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Realities of Contemporary Television Production, Distribution & Exhibition

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The Television Wars (Part I)
By Peter Dekom
The Entertainment and Sports Lawyer
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The Television Wars
(the first installment of many parts... too many, we fear)

BY PETER J. DEKOM

To a casual observer, television... well... just is, you know, television. I know it when I see it. To the Television Academy, the contest is between programs, and Emmy nominations now routinely include productions from the broadcast world, premium and basic cable networks, and even the new digital programming providers. You can “TiVo it,” “binge view it,” “download it,” upload it to your “digital locker” in the “clouds,” pull it down from your “SVOD” provider, buy a DVD or Blu-ray, find it on a parallel Internet site, or simply turn on the “tubey” (tubey? how 1980s!) and see it in real time. For those with better eyesight than mine, there is always the mobile alternative... or perhaps “television everywhere,” where you can just keep watching the same program as you move from venue to venue, device to device. Who would think that in this seemingly progressive world, there are sinister forces fighting declared and undeclared media wars, with hundreds and hundreds of billions of dollars at stake?

OUTSIDE THE BOX

These are the huge bandwidth battles raging in the courts, our regulatory bodies, and if our Congress could actually pass a controversial piece of legislation, we might have seen a massive spillover into this formerly esteemed body. Yes, we need new statutes that reflect the world as it is now! It’s all about the future of how you watch “television.” And yes, there are proposals in Congress that would amend existing laws and regulations, but does anyone think they have a shot at getting passed? Companies have spent decades building terrestrial television networks, local stations, and station groups, and have weathered the transition from over-the-air analog to digital transmission. The struggle to create—to build non-broadcast networks (loosely, “cable networks” or “pay-TV”) via your friendly regional carrier, where cable and satellite delivery space is limited—has cost billions.

And the rage of “digital networks”—the Netflix, Hulu, Amazon, YouTube/Google, etc., types—is now pressing against the competitive dominance of those more traditional broadcast and cable networks. You hear the words “a la carte television,” “bundling,” “net neutrality,” “retransmission rights,” and “reclassification,” to name just a few terms experts love to bandy about. Whether over a quarter of Americans not even having Internet access, and 30 percent of the population not able to receive online “rich media” transmissions because they lack the necessary bandwidth, we are facing a challenge that may lead to “digital polarization” and add to the economic splits we have recently witnessed.

Indeed, the expansion of “over-the-top” streaming alternatives permeates modern American viewing habits.

[O]ver-the-top content (OTT) refers to delivery of audio, video, and other media over the Internet without the involvement of a multiple-system operator (MSO—generally a cable or satellite channel aggregator) in the control or distribution of the content. The Internet provider may be aware of the contents of the Internet Protocol (IP vs. the “intellectual property” IP packets but is not responsible for, nor able to control, the viewing abilities, copyrights, and/or other redistribution of the content. This model contrasts with the purchasing or rental of video or audio content from an Internet service provider (ISP), such as pay television video on demand or an IPTV video service, like AT&T U-Verse. OTT in particular refers to content that arrives from a third party, such as Amazon Instant Video, DramaFever, Crackle, HBO, Hulu, myTV, NetD, Netflix, NowTV, Qello, RPI TV, Viewster, WhereverTV, or WWE Network, and is delivered to an end-user device, leaving the ISP only the role of transporting IP packets.

The web is becoming a definite alternative to traditional television, and content buyers often use both traditional and OTT services to get their product to consumers. And trust, me, bewildered and befuddled as they may be, traditional corporate media is most definitely hedging their bets, if not doing their best to stop or at least slow the transition.

You can see “the hedge” in the acquisition patterns of some of the biggest Hollywood players:

The Walt Disney Company said it had completed a deal to pay $500 million to acquire Maker Studios, a YouTube-based video supplier that generates more than 5.5 billion views a month from a subscriber base of 380 million. The purchase, by far the largest for what Hollywood calls a multichannel network, calls for Disney to pay another $450 million if aggressive growth targets are met.

Or in their newest production activities:

CBS wants to partner with the big players in the digital space to create original shows for Netflix, Hulu and Amazon Instant Video. CEO Les Moonves hinted at the move for CBS Television Studios in the network’s Q2 earnings call on [August 8, 2014]. “Shortly, you’re going to hear about us being in business with some of the SVODs [subscription video on demand services] with [an] original program,” Moonves said. In the past year, CBS has struck multiple show licensing deals with Netflix and Amazon.
You can also read it in the tea leaves as traditional telecommunications try and convince advertisers that traditional television campaigns still remain the most efficient way to reach consumers. Media buys are increasingly blended or at least coordinated web, mobile, and traditional television campaigns these days. Social media is flexing its customizable reach. But television networks now have to aggregate runs plus DVR consumption to generate “ratings,” collecting information about all consumer views over three days (so-called C3 ratings) to justify their still-astounding ad rates.

