*, 540 U.S. at 412.

301. See Philip J. Weiser, *The Next Frontier for Network Neutrality*, 60 ADMIN. L. REV. 273, 319 (2008) (describing possible narrow and broad readings of the Court's *Trinko* holding).

earlier advanced by the 1996 Act.³⁰² However, despite the 1996 Act and the *Trinko* decision, it is not certain that FCC regulation would supersede antitrust jurisdiction over broadband. The *Trinko* Court specifically characterized antitrust enforcement as unnecessary in regulated industries that have defined structures for preventing competitive harm.³⁰³ Because the status of broadband as a regulated industry remains a part of the central debate of its governance following *Comcast*, even a broad reading of *Trinko* may not foreclose antitrust oversight of broadband practices.³⁰⁴

2. Federal Trade Commission

The FTC's engagement with broadband has been more direct than the DOJ's. After a yearlong inquiry into the broadband marketplace, the FTC released a report (FTC Staff Report) in 2007, addressing the need for the agency to enforce competition policy in the sector.³⁰⁵ The FTC Staff Report adopts a deregulatory approach to broadband, noting that the industry is "young and dynamic" and that the FTC had not identified any instances of market failure in the broadband market.³⁰⁶ Specifically, the FTC Staff Report warned against hasty regulatory intervention in an effort to prevent prospective harms.³⁰⁷ Despite concluding that action was unnecessary—and indicating that regulatory action might indeed have adverse effects on consumers—the FTC indicated that it would continue to work to promote broadband access.³⁰⁸

The FTC, like the FCC and the DOJ, also lacks clearly defined jurisdiction over broadband practices. Under the Federal Trade Commission Act (FTC Act), the FTC is precluded from enforcing unfair competition laws against "common carriers."³⁰⁹ As a result, the FTC has not played a significant role in federal oversight of the telecommunications industry.³¹⁰ However, as discussed above, the *Brand X* Court affirmed the FCC's decision to classify broadband as an information service under the Communications Act.³¹¹ In the FTC Staff Report, the FTC grounded its

302. See, e.g., NUECHTERLEIN & WEISER, *supra* note 15, at 418–19 (suggesting that "specialized regulatory agencies, led by the FCC, will play the dominant role in setting telecommunications competition policy for the foreseeable future"); Nuechterlein, *supra* note 171, at 44 (noting that *Trinko*, along with a subsequent Supreme Court decision, suggest that "as prescriptive regulation of a field waxes, antitrust enforcement must wane").

303. *Trinko*, 540 U.S. at 412.

304. Nuechterlein, *supra* note 171, at 44 & n.62 (suggesting that the "basis for caution in the judicial application of antitrust law would be absent if the FCC were deemed to lack jurisdiction over a given regulatory area").

305. FED. TRADE COMM'N, BROADBAND CONNECTIVITY COMPETITION POLICY (2007) [hereinafter FTC STAFF REPORT], available at <http://www.ftc.gov/reports/broadband/v070000report.pdf>.

306. *Id.* at 11.

307. *Id.*

308. *Id.* at 12.

309. 15 U.S.C. § 45(a)(2) (2006); see also James B. Speta, *The Shaky Foundations of the Regulated Internet*, 8 J. ON TELECOMM. & HIGH TECH. L. 101, 127 (2010).

310. See Nuechterlein, *supra* note 171, at 50.

311. See *supra* notes 210–16 and accompanying text.

jurisdiction over broadband in the *Brand X* ruling, arguing that, as broadband services are not common carriers, the exemption in the FTC Act does not apply.³¹² The question as to whether the FTC possesses jurisdiction over broadband under the FTC Act is therefore uncertain.³¹³

C. Dual Agency Review of Telecommunications Mergers

The passage of the 1996 Act ushered in a wave of telecommunications mergers.³¹⁴ Comcast's acquisition of NBCU discussed above is just the latest in a decade-long trend of vast consolidation in the telecommunications and media industries.³¹⁵ In almost all instances, both the antitrust authorities—either the DOJ or the FTC—and the FCC concurrently review major mergers in this sector. As the discussion above illustrates, the FCC, DOJ, and FTC each face significant jurisdictional questions in connection with continued oversight of broadband. However, over the past decade, these agencies have made a number of determinations with respect to telecommunications and media mergers that elucidate their respective approach to broadband practices.

1. Antitrust Review Under the Hart-Scott-Rodino Antitrust Improvements Act

The DOJ and the FTC principally review mergers under Section 7 of the Clayton Act,³¹⁶ which bars any merger or acquisition whose consummation may be “substantially to lessen competition, or to tend to create a monopoly.”³¹⁷ Under the Clayton Act, the DOJ and the FTC possess concurrent jurisdiction over mergers and acquisitions.³¹⁸ However, as discussed above, the FTC does not have jurisdiction over common carriers.³¹⁹ Accordingly, the DOJ conducts antitrust review of the majority of mergers in the telecommunications sector.³²⁰ In instances where a

312. FTC STAFF REPORT, *supra* note 305, at 38.

313. See Nuechterlein, *supra* note 171, at 50–51 (noting that *Brand X*'s determination that the FCC may classify broadband as an “information service” may not provide a basis for the Federal Trade Commission's (FTC) jurisdiction over broadband, because the FTC may not be able to rely upon an interpretation of a provision in the Communications Act to define a term in the Federal Trade Commission Act).

314. See Weiss & Stern, *supra* note 282, at 201–05 (listing major telecommunications mergers in the several years following passage of the 1996 Act); see also David A. Curran, *Rethinking Federal Review of Telecommunications Mergers*, 28 OHIO N.U. L. REV. 747, 748 & n.10 (2002).

315. See *supra* Part I.D.1.

316. 15 U.S.C. § 18 (2006); see also Donald J. Russell & Sherri Lynn Wolson, *Dual Antitrust Review of Telecommunications Mergers by the Department of Justice and the Federal Communications Commission*, 11 GEO. MASON L. REV. 143, 144 (2002) (noting that the Department of Justice (DOJ) may review mergers under the Sherman Act in rare instances).

317. 15 U.S.C. § 18.

318. See *id.*; see also Russell & Wolson, *supra* note 316, at 143 n.1.

319. See 15 U.S.C. § 21(a); see also *supra* note 309 and accompanying text.

320. See Russell & Wolson, *supra* note 316, at 143 n.1.

common carrier is not involved, the DOJ and the FTC conduct a clearance process to determine which agency will oversee the review.³²¹

The manner in which the antitrust authorities handle merger review changed with the passage of the Hart-Scott-Rodino Antitrust Improvements Act of 1976³²² (HSR Act). The HSR Act establishes a premerger notification process, requiring the merging parties to serve notice upon the reviewing agency and await review prior to consummating the merger.³²³ The antitrust authorities assess the merits of these mergers pursuant to jointly crafted Horizontal Merger Guidelines, which were updated in 2010.³²⁴ After review, if the antitrust agency believes that the proposed merger will result in anticompetitive activity, it bears the burden of establishing a section 7 violation before a federal district court.³²⁵ Merger reviews are often settled through consent decrees whereby the merging parties agree to conditions to the merger in order to gain antitrust approval.³²⁶ Under DOJ guidelines, where the agency extracts such conditions from merging parties, “[t]here must be a significant nexus between the proposed transaction, the nature of the competitive harm, and the proposed remedial provisions.”³²⁷

2. FCC Review Under the Communications Act

Under the Clayton Act, the FCC possesses concurrent review authority of telecommunications mergers with the antitrust authorities.³²⁸ However, the FCC generally reviews mergers under the Communications Act,³²⁹ an authority that stems from the transfer of common carrier or broadcast licenses as part of the merger, which the FCC must find are transferred in the “public interest.”³³⁰ As a result of this requirement, the merging parties have the burden of convincing the FCC that the merger should be approved.³³¹ FCC merger reviews often result in “voluntary” conditions being imposed on the merging parties, a result that is shielded from judicial review.³³²

321. *See id.*

322. Pub. L. No. 94-435, 90 Stat. 1383, 1390 (codified at 15 U.S.C. § 18a (2006)).

323. 15 U.S.C. § 18a(a)–(b).

324. U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES, (Aug. 19, 2010), <http://www.justice.gov/atr/public/guidelines/hmg-2010.html>.

325. *See* Russell & Wolson, *supra* note 316, at 147; *see also* United States v. Citizens & S. Nat’l Bank, 422 U.S. 86, 120 (1975) (applying requirement that government make out prima facie case under Section 7 of the Clayton Act).

326. *See* Russell & Wolson, *supra* note 316, at 147.

327. ANTITRUST DIV., U.S. DEP’T OF JUSTICE, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 2 (2004), <http://www.usdoj.gov/atr/public/guidelines/205108.pdf>.