As traditional television viewership continues to erode, networks want to expand that three-day rating to so much more (like seven days—C7): [Broadcast networks like CBS, NBC and Fox have all pushed for the value of viewing that takes place over a longer time frame, citing increased use by consumers of digital-video recorders [DVRs] and, more recently, video on demand. As technology offers up methods for counting viewers who watch programs on tablets and mobile devices, the push to include those people will likely intensify as well.

Leslie Moonves, chief executive of CBS Corp., has been particularly vocal on the matter, telling investors as early as November of 2012 that the “most significant development we are seeing is the increased levels of viewing via the DVR streaming and video on demand. This is a good thing for us. It means more people are watching our programming in the situations where there used to be scheduling conflicts. But it also means that you have to be more savvy when reading the ratings these days. It now takes more time to determine the true performance of a show and, in fact, even a network.

A CBS spokesman confirmed the network had struck a “C7” deal with a major ad agency, but did not name the agency involved. Fox confirmed that it has an agreement in place to do a “C7” deal with a major ad agency it would not name. NBC has struck a similar deal with one agency, according to a person familiar with the situation.

ABC and the CW did not respond immediately.

On September 17, 2014, Moonves announced that not only would CBS be reporting C7 ratings but that it was also already making C7 deals with advertisers. Maybe it should be views per year?! And you thought denial was a river in Egypt!

And it really doesn’t matter what anyone proposes as a solution for much of anything in this wild and woolly western wonderland—there’s going to be a pile of folks who love it and a major constituency that will fight tooth, nail, and campaign contribution-lobbying sword to kill it. Try this for example:

Sen. Jay Rockefeller (D-W.Va.) and Sen. John Thune (R-S.D.) are proposing that subscribers to cable and satellite services be allowed to choose which broadcast channels they want to pay for as part of their multichannel package.

Their proposal was met with immediate opposition on [August 8, 2014] from the broadcast lobby—and praise from groups representing pay-TV providers and smaller cable systems.

The rationale behind the proposal has been to limit the blackouts that occasionally take place when multichannel operators negotiate with broadcasters for retransmission rights, according to The Hill. A showdown between CBS and Time Warner Cable last year saw a month-long blackout on the latter’s systems.

Shock! And this was a rare bipartisan congressional effort too! We’re also seeing a new vocabulary, one that permeated Apple’s recent purchase of Beats, for example, describing the value of high-quality “curating” in its music streaming services. Huh? Putting thematically linked content into an appropriate consumer-recognizable pot? But by making content easier to find, consumers, especially the younger, technically savvy consumers who just dive toward specific content versus “channels,” might actually embrace (read: pay for) content in a whole new way acceptable even to them. And if there is a hallmark of these new digital services, they make finding specific content—and providing at consumer-designated playing times on consumer-designated platforms—a whole lot easier... and are always economically well priced. Complexity is managed through “curating.”

In a recent group interview by Deadline.com, heads of premium cable channels defended the onslaught of streaming services like Netflix, claiming better programming and cutting edge technology:

[Starr CEO Chris Albrecht] pointed out how premium “was at the forefront of technological advances” with such view-where-you-go apps as HBO GO. If premium cable is going to outlast Netflix, the trick is in getting cable and satellite distributors to offer up such services at a suitable price point for the customer. “The consumer is increasingly becoming the buyer of such distribution equipment, and they’re going to feel entitled about what they want, when they want,” said Albrecht, who also noted, “You still need curators, whether you label them as channels, networks or brands. Right now Netflix is curating the content they license. HBO, FX—we’re all doing that. How many curators will there be at the end of the day? I don’t know, but there will be curators whether it’s delivered linearly or through an authenticated app. The curation is the important way in which people will navigate their way through infinite choices.”

Methinks the lady protests too much. Yup, content buyers are price sensitive, and cable is pricing itself out of the younger demographics. Unless we can make Internet access forbiddingly pricier? And what, cable as a technology leader? With HBO’s Game of Thrones being the most pirated piece of IP (this time, “intellectual property”) in history, because of its restricted online availability only to HBO subscribers, it’s hard to picture premium cable as leading innovation anywhere. Curation is a nice word, a valuable concept perhaps, but the television model
is being completely reinvented. And there are so many complexities defining the future of our access to content.

Look at one more particularly important variable and its impact on web access: income. Many in lower-income neighborhoods access the web solely through smartphones. That's it. They struggle to pay for cable access at any level, where they even have it, and the new super-fast networks are still expensive. Google's rollout of its proprietary fiber optic bandwidth in select cities is a case in point. By looking at consumers' willingness to preregister for the service (expected to cost $70/month), some interesting facts emerge:

A survey earlier this year of five neighborhoods in the Kansas City area conducted for brokerage firm Bernstein Research found that more than half of households had signed up for the service. At that rate, the service would be "very profitable" for Google, Bernstein analyst Carlos Kirjner said.

The Bernstein survey found that participation varied with income. In the Womall Homestead neighborhood—median household income $116,000—83% of residents surveyed subscribed to Google Fiber; in the Community College area—median income $24,000—27% subscribed.8

But even "ordinary" high-speed Internet access is expensive, and while some cable companies are offering basic services to lower-income families, such token efforts are hardly enough (a little bit of show for the regulators?).

In terms of measurable productivity:

Cities with gigabit connections reported 2.1 percent higher per-capita GDP than their slower counterparts, [a study by the Boston-based Analysis Group] found. That might not sound like much, but consider that per-capita GDP in the entire United States has been growing at a pace of one to two percent a year since the recession, according to the World Bank.

If you add it all up, that amounts to $1.4 billion in extra growth, the study says. The findings are consistent with predictions from economists that Internet access will enhance U.S. productivity. More than a decade ago, Alice Rivlin and Robert Litan observed in a Brookings Institution report that investments in information technology helped drive annual productivity growth in the 1990s past three percent.9

Are we looking forward to another polarizing factor in an already deeply divided United States? High-speed web access is one of the most important factors in the evolution of television. Cost goes to the very heart of what the media and communications industry can do and what they want to do with our ability to receive and transmit communications and entertainment. Standby for the Television Wars.

AN AEREO SHOOTS INTO THE AIR
It's hard to think of Aereo as much of an actual threat.

Aereo had 77,596 subscribers, spread out among 10 cities, at the end of 2013, according to documents the company has filed with the U.S. Copyright Office . . .

About 27,000 of those subscribers lived in the New York City area, which was Aereo's first market, and launched in the spring of 2012. Boston, which launched in the spring of 2013, had 12,000 subscribers. The Atlanta area, which also launched in 2013, accounted for 10,000 investors.10

Compare that to Netflix's announced global subscriber pool: 50 million customers as of July 2014 (36.2 million in the United States alone).11 Yet challenges to Aereo's very existence were important enough to be addressed by the highest court in the land.

Following oral arguments where the U.S. Supreme Court walked around all the obvious issues, the Court was deciding a case (American Broadcasting Cos. v. Aereo, Inc.) about whether a local digital network (Aereo) could pick up "free-over-the-air" network broadcast and retransmit for pay the identical telecast to the exact same footprint of an audience in the name of a clearer signal without the consent of the originating networks. Aereo said it was simply going to the same audience for which the networks were providing free content (advertiser-supported), which didn't contract or impair what the networks were trying to do in the first place. The networks believed Aereo was stealing their copyrighted programming without permission or compensation. They wanted retransmission fees or, better yet, to kill Aereo.

Betamax, Part 2?

These broadcasters faced conflicting lower-court decisions and pledged that if they lost the case, they might well abandon the airwaves and migrate entirely to the web or cable universe. They were snug in their quest for resolution by the highest court in the land . . . until the Silicon Valley chimed in, filing their amicus briefs, saying that the networks' position was a severe threat to the evolution of consumers' use of cloud storage systems and personal rights to time-shift content. Uh-oh!

You see, the Valley saw a direct threat to their technological advances, particularly their march toward moving consumers to the clouds (remotely located file servers with dedicated "consumer space"), if the networks prevailed. Relying on Sony Corp. of America v. Universal City Studios, Inc. (popularly known as the "Betamax case"), which allows consumers to record (on their personal recording machines) legitimately obtained content for later individual consumption without infringing a copyright, the Silicon Valley believed that operating distant (remote) cloud storage on behalf of consumers (the "new" version of a personal recorder they posted) would be directly threatened by the telecasters' quest for a finding of infringement.

To fall within the four squares of the Betamax case, Aereo employed a seeming archaic physical manifestation of each consumer's subscription—a small antenna about the size of a dime inserted onto a motherboard—which was the basis for such consumer's receiving of the relevant local television network signals. The operation of a remote device (here an antenna, but the logic applied equally to remote file server space, said Valleyites) under the direct control of the relevant individual consumer is considered the Holy Grail for next-generation consumer content and data storage.
The Silicone Alley vs. the Silicon Valley: The Big Decision

The last time the Silly Con Valley (forgive me!) clashed big time with Hollywood’s Silicon Alley (forgive me again) was about two and a half years ago over content providers’ “sure thing” quest to pass the Stop Online Piracy Act (SOPA). When the tech-biggies took the position that SOPA was a threat to Internet freedom, the bill died almost instantly. I don’t want to appear cynical, but the Silly Con Valley seems to have a lot more campaign money to throw around these days than old-world Hollywood, but that power doesn’t also apply to judicial decisions. Or does it?

CBS President and CEO Les Moonves echoed earlier sentiments from other network heads on one particular option that has to have entertainment litigators—who love to sue over the meaning of terms (like “television”)—drooling like bulldogs:

“We have deals with most of our [pay TV distributors] for a long, long time to deliver our content,” he says. In addition “we’re thinking about over the top, delivering directly to our consumers [via the Internet]. We’re talking about doing Aereo among ourselves if it became viable.” Analysts didn’t follow up to ask how that might affect CBS affiliates. In any case, Moonves says, the tiny company has attracted “way more attention than it deserves” adding that he has “confidence that the Court will find Aereo to be illegal.”