328. 15 U.S.C. § 21(a); *see also* Russell & Wolson, *supra* note 316, at 144–45.

329. *See* Weiss & Stern, *supra* note 282, at 198 (suggesting that the FCC “never uses the Clayton Act as its basis for proceeding” in merger reviews).

330. *See* 47 U.S.C. § 214(a) (requiring that the Commission certify that common carrier lines are licensed or acquired for “the present or future public convenience and necessity”); *id.* § 310(d) (2006) (requiring that the FCC find that transfer of radio licenses will serve the “public interest, convenience, and necessity”).

331. *See* Weiss & Stern, *supra* note 282, at 197–98 & n.24.

332. *See* Russell & Wolson, *supra* note 316, at 149.

There has been considerable criticism leveled at the FCC in connection with its merger review process.³³³ Typically, this criticism focuses on the length of time that the FCC takes to conduct its reviews, the extent to which the conditions it places on the parties are unrelated to the merger, and the lack of clearly defined review standards.³³⁴ However, despite attempts for significant reform or repeal of the FCC's authority in this regard, the Commission continues to assert itself in this arena.³³⁵

3. Recent Telecommunications and Media Mergers

Several of the most significant mergers in the past decade have reformulated portions of the former AT&T monopoly and, despite stiff public opposition, have been approved both by the DOJ and the FCC.³³⁶ In 2005, SBC Communications, a RBOC created as part of the AT&T divestiture, acquired its former corporate parent, AT&T.³³⁷ In a similar acquisition that same year, Verizon, another RBOC, merged with MCI, formerly a major competitor to AT&T in the long distance market.³³⁸ In its review under the HSR Act, the DOJ, concerned that the merged entities would unduly consolidate specialized broadband services, forced both merging groups to divest specific fiber optic channels to competitors.³³⁹ The FCC, meanwhile, forced the merging companies to agree to adhere to the terms of the Internet Policy Statement following the merger.³⁴⁰ When the newly merged AT&T acquired RBOC BellSouth in 2007, the DOJ imposed no conditions on the merger,³⁴¹ while the FCC again required, among other things, that the merged entity abide by the Internet Policy Statement for thirty months following the merger.³⁴²

In addition to these telecommunications mergers, several reviews of mergers between media firms demonstrate how the various agencies have approached the competitive ramifications of these alignments. In a 1996 merger involving Time Warner and Turner Broadcasting, the FTC forced Time Warner to carry alternative news channels on its cable systems, in

333. See generally Rachel E. Barkow & Peter W. Huber, *A Tale of Two Agencies: A Comparative Analysis of FCC and DOJ Review of Telecommunications Mergers*, 2000 U. CHI. LEGAL F. 29.

334. See Philip J. Weiser, *Reexamining the Legacy of Dual Regulation: Reforming Dual Merger Review by the DOJ and the FCC*, 61 FED. COMM. L.J. 167, 168–69 (2008) (summarizing critiques of FCC merger review).

335. See Harold Feld, *The Need for FCC Merger Review*, 18 COMM. LAW. 20, 20 (2000) (discussing instances where Congress considered eliminating, but ultimately left intact, FCC merger review authority).

336. See NUCHECHTERLEIN & WEISER, *supra* note 15, at xvi.

337. SBC Commc'ns Inc. & AT&T Corp. Applications for Approval of Transfer of Control, 20 FCC Rcd. 18,290 (2005) [hereinafter SBC-AT&T Order] (mem. op. and order).

338. Verizon Commc'ns Inc. & MCI, Inc., Applications for Approval of Transfer of Control, 20 FCC Rcd. 18,433 (2005) [hereinafter Verizon-MCI Order] (mem. op. and order).

339. See *United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1, 6–7 (D.D.C. 2007).

340. See SBC-AT&T Order, *supra* note 337, at 18,368, 18,414; Verizon-MCI Order, *supra* note 338, at 18,509, 18,561; see also *supra* note 222 and accompanying text.

341. See NUCHECHTERLEIN & WEISER, *supra* note 15, at xvii & n.2.

342. AT&T Inc. & BellSouth Corp. Application for Transfer of Control, 22 FCC Rcd. 5662, 5814–16 (2007) (mem. op. and order).

addition to Turner-owned CNN.³⁴³ The FTC also reviewed the 1999 merger between AOL and Time Warner and, as an approval condition, required the merged entity to provide open access to its cable service facilities in order to accommodate rival broadband providers.³⁴⁴ The FCC, on the other hand, required AOL to allow competitors to interconnect to its dominant instant messenger service.³⁴⁵ The FCC's requirement has been criticized as an example of the Commission's failure to engage in appropriate decision making with respect to its merger review authority.³⁴⁶ Perhaps confirming this criticism, the FCC decided to repeal the instant messenger interconnection requirement two years after approving the AOL-Time Warner merger.³⁴⁷

The Comcast-NBCU merger discussed in Part I.D.1 represents the latest in this line of dual FCC and antitrust reviews. In a coordinated effort, the FCC and the DOJ imposed conditions upon the merger that aggressively address potential conflicts in the market for broadband video distribution.³⁴⁸ The conditions imposed give validation to the rise of broadband video distributors, as online distributors will have the same ability to bargain for bundled packages of NBCU content from Comcast as will traditional MVPDs.³⁴⁹ Comcast will be required to offer NBCU content to online distributors who enter into comparable content agreements with NBCU's content producer peers.³⁵⁰ Comcast must take measures to ensure that NBCU content is available online,³⁵¹ and must also agree to the nondiscrimination rule contained in the Net Neutrality Order.³⁵² Notably, Comcast agreed to adhere to many of the conditions for seven years.³⁵³

343. See Time Warner Inc., FTC File No. 961-0004, at 16–17 (Fed. Trade Comm'n Sept. 12, 1996) (decision and order), <http://www.ftc.gov/os/1996/09/twconsnt.pdf>.

344. See Am. Online, Inc. & Time Warner Inc., FTC Docket No. C-3989, at 11 (Fed. Trade Comm'n Apr. 17, 2001) (decision and order), <http://www.ftc.gov/os/2001/04/aoltwdo.pdf>; NUECHTERLEIN & WEISER, *supra* note 15, at 160–62.

345. Applications for Consent to the Transfer of Control of Licenses & Section 214 Authorizations by Time Warner Inc. & Am. Online, Inc., Transferors, to AOL Time Warner Inc., Transferee, 16 FCC Rcd. 6547, 6610–11 (2001) (mem. op. and order).

346. See Daniel L. Brenner, *Creating Effective Broadband Network Regulation*, 62 FED. COMM. L.J. 13, 35 (2010) (criticizing the FCC's failure to anticipate the development of competitive instant messaging technology); Philip J. Weiser, *Institutional Design, FCC Reform, and the Hidden Side of the Administrative State*, 61 ADMIN. L. REV. 675, 708–09 (2009) (criticizing the FCC for the lack of nexus between the imposed instant messenger obligation and the merger, and for the Commission's failure to adequately delineate its jurisdiction over instant messaging services).

347. Applications for Consent to the Transfer of Control of Licenses & Section 214 Authorizations by Time Warner Inc. and Am. Online, Inc., Transferors, to AOL Time Warner Inc., Transferee, 18 FCC Rcd. 16,835 (2003).

348. Press Release, *supra* note 151 (quoting the head of the DOJ Antitrust Division, Assistant Attorney General Christine Varney, as stating that the DOJ “worked in close cooperation and unprecedented coordination” with the FCC on the merger review).

349. *Id.* The offline corollary to this requirement, the FCC's “program access rules,” is discussed *infra* in Part III.B.3.

350. News, *supra* note 150.

351. *Id.*

352. *Id.*

353. See Stelter & Arango, *supra* note 141 (noting that the seven-year duration is “an unusually long period of time” for merger conditions).

While the conditions are expressly designed to promote the development of the broadband video space, there is some question as to whether having online distributors bargain as MVPDs will force the online space into an MVPD-like business model.³⁵⁴

III. THE FCC AND ANTITRUST OPTIONS: SUBSTANTIVE AND PROCEDURAL DEBATES

As Part II suggests, the assessment of any regulatory regime for the distribution of video content over broadband must begin with the question of jurisdiction. Each of the agencies proposed as potential regulators in this area—the FCC, the DOJ, and the FTC—are presented with a number of hurdles in connection with their authority to oversee this developing market. But, beyond the question of authority, the jurisdictional muddle following *Comcast* has reinvigorated the debate over whether broadband is best addressed through FCC regulation or antitrust oversight.³⁵⁵ These debates center on the substantive and procedural approaches of these agencies in an effort to assess the relative efficacy of possible oversight regimes.