Methinks the lady doth protest too much. It is…er was…a big deal.

In the end, the Supreme Court side-stepped the Betamax case by focusing not on the technology, but on the perceived category of services that Aereo, to the Court anyway, most resembled. In an opinion released on June 25, 2014, a 6-3 majority (three staunch conservatives dissenting) saw Aereo more like a cable system than a piece of individual technology and ruled in favor of the networks accordingly. If Aereo wanted access to local network programming, under the public performance provisions of the Copyright Act, it would have to pay retransmissions fees.

Justice Stephen Breyer expressed the majority opinion:

Aereo claims that because it transmits from user-specific copies, using individually-assigned antennas, and because each transmission is available to only one subscriber, it does not transmit a performance “to the public.” Viewed in terms of Congress’ regulatory objectives, these behind-the-scenes technological differences do not distinguish Aereo’s system from cable systems, which do perform publicly. Congress would as much have intended to protect a copyright holder from the unlicensed activities of Aereo as from those of cable companies.

But, you see, the Court didn’t actually empower Aereo as a bona fide cable operator such that it would automatically be entitled simply to pay such fees and be done with it.

The Post-Ruling Reactions

How did the baby antenna retransmitter react? At first anyway, the CEO of Aereo’s parent seemed ready to give up:

“It’s over,” [Barry] Diller told CNBC…after the ruling was handed down. [Aereo CEO Chet] Kanojia had a different take: “We are disappointed in the outcome, but our work is not done. We will continue to fight for our consumers and fight to create innovative technologies that have a meaningful and positive impact on our world.”

The winner’s view was obviously different: “Today’s decision is a victory for consumers,” the broadcasters’ lawyer Paul Clement said today. ‘The Court has sent a clear message that it will uphold the letter and spirit of the law just as Congress intended,’ Clement, a former Solicitor General, represented broadcasters during oral arguments.

A victory for consumers? Really? If you twist very hard: “We will continue to do the same high quality, premium programming that we’ve done and we will deliver it,” noted CBS CEO Les Moonves immediately following the ruling, “So this is a pro-consumer thing. And frankly, for Aereo to say that it isn’t is a little bit of sour grapes.” As long as consumers do it their way! But it sure makes it tougher to “cut the cord” (more below) and makes consumers more reliant on the higher quality signals for “free television” available from cable and satellite providers.

With Aereo’s future in doubt, the company’s founder and CEO Chet Kanojia blasted the Supreme Court’s ruling in favor of broadcasters, saying that it “sends a chilling message to the technology industry.”

“It is troubling that the Court states in its decision that, ‘to the extent commercial actors or other interested entities may be concerned with the relationship between the development and use of such technologies and the Copyright Act, they are of course free to seek action from Congress,” Kanojia said in his statement. “That begs the question: Are we moving towards a permission-based system for technology innovation?”

As we’ll see below, Aereo is writhing in its seeming death throes, gasping for life that seems to be slipping away.

The Court seemed to go out of its way not to make this a “tech” decision, but was it one anyway? “Given the limited nature of this holding, the Court does not believe its decision will discourage the emergence or use of different kinds of technologies,” is the Court’s assumption. Forgetting about the time and effort of Aereo’s employees and principals, the estimate was that its investors faced a $97 million loss if the service shut down completely, a loss that became a reality when Aereo eventually filed for bankruptcy. Aereo offered consumers a refund, but asked for people to send e-mails to their representatives in Congress saying:

how disappointed you are that the nation’s highest court issued a decision that could deny you the right to use the antenna of your choice to access live over-the-air broadcast television. Tell them your stories of why having access to a cloud-based antenna is important to you and your families. Show them you care about this issue.

Aereo then took the Supreme Court’s “if it walks like a duck theory” and began to reinvent its business model accordingly:
“The Supreme Court’s holding that Aereo is a cable system under the Copyright Act is significant because, as a cable system, Aereo is now entitled to the benefits of the copyright statutory license pursuant to the Copyright Act,” the company’s lawyers said in a letter to [U.S. District Judge Alison Nathan], “Aereo is proceeding to file the necessary statements of account and royalty fees.”

Broadcasters, however, objecting to Aereo’s shift in strategy, noted that Aereo previously said that it did not fall under the definition of a cable company. The issue came up during oral arguments before the Supreme Court, but Aereo’s attorney David Frederick said it was equipment provider, not a cable service.

“Whatever Aereo may say about its rationale for raising it now, it is astonishing for Aereo to contend the Supreme Court’s decision automatically transformed Aereo into a cable system under Section 111 given its prior statements to this court and the Supreme Court,” broadcasters’ lawyers wrote.

Do you feel the love? Neither does another government agency:

The Copyright Office has shot down Aereo’s attempt to recast itself as a cable system that may retransmit broadcast signals to paying online subscribers with the benefit of the cable compulsory license.

“[T]he Office does not believe Aereo qualifies for the Section 111 statutory license and will not process Aereo’s filings at this time,” says Copyright Office General Counsel Jacqueline Charlesworth in a July 16 letter to Aereo.