This part outlines the ways in which these two oversight methodologies are likely to approach the market for broadband video distribution, with particular emphasis on the concerns raised in connection with the recent transactions discussed in Part I.D. Part III.A discusses the debate over whether vertical consolidation concerns should play a role in a broadband video oversight regime. Part III.B discusses debates over non-competition concerns in broadband markets, and the extent to which the FCC and antitrust authorities are equipped to address these concerns. Part III.C addresses procedural paradigms of the FCC and antitrust authorities that likely would impact their effectiveness in addressing broadband video issues.

A. Vertical Leveraging, Market Power, and the Incentive To Discriminate

In its Net Neutrality Order, one of the principal reasons the FCC gave for establishing prophylactic rules against the discrimination and blocking of broadband traffic was the incentive and ability that broadband providers possess to engage in these practices.³⁵⁶ In doing so, the FCC expressly addressed the conflicts that exist between online distributors such as Netflix and the MVPD/broadband providers such as Comcast that serve as thoroughfares for Netflix video traffic.³⁵⁷ The Commission concluded that the rise of services such as Netflix, Hulu, and others will put pressure on broadband providers to act in anticompetitive ways against these services in

354. See Tessler, *supra* note 153 (noting an analyst's opinion that the conditions "shackle[] these new companies to traditional business models and inhibit[] innovation").

355. See *supra* note 171 and accompanying text.

356. See Net Neutrality Order, *supra* note 176, at 11.

357. *Id.* at 12–13 (arguing that "broadband providers have incentives to interfere with the operation of third-party Internet-based services that compete with the providers' revenue-generating . . . pay-television services"); see also *supra* note 84 and accompanying text.

order to make them less attractive to consumers.³⁵⁸ In adopting the blocking and non-discrimination rule, the FCC sought to preemptively curtail these acts, an effort that the Commission found necessary to promote competition and innovation in broadband.³⁵⁹

From the standpoint of substantive necessity, the FCC's assumptions regarding broadband provider incentives and their competitive impact run counter to developments in modern antitrust theory, which suggests that exclusive vertical relationships are not necessarily harmful, and that they often can lead to efficient, procompetitive results.³⁶⁰ In contrast to the FCC's asserted need for ex ante action to guarantee competition in the market for broadband video distribution, modern antitrust analysis approaches vertical arrangements from the presumption that they are efficient.³⁶¹ The starting point for an assessment of how antitrust would view exclusionary, vertical relationships in broadband video markets is the architecture of the Internet, which can be broken into four distinct layers: (1) content; (2) applications; (3) the logical layer, comprised of the standard TCP/IP protocol used to transfer data over Internet networks; and (4) the physical layer, composed of the transport facilities used to send data through the Internet.³⁶² A key feature of this architecture is that the logical layer is not controlled by anyone, and is open to content and application developers without restriction.³⁶³ As a result, although broadband providers exercise a high degree of control over the physical layer, because the physical layer and the applications layer are distinct, application developers are free to create various programs, such as Netflix and Hulu, that use the standardized logic of the Internet to deliver content to consumers without authorization or payment to broadband providers.³⁶⁴

Although it would appear at first that broadband providers would be chagrined by their inability to reap rewards from the transfer of unaffiliated content over their networks, modern antitrust analysis suggests that broadband providers are instead incentivized to encourage a robust marketplace for applications and content because this increases the value of the platform, allowing broadband providers to charge consumers a higher

358. Net Neutrality Order, *supra* note 176, at 13–14.

359. *Id.* at 45–46.

360. See, e.g., Christopher S. Yoo, *What Can Antitrust Contribute to the Network Neutrality Debate?*, 1 INT'L J. COMM. 493, 504–06 (2007).

361. Joseph Farrell & Philip J. Weiser, *Modularity, Vertical Integration, and Open Access Policies: Towards a Convergence of Antitrust and Regulation in the Internet Age*, 17 HARV. J.L. & TECH. 85, 87 (2003) (“[C]urrent antitrust doctrine still generally presumes that vertical agreements, vertical extension, and vertical mergers are unobjectionable unless a fact-intensive investigation shows otherwise.”).

362. *Id.* at 90–91.

363. See *id.* (describing the impact of TCP/IP openness).

364. *Id.*; see also *Keeping the Internet Neutral?: Tim Wu and Christopher Yoo Debate*, 59 FED. COMM. L.J. 575, 581–82 (2007) (relaying comments from network neutrality proponent Tim Wu that the layered architecture promotes market entry by content and application providers).

price for broadband access.³⁶⁵ In addition, this analysis contends that platform providers are incentivized to make the most efficient decision as to whether to join the applications market—a decision being made by Comcast and other MVPDs with the TV Everywhere model³⁶⁶—and will do so only if it increases the overall value of the combined application and platform.³⁶⁷ Generally, a broadband provider is therefore encouraged to provide support for the unaffiliated applications running over its physical layer, so that it can maximize the value of its own platform.³⁶⁸ The presumption supported by this reasoning is that, where a platform monopolist enters into the applications market, or if it engages in exclusionary behavior within the applications market, it has done so only because it is efficient and likely to benefit consumers.³⁶⁹

This presumption lends support to those favoring a hands-off approach to the rising conflict between broadband providers and online distributors, insofar as the broadband provider will lack the incentive to inefficiently block or degrade applications because it would result in a decrease in value to consumers of its platform product.³⁷⁰ However, there are several pertinent exceptions to the above analysis.³⁷¹ The most critical for the broadband video marketplace is that, where the unaffiliated product at the applications layer threatens a core business of the platform provider, the platform provider might be incentivized to act inefficiently to suppress those applications.³⁷² This is precisely the circumstance present in the broadband video marketplace—as they grow, broadband video distributors are becoming direct threats to broadband providers' core MVPD business.³⁷³

Despite the likelihood that many broadband providers possess an underlying incentive to engage in discriminatory conduct toward online video distributors, that fact does not necessarily end the debate as to the need for the FCC's prophylactic remedy, because incentive alone is

365. Farrell & Weiser, *supra* note 361, at 103 (providing models as to how a platform provider would benefit from unaffiliated application development).

366. *See supra* Part I.C.5.

367. Farrell & Weiser, *supra* note 361, at 103 (demonstrating how a platform provider's entry into the application market would be efficient and value-enhancing).

368. *Id.* at 104.

369. *See id.* at 104–05.

370. *See* Nuechterlein, *supra* note 171, at 41 (suggesting that, generally, platform providers will not favor affiliated content in ways that harm consumers).

371. *See* Farrell & Weiser, *supra* note 361, at 105 (listing eight exceptions to the presumption that platform providers will enter the applications market only if it is efficient).

372. *Id.* at 109 & n.100 (“[C]onsider the attitude of cable providers toward streaming video applications over their cable modems. . . . [C]able providers should happily endorse this use of their platform, as it would make the platform more valuable to users and therefore more profitable. But a cable provider who allows video streaming will find it harder to engage in the profitable and customary price discrimination that sets high markups for premium cable programming. Thus, a cable provider might rationally, but inefficiently, try to stop this innovative method of distribution.”); *see also* van Schewick, *supra* note 171, at 345–46 (drawing a similar analogy to a telephone company's incentives with respect to a VoIP service running over its broadband network).

373. *See supra* notes 64–66 and accompanying text.

insufficient to exact competitive harm. Instead, there generally needs to be a finding that the broadband provider possesses market power³⁷⁴ and an ability to engage in anticompetitive practices.³⁷⁵

One of the arguments against a determination that broadband providers possess market power and the ability to exert anticompetitive leveraging against broadband video distributors is grounded in the geographical scope of various Internet-related markets.³⁷⁶ Broadband providers, even if they exist as a monopoly with respect to end users, can only engage in anticompetitive practices against an online distributor in the specified local area where they control the physical layer.³⁷⁷ Accordingly, even a large broadband provider such as Comcast would be able to harm Netflix only in a specified region, allowing Netflix to continue to reach customers in the rest of the country.³⁷⁸

In response to the above argument, those favoring the types of prophylactic rules that the FCC adopted in the Net Neutrality Order argue that the incentive and ability to engage in anticompetitive practices can be found in a broadband provider's power to protect their core business without being injured by the exclusionary remedy of having to lose the customer.³⁷⁹ Moreover, this line of argument suggests that, even assuming that the geographic market for content and applications is national, a reduction of that market by a broadband provider would lead to a decreased incentive to create innovative concepts at the application and content levels, which is itself worthy of protection.³⁸⁰

A further divide between proponents and opponents of prophylactic rules concerns the appropriate scope of competition policy. Under antitrust principles, the goal of economic policy is to promote competition, without

374. See Howard A. Shelanski, *Antitrust Law as Mass Media Regulation: Can Merger Standards Protect the Public Interest?*, 94 CALIF. L. REV. 371, 409 (2006) (defining "market power" as a firm's "ability to raise prices, lower output levels, reduce quality, or otherwise indicate that it is insulated from competitive pressure").

375. See Nuechterlein, *supra* note 171, at 34, 40; see generally James B. Speta, *A Sensible Next Step on Network Neutrality: The Market Power Question*, 8 REV. NETWORK ECON. 113 (2009). In its Net Neutrality Order, the FCC decided that it was unnecessary to determine whether broadband providers hold market power based on the fact that broadband providers possess the technical capability to block traffic in the last mile to end users. See Net Neutrality Order, *supra* note 176, at 19 & n.87.

376. See, e.g., Yoo, *supra* note 360, at 513.

377. See Nuechterlein, *supra* note 171, at 40 ("[N]o broadband provider occupies a large enough share of the *national* broadband market to harm competition in the inherently national (and international) markets for content and applications.").

378. See Yoo, *supra* note 360, at 513 (arguing that content and application providers are more concerned with the overall size of the applicable market than with their ability to reach consumers in a specified local area). Yoo concludes that the broadband provider market, measured against the national market for content and applications, is insufficiently concentrated for one firm to threaten application and content providers. *Id.*

379. See Brett M. Frischmann and Barbara van Schewick, *Network Neutrality and the Economics of an Information Superhighway: A Reply to Professor Yoo*, 47 JURIMETRICS J. 383, 417–18 (2007) (arguing that, because broadband services usually operate as a monopoly or duopoly in a given area, consumers are unlikely to switch services simply based on harm to one applications provider).

380. See *id.* at 418–20.

concerning itself with the impact that policies have on any one competitor.³⁸¹ In the broadband context, those favoring this approach assert that innovation occurs both at the content and applications level and at the physical level of the network, and that, in the absence of harmful conduct, such developments should be allowed to proceed outside of regulation that might stifle experimentation and diversified broadband practices.³⁸² The FCC diverged starkly from this perspective in the Net Neutrality Order, expressly advocating for a regulatory framework that protects innovation at the content and application layer even where broadband provider activity does not amount to anticompetitive harm.³⁸³ The institutional decision in this regard may thus prove crucial, as it is unclear whether, given these developments in modern antitrust doctrine, the DOJ or the FTC would object to the blocking and discrimination practices that lie at the center of the Net Neutrality Order.³⁸⁴

B. Beyond Economics: Public Interest Concerns and Broadband

Even as the debate rages over the appropriate economic approach to broadband practices, others question whether competition should be the primary concern in governing the relationships between broadband providers and application and content providers. This section highlights debates regarding the applicability of non-economic concerns in the broadband context, and discusses recent FCC history in addressing these concerns in the context of media ownership regulations and program access rules.

1. The FCC's Public Interest Standard

As a general rule, antitrust law's sole focus is on competition, whereas the FCC has a broader mandate to ensure that communications are delivered in the "public interest," an inquiry that encapsulates matters such as the promotion of diversity and localism, as well as competition.³⁸⁵ Commentators diverge as to whether these non-competitive issues are animated in broadband markets. Some have suggested that concerns related to vertical leveraging against content and application providers are solely within the ambit of the market power analysis that antitrust addresses.³⁸⁶

381. See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977); Nuechterlein, *supra* note 171, at 41.

382. See Yoo, *supra* note 360, at 501, 502–04.

383. Net Neutrality Order, *supra* note 176, at 45–46.

384. See Brenner, *supra* note 346, at 61 & n.185 (noting that antitrust would not necessarily find a competitive violation if a broadband provider were to block certain programming or charge fees for prioritizing third party traffic).

385. See Jerry Brito & Jerry Ellig, *A Tale of Two Commissions: Net Neutrality and Regulatory Analysis*, 16 *COMMLAW CONCEPTUS* 1, 33–34 (2007) (describing the different congressional mandates directed to the FTC and the FCC by their respective enabling statutes).

386. See Nuechterlein, *supra* note 171, at 37–39 (suggesting that the core concern of nondiscrimination is market power, and that network neutrality regulation does not address concerns related to issues of "free expression"); Speta, *supra* note 375, at 123–24.

Others reject the argument that market-based considerations are the only issues concerning broadband. In perhaps the sharpest critique of an economic-only approach, Professor Susan Crawford has argued that the concern of most debates over blocking and discrimination of content is misplaced, in that its sole focus is over the control of content delivery.³⁸⁷ Crawford suggests instead that the push for nondiscrimination helps foster diverse and unknown types of human interactions that occur over networks governed by nondiscrimination principles.³⁸⁸ Professor Anthony Varona has echoed this sentiment, suggesting that “calls for net neutrality should be broadened to encompass not only competitive and antitrust considerations but also the effects that commoditization of bit transport would have on opportunities for noncommercial, local political and democratic engagement online.”³⁸⁹

Whether a federal oversight regime for broadband practices simply should be focused on competitive harms or whether it should delve into issues relating to the elements discussed above is only preliminary to the question of which federal agency is appropriate. As indicated, the antitrust authorities are almost entirely focused upon the competitive concerns of a given transaction or activity, while the FCC often relies upon its use of the “public interest” or the “public convenience” in mandating rules under the Communications Act.³⁹⁰ The notion of the “public interest” itself has come under much scrutiny, with critics lambasting the FCC’s application of this standard as vague or subject to political whim.³⁹¹ Others express concern that, despite the public interest mandate in the Communications Act, the FCC has shifted toward evaluating media industry practices solely from the standpoint of competitive efficiency, to the exclusion of concerns regarding localism and diversity.³⁹² For example, Professor Howard Shelanski describes two different approaches to interpreting the “public interest” in communications policy.³⁹³ The first is an “efficiency model” concerned solely with fostering a market that meets consumer demand.³⁹⁴ The second, the “democracy model,” seeks to promote a media landscape populated with quality, diverse programming.³⁹⁵ Shelanski suggests the “efficiency model” now takes precedence at the FCC, but that the

387. See Susan P. Crawford, *The Internet and the Project of Communications Law*, 55 UCLA L. REV. 359, 389–91 (2007).

388. *Id.* at 390, 403.

389. Anthony E. Varona, *Toward a Broadband Public Interest Standard*, 61 ADMIN. L. REV. 1, 120 (2009).

390. See, e.g., 47 U.S.C. §§ 214(a), 310(d) (2006).

391. See Barkow & Huber, *supra* note 333, at 42–43 (describing the “public interest” as “amorphous” and stating that the FCC uses whatever standard it deems convenient at the time of its rulemaking). But see Thomas M. Koutsky & Lawrence J. Spiwak, *Separating Politics From Policy in FCC Merger Reviews: A Basic Legal Primer of the “Public Interest” Standard*, 18 COMMLAW CONSPECTUS 329, 338 (2010) (arguing that the “public interest” standard is delineated by applicable judicial precedent).

392. See Shelanski, *supra* note 374, at 388.

393. *Id.* at 383–87.

394. *Id.*

395. *Id.*

“democracy model” is still raised with respect to media diversity concerns and the promotion of particular programming.³⁹⁶ While thus arguing that the FCC has abandoned elements of the public interest in some instances, Shelanski further asserts that an antitrust regime would be ill-suited to fostering either the “democracy” or “efficiency” model in media markets.³⁹⁷

2. Media Ownership Rules and *Prometheus Radio Project v. FCC*

Among the FCC actions that might impact the Commission’s approach to broadband regulation is its treatment of media ownership rules.³⁹⁸ Over the years, the FCC enacted a number of rules that have imposed restrictions upon the number of media entities one organization can own on both a national and local level.³⁹⁹ Beginning in the 1940s, these rules included disallowing a firm from owning more than one television station in one community, as well as a cap on the percentage of the national broadcast audience that could be reached by stations that were under one firm’s control.⁴⁰⁰ Additionally, a rule imposed in the 1970s dictated that a single company could not own a newspaper and a television station in the same local community.⁴⁰¹ The motivation for these rules was the promotion of local and diverse media programming in the name of the “public interest.”⁴⁰²

Media ownership regulation began to come under strain in the 1980s, when deregulatory sentiments at the FCC led to efforts to eliminate the nationwide ownership limitations.⁴⁰³ Ultimately, Congress interceded in proceedings that would have led to complete deregulation and in 1984 increased the authorized ownership level to twenty-five percent of the national viewing audience.⁴⁰⁴ The passage of the 1996 Act continued this deregulatory pattern. There, Congress specifically directed the FCC to raise

396. *Id.* at 387–89.

397. *Id.* at 397, 402.

398. *Cf.* John Blevins, *A Fragile Foundation—The Role of “Intermodal” and “Facilities-Based” Competition in Communications Policy*, 60 ALA. L. REV. 241, 249 (2009) (suggesting that the deregulatory regimes for both broadband Internet service and media ownership policies were influenced by the FCC’s belief that consumers had access to competitive alternatives).

399. *See* NUCHTERLEIN & WEISER, *supra* note 15, at 378–79.