**Back to the courts?**

**Aereo tried another life-saving effort:**

On [July 31, 2014], Aereo pleaded for its life to a New York federal judge, claiming it was “bleeding to death” in its current non-operational state.

On [August 1, 2014], U.S. District Court Judge Alison Nathan reacted swiftly, knocking Aereo for having “jumped the gun in filing, without authorization, its motion for emergency consideration of preliminary injunction issues upon remand.”

Aereo’s motion has been stricken from the record . . . .

. . . .

[The company’s time for reinvention might be running out.]

“Aereo is currently incurring staggering costs without accruing any revenue,” said Aereo’s emergency motion. “The company is figuratively bleeding to death.”

Judge Nathan was unmoved.

According to the judge’s latest order . . . “The Court agrees with Plaintiffs that the appropriate next step is to consider a proposed order consistent with the Supreme Court’s decision and the Court directs Plaintiffs to prepare such an order, accompanied by a memorandum of law in support of their position, on or before two weeks from today’s date. Defendant’s opposition, if any, shall be filed on or before two weeks after receipt of Plaintiffs’ proposed order and memorandum of law.”

On August 15, 2014, the broadcasters counterattacked:

Court documents . . . had TV programmers’ lawyers arguing that Judge Alison Nathan should forget about giving Aereo another chance and simply lay down an injunction against the company that would ban it from operating.

Broadcasters are arguing that Section 111 is irrelevant. The Supreme Court’s already said everything you need to know, they say.

“The . . . opinion does not hold that Aereo is a cable system entitled to a Section 111 license, even though the Court was clearly aware of Section 111, as Aereo points out,” the broadcasters wrote.

That’s not all. Broadcasters are trying to go for the kill, calling for a nationwide ban on Aereo. They’re also demanding that any injunction address not just Aereo’s retransmission of content in near real-time, but also even content that’s played back online hours or days after the original broadcast. (Time-delayed playback has, for a long time, been considered fine under the law if the recording is being made for personal use. That’s how we get VCRs and DVRs.)

Aereo’s attempt to get the Second Circuit to intervene was rebuffed on August 21, 2014. The appellate court told the company that it first had to deal with the trial court over getting treated like a cable television provider. Is this the stab in the heart that puts Aereo out of its misery, or can the beleaguered little company hang on, seeking relief from Congress or the courts? Time will tell.

**How Tech Competitors Reacted**

During this mish-mash, however, as Aereo “paused” its service to contemplate this potential repositioning, small tech companies like Iowa-based Synclab (with investors that include CBS and the National Association of Broadcasters)—which provides a very low-cost system to allow stations to stream their telecasts on the web—are entering the fray, reversing the process. Instead of asking consumers to buy an antenna, Synclab is going to the telecasters to see if they want access to the web.

Synclab’s biggest challenge is to figure out, with stations, what business models make sense. “Some stations are dabbling with free,” [founder and CEO Jack] Perry says—but most likely will want to limit themselves to cable and satellite subscribers who use the distributors’ TV Everywhere
platforms. Synchbak hopes to iron the business issues out this year. If it does, then “we’re ready to roll out in early 2015,” he says.20

Aereo may just be one tiny footnote—a blip of transitory relevance—in the bigger battle over the future of television.

Technology solutions are popping up all the time. Time-shifting recording company TiVo has also announced a DVR (a digital video recorder, the “Roombio OTA,” at $50 plus $14.99/month with a one year minimum commitment) that works strictly with over-the-air telectas for those who don’t have pay-TV access via cable or satellite.21 The company justifies its monthly fee by personalizing the service (customer-friendly dashboard, recommendations, curation functions, etc.), even though comparable technologies (e.g., Channel Master) eschew this ongoing charge. Technology solutions, often followed by “countermeasures” from industry incumbents, seem to define this space.

Television technology battles are everywhere. For example, feeling their “Aereo” oats, the broadcast networks are also using the appellate courts to challenge the “television anywhere” “Slingbox” technology deployed by satellite carrier Dish.

[On July 7, 2014, Fox] challenged the legality of a Dish Network feature that allows subscribers to [transmit and watch] station feeds on devices outside the home.

In oral arguments before the 9th Circuit Court of Appeals, Fox’s legal team sought to reverse a lower court ruling in which a federal judge refused to grant a preliminary injunction that would put an immediate halt to Dish’s Dish Anywhere service, concluding that they had not proven they would suffer irreparable harm if it continued.28

Oh, Fox lost the appeal at that level. Yup, them that networks are really dedicated to their consumers.

LEGENSIIVE POSSIBILITIES?
The impact of the Aereo decision on cord-cutting is obvious—while consumers can pull local network signals off the air (where there is no cost other that getting a real personal antenna), consumers cannot subscribe to an online service unless that service has a retransmission deal with the networks. Legally anyway.

Remember that Rockefeller-Thune proposed legislation noted above? Could that be a backdoor salvation for Aereo?