400. *See id.*; *see also* Broadcast Services Other Than Standard Broadcast, 6 Fed. Reg. 2282, 2284–85 (May 6, 1941).

401. *See* NUCHTERLEIN & WEISER, *supra* note 15, at 378; *see also* Amendment of Sections 73.34, 73.240, & 73.636 of the Comm’n’s Rules Relating to Multiple Ownership of Standard, FM, & Television Broad. Stations, 50 F.C.C. 2d 1046, 1047 (1975) [hereinafter Multiple Ownership Rules] (2d rep. and order).

402. *See, e.g.*, Multiple Ownership Rules, *supra* note 401, at 1048 (“Section 309(a) [of the Communications Act] specifically requires the Commission to find that the granting of a license serves the public interest, convenience, and necessity. The term public interest encompasses many factors including ‘the widest possible dissemination of information from diverse and antagonistic sources.’” (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945))).

403. *See* NUCHTERLEIN & WEISER, *supra* note 15, at 378–79.

404. *See id.* at 379.

the national ownership limit to thirty-five percent of the national viewing audience.⁴⁰⁵ Additionally, Section 202(h) of the 1996 Act directed the FCC to conduct quadrennial reviews of its media ownership rules and, upon review, to “repeal or modify any regulation it determines to be no longer in the public interest.”⁴⁰⁶ Pursuant to this mandate, in a 2003 order⁴⁰⁷ (2003 Media Ownership Order), the Commission made substantial revisions to—or repealed—a number of its ownership rules.⁴⁰⁸ The FCC concluded that the public interest could be served by increasing the national audience cap to forty-five percent.⁴⁰⁹ The Commission also made significant changes to its cross-ownership rules, eliminating the rule entirely in large markets.⁴¹⁰ The FCC relied upon a number of different factors as having obviated the need for the rules, pointing to the rise of competitive cable stations and the Internet as a source of diverse media voices in relaxing its requirements.⁴¹¹

In making these changes to its ownership rules, the FCC was acting not simply based on the statutory language in section 202(h). Instead, the deregulatory bent of the 2003 Media Ownership Order was partially grounded in two decisions from the D.C. Circuit interpreting section 202(h). In the first, *Fox Television Stations, Inc. v. FCC*,⁴¹² the D.C. Circuit held that the language in 202(h) requiring the Commission to determine if its media ownership rules were “necessary in the public interest” created “a presumption in favor of repealing or modifying the ownership rules.”⁴¹³ The *Fox* court rejected what it described as the FCC’s earlier “wait-and-see” approach to section 202(h) determinations where it had failed to justify the continued implementation of the national ownership cap through a sufficient evidentiary record.⁴¹⁴ The *Fox* decision served to remand the review of the media ownership rules to the FCC, with a seemingly clear directive that the FCC carried the burden of showing that the continued use

405. Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(c)(1)(B), 110 Stat. 56, 111 (codified as amended at 47 U.S.C. § 303 note (2006) (Broadcast Ownership)).

406. *Id.* § 202(h). The 1996 Act initially required biennial review of the ownership rules, but Congress amended this in 2004 to provide for quadrennial review. *See* Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99–100 (codified at 47 U.S.C. § 303 note).

407. *See* 2002 Biennial Regulatory Review—Review of the Comm’n’s Broad. Ownership Rules, 18 FCC Rcd. 13,620 (2003) [hereinafter 2003 Media Ownership Order].

408. *See* Shelanski, *supra* note 374, at 379–80; *see also* NUCHESTERLEIN & WEISER, *supra* note 15, at 380.

409. 2003 Media Ownership Order, *supra* note 407, at 13,814–15. After public outrage over the increase, Congress reduced the national viewership ownership limit to thirty-nine percent. *See* NUCHESTERLEIN & WEISER, *supra* note 15, at 381.

410. 2003 Media Ownership Order, *supra* note 407, at 13,800–03; *see also* Shelanski, *supra* note 374, at 380.

411. 2003 Media Ownership Order, *supra* note 407, at 13,623 (“Our current rules inadequately account for the competitive presence of cable, ignore the diversity-enhancing value of the Internet, and lack any sound basis for a national audience reach cap.”); *see also* NUCHESTERLEIN & WEISER, *supra* note 15, at 381.

412. 280 F.3d 1027 (D.C. Cir.), *modified on reh’g*, 293 F.3d 537 (D.C. Cir. 2002).

413. *Id.* at 1048.

414. *Id.* at 1044.

of the extant media ownership rules remained “necessary in the public interest.”⁴¹⁵

A second significant judicial antecedent to the FCC’s 2003 Media Ownership Order was the D.C. Circuit’s 2002 decision in *Sinclair Broadcasting Group v. FCC*.⁴¹⁶ In *Sinclair*, the court reviewed the FCC’s decision to partially relax its local broadcast station ownership rules, which had disallowed one entity from owning two separate broadcast stations in the same geographic region.⁴¹⁷ In 1999, under the aegis of section 202(h), the FCC had loosened this requirement for the first time, allowing a company to own multiple broadcast stations in the same community so long as eight independently owned television stations would remain in the designated geographic region, and both stations were not ranked within the top four broadcast stations in the locality.⁴¹⁸ In modifying this rule without abolishing it, the Commission argued that it was seeking to balance its interest in maintaining diversity in the broadcast arena with changes wrought in recent years that had resulted in a variety of new media entrants.⁴¹⁹ *Sinclair Broadcasting* brought a challenge to the revised limits, arguing that the FCC was required to abolish the rule entirely.⁴²⁰ While the D.C. Circuit acknowledged that it normally gives strong deference to the agency’s determination with respect to its belief of what is necessary to foster diversity, the court found that the Commission had failed to offer appropriate evidence as to why it excluded non-broadcast media outlets from its eight independent station requirement.⁴²¹ As in *Fox*, the *Sinclair* court criticized the FCC for adopting a “wait-and-see approach” with respect to including non-broadcast outlets in its independent voices count.⁴²² After review, the court remanded the local ownership limitations to the Commission with a mandate to justify their continued existence with a more complete evidentiary record.⁴²³

Fox and *Sinclair* thus served as motivation for the FCC’s deregulatory approach toward review of the media ownership rules.⁴²⁴ In the 2003 Media Ownership Order, the FCC expressly recognized that it was acting under the presumptions and evidentiary requirements of *Fox* and *Sinclair*, and acknowledged that those courts’ interpretations of section 202(h) mandated that the burden rested upon those attempting to maintain the

415. *Id.*; see also Shelanski, *supra* note 374, at 378.

416. 284 F.3d 148 (D.C. Cir. 2002).

417. *Id.* at 154–55.

418. Review of the Comm’n’s Regulations Governing Television Broad., 14 FCC Rcd. 12,903, 12,933 (1999) (rep. and order).

419. *Id.* at 12,904.

420. *Sinclair*, 284 F.3d at 152.

421. *Id.* at 161, 162–63.

422. *Id.* at 162–64 (quoting *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1042 (D.C. Cir. 2002)).

423. *Id.* at 169.

424. See Shelanski, *supra* note 374, at 379 (“[S]tatutory mandates, past FCC decisions, and the courts played important roles in defining the scope and substance of the review and in creating a complex set of pressures to deregulate.”).

ownership rules.⁴²⁵ This frame of reference influenced the FCC's decision to make the significant changes discussed above.⁴²⁶

The Commission's actions in the 2003 Media Ownership Order prompted a considerable backlash from those opposing further media deregulation.⁴²⁷ In addition to the direct response from Congress regarding the national ownership cap,⁴²⁸ the portions of the FCC's order concerning local ownership limitations were challenged in court.⁴²⁹ In 2004, the Third Circuit invalidated much of the 2003 Media Ownership Order in *Prometheus Radio Project v. FCC*.⁴³⁰ In doing so, the Third Circuit acknowledged that the FCC had the ability to modify or repeal its ownership rules under section 202(h), but concluded that the Commission had once again failed to provide a comprehensive evidentiary record supporting its determinations that maintaining the rules was no longer in the public interest.⁴³¹

First, the *Prometheus* court rejected the section 202(h) readings of *Fox* and *Sinclair*, concluding instead that section 202(h) provides no statutory presumption in favor of eliminating the rules.⁴³² With respect to the Commission's decision to relax the rule barring ownership of both a newspaper and television station in the same geographic market, the Third Circuit took issue with the "diversity index" that the FCC had developed as a way of measuring whether cross-ownership would allow for a significant number of diverse news sources within a locality.⁴³³ In particular, the court determined that the FCC had overvalued the Internet as a source for local media content, and that the FCC irrationally did this in light of the Commission's decision to exclude cable news sources from the diversity calculus.⁴³⁴ The court additionally chastised the Commission for assigning equal market shares in its diversity index to each of the firms within a certain medium, even though the FCC had assigned different diversity values to distinct media.⁴³⁵ Finally, the court concluded that the new cross-ownership regime set up in the 2003 Media Ownership Order had been inconsistently derived from the formula that the FCC had developed using the diversity index.⁴³⁶ The result of *Prometheus* was a remand of the cross-ownership rules to the FCC, with an admonishment to provide better evidentiary support for its rulemaking.⁴³⁷ The 2003 Media Ownership Order's loosening of the bar on a company's ability to own multiple

425. 2003 Media Ownership Order, *supra* note 407, at 13,624–25, 13,722.

426. *See supra* notes 407–11 and accompanying text.

427. *See, e.g.,* NUECHTERLEIN & WEISER, *supra* note 15, at 380–82; Shelanski, *supra* note 374, at 381.

428. *See supra* note 409 and accompanying text.

429. *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004).

430. *Id.* at 435.

431. *Id.* at 382.

432. *Id.* at 393–94; *see also* NUECHTERLEIN & WEISER, *supra* note 15, at 382 & n.96.

433. *Prometheus*, 373 F.3d at 403–04.

434. *Id.* at 405–06.

435. *Id.* at 408–09.

436. *Id.* at 411.

437. *Id.* at 408–09, 411–12.

television stations within the same geographic region met a similar fate, as the *Prometheus* court remanded the rule to the FCC on the grounds that it had failed to justify why it had chosen the specific regime it adopted.⁴³⁸

The FCC, pursuant to the section 202(h) directive, took up the *Prometheus* remand in its next quadrennial review of the media ownership rules.⁴³⁹ There, the FCC determined that many of the extant ownership rules remained necessary in the public interest.⁴⁴⁰ It decided to alter only one rule, allowing an owner of a broadcast television station to also own a newspaper in the same community but only in the largest markets, and subject to the requirements that (1) the station cannot be in the top four stations in the market, and (2) there must still be eight independent “major media voices” in the particular market.⁴⁴¹ That determination is currently being challenged before the Third Circuit.⁴⁴²

The result of the strange path from the 1996 Act’s mandate in section 202(h) to review of the ownership rules through *Fox*, *Sinclair*, and *Prometheus* is that the media ownership rules have barely changed. From the standpoint of the development of broadband video distribution, which itself casts a new shadow over the question of media control, the media ownership proceedings show what can happen when an agency attempts to tackle issues beyond the question of competition policy.⁴⁴³

3. Program Access Rules

Program access rules are another component of FCC media regulation that relate to the concerns raised in the broadband video market. Pursuant to the Cable Television Consumer Protection and Competition Act of 1992⁴⁴⁴ (Cable Act), cable providers are required to make satellite-delivered programming that they own or control available to rival MVPD services at reasonable rates.⁴⁴⁵ This rule functions to bar MVPDs from carrying popular programming exclusively through their own MVPD services, which would arguably make their services more attractive to consumers and perpetuate their market dominance.⁴⁴⁶ Like the media ownership rules, the program access rules have had a contentious procedural history at the FCC. When Congress initially established the

438. *Id.* at 418–20.

439. *See* 2006 Quadrennial Regulatory Review—Review of the Comm’n’s Broad. Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996, 23 FCC Rcd. 2010 (2007) (rep. and order and order on reconsideration).

440. *Id.* at 2016–17 (noting that, while the media landscape was undergoing changes, most consumers continued to rely on traditional media sources such as broadcast television and newspapers for their local news and information sources).

441. *Id.* at 2019.

442. *See, e.g.*, Katy Bachman, *Media Ownership Rules in Limbo*, MEDIA ACCESS PROJECT (Feb. 25, 2011), <http://www.mediaaccess.org/2011/02/media-ownership-rules-in-limbo/>.

443. *See* Shelanski, *supra* note 374, at 381 (suggesting that ownership changes that result in a loss of diverse viewpoints leads to more public outcry than ownership changes where the result is only pecuniary).

444. Pub. L. No. 102-385, § 19, 106 Stat. 1460, 1494 (1992).

445. 47 U.S.C. § 548 (2006).

446. *See* NUECHTERLEIN & WEISER, *supra* note 15, at 369–70.

program access rules in 1992, the Cable Act provided that the rules would sunset after ten years unless the FCC affirmatively found them to still be necessary to promote competition and diversity in video programming distribution.⁴⁴⁷ The FCC, upon review in 2002, extended the rules through October 2007,⁴⁴⁸ and then again extended them until October 2012,⁴⁴⁹ in each instance contending that the continuance of the rules was necessary for a competitive and diverse MVPD marketplace.⁴⁵⁰ In addition, in 2010, the FCC extended the reach of the program access rules to bar exclusive arrangements for programming that is delivered terrestrially.⁴⁵¹ The last order was passed over the dissent of Commissioner McDowell, who argued that the FCC had no authority to extend the rules to terrestrial distribution given the Cable Act's express reference to satellite-delivered programming.⁴⁵²

The continued existence and scope of the program access rules are likely to be critical in the broadband video distribution market. As discussed above, the FCC and DOJ imposed upon Comcast requirements that it make NBCU content available to broadband competitors.⁴⁵³ There are many issues surrounding this potential requirement, including how the FCC would go about determining which online distributors would qualify as rival MVPDs and thus have access to NBCU content.⁴⁵⁴ However, because an important component of Comcast's decision to acquire NBCU was likely to buttress its TV Everywhere online model against other online competitors, the imposition of program access rules could effectively eliminate the vertical efficiencies of the merger,⁴⁵⁵ and might also impose a MVPD-type model on the developing broadband space.⁴⁵⁶

C. Questions of Procedure: Finding an Optimal Approach to Broadband Oversight

Apart from the substantive considerations addressed above, commentators have debated whether antitrust law or FCC regulation provides the best procedural mechanism to address concerns in a dynamic broadband landscape. The issue of whether broadband video concerns should be handled through FCC regulation or antitrust oversight presents a

447. 47 U.S.C. § 548(c)(5).

448. See Implementation of the Cable Television Consumer Protection & Competition Act of 1992, 17 FCC Rcd. 12,124, 12,124 (2002) [hereinafter 2002 Cable Implementation] (rep. and order).

449. See Implementation of the Cable Television Consumer Protection & Competition Act of 1992, 22 FCC Rcd. 17,791, 17,792 (2007) [hereinafter 2007 Cable Implementation] (rep. and order and notice of proposed rulemaking).

450. See 2002 Cable Implementation, *supra* note 448, at 12,125; 2007 Cable Implementation, *supra* note 449, at 17,792.

451. See Review of the Comm'n's Program Access Rules & Examination of Programming Tying Arrangements, 25 FCC Rcd. 746, 747 (2010) (1st rep. and order).

452. *Id.* at 822 (McDowell, Comm'r, dissenting).

453. See *supra* note 349 and accompanying text.

454. See Peers, *supra* note 144.

455. See *id.*

456. See *supra* note 354 and accompanying text.

challenge of balancing the institutional merits of each agency.⁴⁵⁷ In general, outside of the merger review context, the antitrust approach to competition oversight is straightforward: the DOJ and FTC enforce the antitrust laws on a case-by-case basis, building evidence after a violation arises.⁴⁵⁸ Conversely, the FCC often conducts its regulatory oversight through ex ante rulemaking.⁴⁵⁹ However, in the 2009 NPRM, the FCC sought comment on whether its oversight of broadband practices should proceed through case-by-case determinations.⁴⁶⁰ Moreover, the FCC's Net Neutrality Order appears to have embraced the notion of a case-by-case adjudication methodology, at least with respect to determining when a broadband provider's actions constitute "reasonable network management."⁴⁶¹

Either an FCC or antitrust regime would likely face procedural drawbacks when engaging the dynamic broadband video landscape. The FCC in particular is often criticized for a lack of a proper evidentiary record in its rulemaking proceedings.⁴⁶² The *Fox*, *Sinclair*, and *Prometheus* cases demonstrate the extent to which judges find failings in the FCC's order-making process: courts in those cases were consistently critical of the FCC's failure to produce a robust and logical evidentiary record to support the Commission's decisions.⁴⁶³ Evidentiary concerns were also addressed in the Net Neutrality Order by Commissioner Meredith Attwell Baker who, in dissent, roundly criticized the majority's decision to promulgate broad rules despite a lack of evidence of anticompetitive broadband practices.⁴⁶⁴ These types of critiques have frequently been raised against the Commission;⁴⁶⁵ some observers view the institutional paradigm as running

457. See Weiser, *supra* note 301, at 318 ("[T]he most nettlesome policy challenge is to develop and implement an effective institutional framework to enforce any system of managing the competition policy issues associated with overseeing the terms of dealing between applications providers and network owners.").

458. See Weiss & Stern, *supra* note 282, at 195; see also Barkow & Huber, *supra* note 333, at 37 (suggesting that the role of the DOJ is "to interfere only as is necessary to keep markets free and competitive").