The Senate proposal, known as “Local Choice,” would ease the pressure on cable companies who currently pay rising fees to broadcasters to get their content. This idea could work in Aereo’s favor; if the courts accept its new argument that Aereo is a cable company, Aereo might find itself lumped in with the other firms that would be affected by Local Choice, too. Local Choice would benefit Aereo by letting it avoid paying those expensive content fees itself, landing it back where it began before it was laid low by litigation. Voila—Aereo emerges more or less intact, though the details are a little more complicated.

Local Choice would end the retransmission system as we know it. Rather than have cable companies negotiate with broadcasters over how much to pay in retransmission, broadcasters would deal with viewers directly. You’d be able to unbundle the broadcast portion of your cable bills, picking and choosing which broadcast channels you want and don’t want. You could opt to subscribe to CBS and ABC but not Fox or NBC—and then you’d pay only for the channels you select. You’d get to avoid annoying content blackouts that arise from price disputes between companies. You’d have a better idea of what one channel is worth relative to another. And your choices would more directly influence the TV market. In fact, analysts say, the price of retransmission might even fall over time as competing broadcasters fought for your eyeballs. (You would still, of course, be able to get broadcast channels for free with an over-the-air antenna, just like always.)29

How hard do you think the cable carriers will oppose this? Yeah . . . don’t hold your breath. That would require Congress to vote for consumers and not heavily financed special interests!

But Aereo is just one battle in a war that isn’t close to ending. With technology accelerating, this digital assault on our legal and business systems suggests that there is no peaceful settlement anywhere on the horizon. War is here, and another mega conflict is exploding across our broadband bow.

ENDNOTES

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The Television Wars (Part II): There's No Neutrality in my Net

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We visited the Aereo debacle in my last sortie into this nefarious world of domestic television terrorism. Now we need to focus on the obvious battle of petulant, perturbed, powerful pachyderms that has center stage. One issue/force? Two challengers? Or more? Too many constituents? The mega, potentially malevolent, media mergers on the table? Mostly Comcast’s desire to swallow (merge with) Time Warner Cable (TWC), and a bit of AT&T’s passion for DirecTV? Or this thing called net neutrality? Maybe the underlying social and technological shifts?

What or who are these elephants? What do they want? And do we really have two distinct “biggest of the big” issues, at least as far as the Federal Communications Commission (FCC) is concerned, or two rather complex reflections of the same quandary or set of quandaries? Big vs. little? Consolidation at the top, a grassroots shift in media consumption patterns at the bottom locked in a battle to the death? Technology vs. greed? Business vs. consumer? Cutting the cord or staying the course? A mere speed bump on the technology superhighway that really disappears with more elegant bandwidth?

On February 26, 2015, reflecting a heavily partisan 3 – (Democratic appointees) to-2 (GOP commissioners) vote, the FCC issued its much-awaited ruling on net neutrality: henceforth, the Internet would be reclassified into a more tightly controlled regulatory category (under Title II of the Telecommunications Act of 1934 as amended in 1996) that would treat web carriers as public utilities, subject to the kind of
governance and rate review applicable to telecoms. Title II is the same section of the Act that deals with FCC-granted broadcast and wireless licenses. Obviously, this decision will give rise to a number of implementing decisions, but those championing an open Internet won out. So far anyway.

The web carriers had previously been governed, for almost a decade, by the looser restrictions applicable to categories that included content providers under Title I. Title I focuses on "information services," which are defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." Title II, with lots more direct FCC oversight and control than Title I, is directed at "telecommunication services," which include "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." We'll get into this quagmire in greater detail later, but these words are at the heart of this web war and the FCC's ruling.

The feelings of the FCC commissioners themselves reflect the great divide on the matter of web regulation and net neutrality.

[ FCC Chairman Tom] Wheeler has billed his proposal as a "21st century" approach to Title II regulation, as it also restricts the FCC from imposing rate regulation, tariffs or limits on bundling. Wheeler has pointed to other industries, like wireless phone service, where Title II regulation has worked when applied to new technology, even as [dissenting GOP] commissioners Ajit Pai and Michael O'Rielly were skeptical that it won't lead to some future price regulation. Both voted against the FCC's action.

In his dissent, Pai accused the FCC of ceding to President Obama's support for recategorizing the Internet. "We shouldn't be a rubber stamp to political decisions made by the White House," he said.

Pai said that the action "marks a monumental shift toward government control of the Internet" and predicted it would lead to higher prices for Internet service, slower speeds, less innovations and less choice.

O'Rielly called it a "monumental and unlawful power grab."

Lawyers specializing in media law began drooling. Trumpets blared. Lobbyists brought out their fancy duds. And we moved from tactical drone strikes in the legal media landscape to a looming escalation of administrative challenges and litigation representing a massing of cruise missiles, pinpoint bombers, and the movement of masses of potential boots on the ground—congressional sabre rattling par excellence—between and among factions struggling for the future of modern American media. Issue: can the FCC even reclassify the web into Title II at all?
If the challenges against this FCC ruling, the tsunami of litigation, and legislative and administrative efforts succeed at any level, then each and every past proposal, every twist and turn that has surfaced in the past year, may well arise from the dead and redefine the future of the Internet regardless of this new ruling. Believe me, it still all matters. So what exactly are the issues and how did we get here? What is the impact of the wording of this rule? What was (is?) this battle all about?

**SEMINAL PLAYERS ON THE BATTLEFIELD**

The *net neutrality* war is about high-bandwidth users who want carriers to allow the users’ signals on an open and nonrestricted road, and the carriers claiming they need the right to require high-bandwidth users to pay extra money to prioritize their signals and use that excess digital capacity. The carriers want a loser regulatory schema to allow them to use the marketplace to define economics (Title I with the right to charge based on prioritized speed and usage). Heavy web users and a vast majority of the public want a more open web with strong regulatory oversight to prevent the carriers from running roughshod on issues ranging from higher-cost “fast lanes” to overall access pricing (Title II). Round one: a heavily regulated but open net (Title II).

As Comcast (America’s largest cable company) and TWC (the second largest) try to implement a megamerger of such cable carriers—a defense to changing consumer habits and perhaps a migration from cable television to the Internet—Netflix has made a reluctant bandwidth deal with these cable giants (adding AT&T in May 2014), even as its CEO screamed bloody murder. So net neutrality is, technically, an issue separate from any direct approval of a merger, but, well . . . really? Hard to separate these two issues when these behemoths merge? Impossible, actually.


The two companies are currently engaged in a full-court press to convince regulators and lawmakers that Comcast’s $45 billion takeover of Time Warner Cable—which would create a behemoth of a company that controls nearly 40 percent of the U.S. broadband market [more under the new definition of “broadband” noted below] and provides cable to almost a third of American homes—isn’t anti-competitive and is in the public interest.  

Or at least that there will be “no material negative impact.”

Under the FCC redefinition of “broadband” issued in January 2015, requiring a much faster 25 megabits per second (Mbps), today Comcast alone controls about half of America’s broadband capacity. The merger is really all about net neutrality, the future of broadband quality and access, and the government’s ability to regulate this morass of technology mixed with an incredible profit motive.

What would the American broadband landscape have looked like if the FCC had passed or accepted a premium fast lane (a multitiered system) vs. true net neutrality? You might ask how much more money would this merger generate for these cable giants? Remember, despite
the FCC’s net neutrality ruling, there are lot of players trying to undo that decision and allow such tiered Internet access.

What’s more, if these merger partners can find a way to increase the cost of bandwidth sufficiently (see the reference to the 15 percent market share rule below), doesn’t that simply make consumers more willing to keep expensive cable (which these behemoths also control!!) vs. migrating to a cord-cutting content consumption alternative that requires that more expensive bandwidth to work? Wow! And trust me, that’s the clearest writing on the wall. Under this scenario: cable companies = J; consumers = L.

We’re going to journey through the twisting back and forth, flip-flopping if you will, from Congress to the FCC, between some sort of multitiered (based on bandwidth) prioritization system to a single, wide-open Internet highway. We’ll watch the new standards proposed and then implemented, battles between power factions, and a drama that leads directly to your wallet. It seems that there are a lot of folks who believe you just aren’t paying enough for content, through cable, mobile, or the web, or for bandwidth.

The big carriers have screamed that without more freedom to create these prioritized paths (with appropriate costs passed on to consumers), investment and innovation on web delivery will slow to a snail’s pace. And if they can round up enough consumers into their vast networks, if they can force de facto monopolies in large markets, well, they might just get their way.

The merger candidates were doing so well in their earliest pitches to the FCC, but as we shall see, time has not worked for these biggest, baddest boys. They’ve even gone to the newly reconfigured Congress begging for a legislative reworking of the relevant statutory schema under which the FCC can operate, but perhaps I am getting a bit ahead of myself. Let’s step back a bit and look at how some lovely conspiracies . . . er, business plans . . . intended to change the landscape in television and the web.

**MIXING THE POWER OF BIG BANDWIDTH WITH CONTENT: A STUDY IN MOTIVATION**

The underlying issues are complex, but the 30,000-foot view from above has proven to be exceptionally disturbing for those willing to dissect the pieces. For example, Harvard Visiting Professor Susan Crawford didn’t like the NBC/Universal merger with Comcast in 2010.\(^8\) It gave a carrier ownership of powerful content channels, from broadcast to cable to web-based (leverage within its own markets, where it tends to dominate) to price competitors wanting the same channels, to a distinct disadvantage.