459. See Weiss & Stern, *supra* note 281, at 195.

460. See *supra* note 236 and accompanying text.

461. Net Neutrality Order, *supra* note 176, at 48; see also *supra* note 267 and accompanying text.

462. See Shelanski, *supra* note 374, at 418–19 (describing the evidentiary support that courts reviewing the FCC's media ownership decisions require); Speta, *supra* note 375, at 117 (suggesting that the FCC's Comcast decision was made with "very little in the way of rigorous fact-finding").

463. See *supra* notes 414, 421, 431 and accompanying text.

464. Net Neutrality Order, *supra* note 176, at 182–83 (Baker, Comm'r, dissenting) (noting that the majority opinion uses the word "could" over sixty times in providing support for the need to police broadband practices). The Net Neutrality Order lists only four concrete examples of violations of its open internet policies: (1) the Madison River consent decree, (2) the Comcast/BitTorrent dispute, (3) an example of an exclusionary contract between a wireless company and a payment service company, and (4) an example of a mobile provider restricting access to applications on its wireless network. *Id.* at 21 & nn. 104–05.

465. See, e.g., Speta, *supra* note 309, at 129 (suggesting that the FCC's "behavior, historically and especially recently, has ranged from impeding competition to the simply bizarre"); see also *supra* note 391 and accompanying text.

so deep that they suggest that, in a broadband world, the FCC must adopt policies akin to the way antitrust authorities handle claims in order to provide effective oversight.⁴⁶⁶

Despite the seeming preferred status that antitrust has assumed as an institutional body, even those who favor an antitrust-like approach to broadband oversight have recognized a variety of shortcomings in the procedural approaches that the DOJ and the FTC must follow in enforcing antitrust law. The first of these concerns is that the antitrust agencies' reliance on the court system for enforcement can lead to problematic delays in resolving issues in a developing marketplace.⁴⁶⁷ Moreover, for private parties, antitrust can represent an extremely costly enforcement measure.⁴⁶⁸

The second issue that leads commentators to question the institutional efficacy of antitrust is the contention that the DOJ and the FTC lack the necessary expertise to handle complex issues related to broadband and telecommunications policy. As an agency dedicated to communications policy, the FCC is presumed to possess a level of experience and industry expertise that allows it to best address broadband concerns.⁴⁶⁹ However, others downplay this assessment, arguing that the FCC is no more capable of addressing market ills in the broadband sector than antitrust authorities.⁴⁷⁰

IV. A DEREGULATORY POSTURE FOR A DEVELOPING MARKET

The rise of broadband video is beginning to affect the media landscape dramatically, as the convergence of media distribution to broadband networks rearranges the relationships between consumers, content creators, and distributors.⁴⁷¹ Among the changes being wrought are agreements

466. See, e.g., Weiser, *supra* note 301, at 318 (“As commentators increasingly emphasize, the future of telecommunications regulation is for the FCC to reorient its mission to evaluating conduct after the fact using antitrust-like standards.”).

467. See Brenner, *supra* note 346, at 62 & n.189 (suggesting that antitrust presents a “good way” to conceptualize broadband policy concerns, but that it is lacking as an institution equipped to achieve timely remedy); Speta, *supra* note 290, at 19 (suggesting that antitrust reliance on case-by-case adjudication leads to “delay and nonuniformity” of results). *But see* Net Neutrality Order, *supra* note 176, at 152 (McDowell, Comm’r, dissenting) (arguing that the network neutrality rules adopted by the FCC are unnecessary because “[i]f market failure were to occur . . . America’s antitrust and consumer protection laws stand at the ready. Both the Department of Justice and the Federal Trade Commission are well equipped to cure any market ills.”).

468. See Blevins, *supra* note 398, at 286.

469. See, e.g., Koutsky & Spiwak, *supra* note 391, at 332–33 (discussing, in the context of dual merger review, that “the antitrust enforcement agencies simply may not have the industry expertise to understand all of the complexities and nuances of the telecom business”); Speta, *supra* note 309, at 130 (suggesting that the FCC should be charged with policing net neutrality concerns, in part because of “institutional expertise” and “experience”).

470. See Nuechterlein, *supra* note 171, at 61–62 (arguing that the need for the FCC’s technical expertise is overstated); see generally Brenner, *supra* note 346, at 48–54 (discussing instances where the FCC failed to acknowledge or comprehend technical considerations that should have impacted its regulatory decisions).

471. See *supra* notes 64–70 and accompanying text.

between media participants that integrate content and distribution channels in an effort to gain dominance in this emerging marketplace.⁴⁷² These arrangements and the nature of this market have led to rising tensions in the broadband video marketplace, and create the potential that traditional distributors will be incentivized to take anticompetitive action against the new entrants.⁴⁷³ As this marketplace has gained prominence and these conflicts have become increasingly apparent, federal authorities have begun to assess the need for regulatory intervention to prevent market harm.⁴⁷⁴ The FCC reacted to these possible conflicts by promulgating rules that purport to prevent broadband providers from discriminating against online distributors,⁴⁷⁵ despite a significant judicial defeat with respect to its authority over broadband practices.⁴⁷⁶

This part contends that, absent congressional action, the FCC lacks the jurisdictional authority to mount an effective oversight regime over broadband practices. Moreover, this part argues that, even assuming that the Commission is able to overcome these jurisdictional deficiencies, the current regime of prophylactic rules promulgated by the FCC is an inappropriate method of regulation for the broadband video market. Instead, this part proposes that, absent systemic market harms, oversight of this developing marketplace should be left to the antitrust authorities.

A. *The FCC's Cloudy Jurisdictional Picture*

Following *Comcast*, the first question to ask regarding government oversight of broadband video distribution is whether the FCC possesses jurisdiction over this developing marketplace. This issue remains relevant because the Commission continues to assert its authority over broadband practices, despite its defeat in the D.C. Circuit.⁴⁷⁷ As a result, the FCC faces continuing legal and political attacks that challenge its authority in this arena.⁴⁷⁸ The Commission may yet survive the political turmoil surrounding its recent actions,⁴⁷⁹ but its position as to its legal authority to regulate broadband practices should be rejected.

Drawing upon the Title I ancillary authority delineated by the Supreme Court in *Southwestern Cable*, *Midwest I*, and *Midwest II*,⁴⁸⁰ the FCC has tethered its broadband regulatory efforts to Communications Act provisions that either espouse congressional policy, or that demarcate the Commission's express authority to regulate common carriers, broadcasting, and cable services.⁴⁸¹ Indeed, broadband has become a critical component

472. See *supra* notes 138–39 and accompanying text.

473. See *supra* notes 70, 372–73 and accompanying text.

474. See *supra* notes 144–47, 305–08 and accompanying text.

475. See *supra* notes 263–70 and accompanying text.

476. See *supra* notes 247–48 and accompanying text.

477. See *supra* notes 260–72 and accompanying text.

478. See *supra* notes 274–81 and accompanying text.

479. See *supra* note 281 and accompanying text.

480. See *supra* notes 188–97 and accompanying text.

481. See *supra* note 271 and accompanying text; see also Net Neutrality Order, *supra* note 176, at 63 (“[O]ur adoption of basic rules of the road for broadband providers

of the communications system, and the FCC has received congressional indications of the need for Commission involvement in broadband expansion.⁴⁸² But as presently formulated, the FCC's efforts to regulate broadband practice strain the bounds of the Supreme Court's ancillary jurisdiction doctrine and disregard a procedural mandate of the D.C. Circuit's decision in *Comcast*. Beginning with *Southwestern Cable*, the Supreme Court's ancillary jurisdiction cases promulgated a rule that gives the FCC flexibility to take action where doing so is necessary to enforce the substantive provisions of the Communications Act.⁴⁸³ But this jurisdiction is not unfettered: the FCC's Title I authority exists only as a limited grant and, as interpreted by the *Comcast* court, requires the FCC to defend its exercise on a case-by-case basis.⁴⁸⁴ However, instead of proceeding against concrete instances of harms, the FCC's latest effort to regulate broadband in the Net Neutrality Order seeks to enforce "prophylactic" rules over Internet practice.⁴⁸⁵ The Net Neutrality Order amounts to a patchwork of provisions sewn together to provide the Commission with Title I authority over the entire broadband sector.⁴⁸⁶ It is difficult to square the breadth of this assertion of authority with the particularized regulatory interventions that led the Supreme Court to recognize the development of the ancillary jurisdiction doctrine.⁴⁸⁷ Moreover, the Commission is promulgating its rules in the face of hypothetical harms,⁴⁸⁸ further suggesting that it has failed to show how its regulation of broadband is "reasonably ancillary to the . . . effective performance of its statutorily mandated responsibilities."⁴⁸⁹

Additionally, there are pragmatic concerns regarding the Commission's ability to effectuate a governance regime under Title I. Because the Commission lacks express authority over the Internet,⁴⁹⁰ it must shoehorn its regulation of broadband practices to the express authority given to it under the substantive provisions of the Communications Act.⁴⁹¹ But the developments of the past decade—principally those resulting from the

implements specific statutory mandates in the Communications Act and the Telecommunications Act of 1996.”).

482. See *supra* notes 2–4, 31–32 and accompanying text.

483. See *supra* notes 191–93 and accompanying text.

484. See *supra* notes 197, 256 and accompanying text.

485. See *supra* note 264 and accompanying text.

486. See *supra* notes 265–67, 271 and accompanying text.

487. See *supra* notes 188–97 and accompanying text. Concurring with the plurality in *Midwest I* that the FCC could exercise its Title I jurisdiction to force cable systems to create original programming, Chief Justice Warren Burger expressed his reservations regarding further non-statutory expansion of the Commission's authority. See *United States v. Midwest Video Corp.*, 406 U.S. 649, 676 (1972) (Burger, C.J., concurring) (“Candor requires acknowledgment, for me at least, that the Commission's position strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the courts.”).

488. See *supra* note 464 and accompanying text.

489. *Comcast Corp. v. FCC*, 600 F.3d 642, 644 (D.C. Cir. 2010) (alteration in original) (quoting *Am. Library Ass'n. v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005)).

490. See *supra* note 198 and accompanying text.

491. See *supra* notes 180–83, 191–92 and accompanying text.

spread of broadband—demonstrate that the services regulated in Titles II, III, and VI of the Communications Act are themselves undergoing considerable change. Under a Title I structure where the Commission must separately justify each use of its ancillary authority, the FCC may be confronted with a need to constantly reevaluate its posture toward broadband against the moving target of the broader communications system.⁴⁹² There are reasons to doubt the Commission's ability to adapt properly to such volatile regulatory circumstances. For example, the discussion regarding media ownership rules demonstrates how the Commission, even when presented with a directive from Congress, has struggled to convince reviewing courts that it is properly adapting its rulemaking to changed circumstances.⁴⁹³ More general critiques of FCC methodology further suggest that, as an institution, the Commission may be unable to maintain an effective oversight regime over broadband in the absence of express statutory directive.⁴⁹⁴

The form of sweeping prophylactic measures that the FCC has taken in the Net Neutrality Order may not be the most effective way for the Commission to address structural concerns in the marketplace for broadband video distribution. The Commission's jurisdiction over telecommunications and media mergers, while often criticized, remains unquestioned.⁴⁹⁵ In its recent review of the Comcast/NBCU merger, the FCC demonstrated the extent to which this authority can be utilized to extract conditions from major players in the broadband video marketplace.⁴⁹⁶ Putting aside the merits of the conditions, the terms that the joint FCC and DOJ effort was able to obtain from the merged entity substantially address many of the conflicts raised in the broadband video marketplace.⁴⁹⁷ These terms suggest that the Commission may be best served by reserving its efforts to those instances where a specific transaction raises considerable competitive concerns.

B. Beyond Jurisdiction: The Need for Regulation

Even if the FCC can overcome the jurisdictional obstacles it faces in erecting an enforceable regulatory regime under its ancillary authority, the Commission's current approach to overseeing the market for broadband video distribution should be rejected in favor of a hands-off, antitrust-led regime. Within this developing marketplace, despite the potential for anticompetitive harm, there have as yet been no instances that exclaim the need for continued regulatory oversight.⁴⁹⁸ Indeed, examples where supposed antagonistic parties have made distribution arrangements in this developing space belie the Commission's insistence that preemptive

492. *See supra* notes 255–56 and accompanying text.

493. *See supra* notes 406, 408, 414, 421–22, 431 and accompanying text.

494. *See supra* notes 462–66 and accompanying text.

495. *See supra* notes 329–35 and accompanying text.

496. *See supra* notes 348–54 and accompanying text.

497. *See supra* notes 143–48 and accompanying text.

498. *See supra* note 464 and accompanying text.

regulation is necessary to protect online distributors from discriminatory actions.⁴⁹⁹ Even where tensions have flared, this should not give rise immediately to concerns about systematic anticompetitive practices. Instead, the problems in cases such as the Comcast-Level 3 dispute⁵⁰⁰ simply should be seen as inevitable business disputes between network participants as they respond to significant changes to market structure. At most, such instances raise cause for concern, but are insufficient to provide the basis to enact broad, prophylactic rules. Given that the broadband video market is in its infancy, regulators should be wary of taking action without a clear finding of market harm.⁵⁰¹

The FCC's actions are also problematic because of their substantive impact on the broadband video marketplace. The FCC's prophylactic adoption of non-blocking and non-discrimination rules forecloses stakeholders in the broadband distribution market from entering into agreements that may produce beneficial results.⁵⁰² At present, the growth of broadband distribution is undermining many of the traditional revenue streams in the media distribution business.⁵⁰³ In the FCC's push to regulate the relationship between online distributors and broadband providers, the forgotten component of this system seems to be content producers, who have complex affiliations with both sides of this emerging conflict.⁵⁰⁴ It seems likely that content providers, in an effort to sustain revenue models that are collapsing in the broadband era,⁵⁰⁵ will encourage experimentation in distribution systems at both the application level and the network level.⁵⁰⁶ This necessity commands a flexible approach to market remedy that promotes innovation at all levels, and that intervenes only where market harm is clearly delineated.⁵⁰⁷

It may seem odd to reject FCC intervention in the broadband video marketplace. After all, the broadband distribution of video is linked closely to other areas of communications policy where the FCC has had plenary jurisdiction since 1934.⁵⁰⁸ Moreover, Congress has directed the Commission to promote the adoption of broadband services in the United States.⁵⁰⁹ However, it remains to be seen whether the rationales previously used to justify FCC entry into communications markets are applicable here. The companies involved in this market, far from being small, independent entities in need of regulatory oversight for survival, are often major corporations in retailing, equipment manufacturing, and digital

499. *See supra* note 136 and accompanying text.
500. *See supra* notes 82–84 and accompanying text.
501. *See supra* notes 306–07 and accompanying text.
502. *See supra* note 382 and accompanying text.
503. *See supra* notes 52–53 and accompanying text.
504. *See supra* notes 67–68 and accompanying text.
505. *See supra* notes 52–53 and accompanying text.
506. *See supra* notes 381–83 and accompanying text.
507. *See supra* note 382 and accompanying text.
508. *See supra* notes 178–79 and accompanying text.
509. *See supra* note 3 and accompanying text.

distribution.⁵¹⁰ In addition, it is unclear whether the public interest concerns that have spawned much of the FCC's entry into media markets through the media ownership rules and program access rules are present in a distribution market that is unmoored from the geographical limitations and physical scarcity that prompt calls for diversity and localism.⁵¹¹ Instead, the concerns in the present marketplace for broadband video distribution are focused almost entirely on the need for robust competition. Viewed through this competitive prism, it is difficult to argue that consumers are not benefitting from present market conditions. A variety of competitive, inexpensive means for viewing professional video content have developed under the deregulated status quo.⁵¹²

Under present circumstances, a regime governed by antitrust should replace the FCC's prophylactic rules. Instead of rushing to impose rules on market activities, the developments in broadband video distribution should be viewed under modern antitrust law.⁵¹³ Although there may be some concerns with the efficacy of continued antitrust oversight of the communications sector,⁵¹⁴ the FCC's jurisdictional uncertainty is equally problematic. Moreover, the dynamism of the broadband video marketplace should allay concerns regarding antitrust oversight. Because the current marketplace for broadband video distribution is not plagued by entrenched dominant players or systematic market failure, it is not one in need of ongoing oversight and frequent intervention. Instead, it is a marketplace of constant evolution; the developing concerns over anticompetitive acts should be viewed in light of the complexities of the market and as the byproduct of fundamental changes to the way film and television are delivered to consumers. These circumstances demand not a rigid regulatory hand, but rather the looser approach of antitrust-as-backstop, with intervention only in the specific instances where it proves necessary to protect consumer interests.

The broadband video market may eventually manifest anticompetitive practices that require considerable regulatory involvement. If that occurs, FCC oversight may be appropriate. Until then, the FCC should resist the urge to be a "cop on the beat,"⁵¹⁵ and allow the broadband video distribution market to police itself.

510. *See supra* notes 97, 102–03, 106 and accompanying text.

511. *See supra* notes 376–78, 399–402 and accompanying text.

512. *See supra* notes 76, 91–92 and accompanying text.

513. *See supra* note 382 and accompanying text.

514. *See supra* notes 467–70 and accompanying text.

515. *See* Net Neutrality Order, *supra* note 176, at 136 (Genachowski, Chairman).