Professor Crawford likes the Comcast/TWC merger even less. With the United States lagging seriously behind most of the rest of the developed world as to according its citizens with higher levels of bandwidth within a reasonable pricing structure, she sees a Comcast/TWC merger perpetuating second-rate bandwidth while holding prices at the top, parsing the best for those willing to shell out the most. OK, the FCC didn’t go that way, but the fat lady hasn’t even pulled out her tuning fork, much less begun to sing.
When it comes to the distribution of information, the situation becomes even more serious. Self-interested agents in a market-driven economy will, naturally, invest only in what they can make a profit from. Access to the Internet can create public benefits—spillovers—in the form of new jobs and new ways to make a living. But a market-dominating private-access provider will want, unless constrained by regulation, to find ways to drive its own profits up through exacting fees and tolls based on differential treatment of information in an atmosphere of continuing scarcity of truly high-speed access. That can’t be good for American society as a whole.

. . . .

. . . [P]erhaps Americans will start to care when they realize that, compared to other countries, they are paying more for less and leaving behind many of their fellow citizens. As things are, the United States will be unable to compete with nations whose industrial policy has been more forward-thinking.  

So the issue is not just how the web is delivered, fast or slow lanes or just one superhighway, but more so how much does it really cost the average consumer? If the FCC’s reclassification of the web as a utility under Title II of the Telecommunications Act is sustained by the courts, will the FCC begin controlling the pricing structure as well?

Americans aren’t paying 10–20 percent more for luxurious bandwidth, which is normal in places like Korea or the larger cities in China. We are paying multiples of those costs (sometimes five to seven times higher, according to Crawford)! So when a cable giant controls about a third of this country’s markets, which definitely includes some of America’s biggest cities, what incentives does it have to scale up the deployment of fiber optic cables, a megabillion dollar endeavor, particularly when it can stave off in-market competition because it also controls so much of the content that such competitors might seek to obtain?

Interesting objections to the merger are surfacing in small but vocal blocks from unexpected rural areas as well, and not for the reasons you might think: producers of small, rurally targeted programming created by regional television stations that would die if excluded from future bandwidth or effectively denied though predatory pricing structures. Remember, the new merged entity would have a boatload of its own proprietary broadcast, pay-TV and web-based channels, where prices are nothing more than private notes on its internal financing statements, shifting money from one pocket to another on the same coat.

While too many media executives are intimidated to speak against the merger, fearing reprisals if it is approved (and even if it isn’t, in their future dealings with Comcast, TWC, and their obvious content-controlling subsidiaries), occasionally a strong voice with stronger feelings will put aside those fears and “tell it like it is.” Minnesota-based Ed Gottsch’s television stations produce rural-themed programs like The Mollie B Polka Party, National Tractor Pulling, and All American
**Cowgirl Chicks.** He also serves as chairman of the Rural Media Group, and he is traveling around the countryside telling people in farming communities to raise hell with the FCC.

“As you folks in rural America know, every once in a while, you’ve got to take a two-by-four and hit the mule between the ears,” [Mr. Gottsch] said. “That is what we want to do now with Comcast and Time Warner.”

He says Comcast’s proposed $45 billion purchase of Time Warner Cable threatens the future of his television stations.

“There can’t be a wall built between urban and rural America,” Mr. Gottsch says later.

Raised on a family farm in Elkhorn, Neb., Mr. Gottsch, 61, has emerged as one of the country’s most vocal critics of the proposed media consolidation, which would reshape the video and broadband landscape. His warnings about the Comcast deal, as well as AT&T’s $48.5 billion bid for DirecTV, echo a fear that some television groups have expressed about the pending mergers: The deals would create behemoths that will use their heft to push around networks, forcing them to either cut the fees they charge for their programming or risk being thrown off the air. Some executives say the consolidation would result in challenges for new networks, especially those with niche or underserved audiences, and a lack of diversity on TV.

“As media companies get bigger, there always is the sense that the East Coast, West Coast and the N.F.L. cities are very well represented,” said Amy Yong, a media analyst at Macquarie Securities. “The rest of the U.S. gets ignored sometimes.”

But Americans seem to hate the “R” word—regulation—by reason of our historical distrust of government. But at what cost?

**A QUESTION OF NATIONAL PRIORITIES**

Net neutrality doesn’t come cheap, and having to provide better service is a cost that dampens profits. The proposed Comcast/TWC merger will provide efficiencies, just as the merger proselytizers promise, but these benefits will mostly boost profits, not service. So corporations hell-bent on market domination have learned to play our Congress as well as our regulators (often recruited from the companies they are now charged with regulating) like violins. Not so in the European Union.

Europe has passed legislation requiring pure and open net neutrality (pending final approval, but the United States is still struggling with the concept. You’d think bandwidth-sucking Netflix would notice this and expand in that direction. Oh, they are!

Netflix is grabbing a bigger slice of Europe, expanding into
Austria, Germany, France, Switzerland, Luxembourg and Belgium later this year. [They’re all over Asia too, and where they’re not, local ___flix are popping up everywhere.] The company reports that international customers currently make up 25 percent of its streaming revenue, but anticipates that percentage eventually surpassing the U.S. market.\(^\text{11}\)

Oh we hear lip service about the bandwidth issue, from the president:

One of the issues around net neutrality is whether you are creating different rates or charges for different content providers. That’s the big controversy here. So you have big, wealthy media companies who might be willing to pay more and also charge more for spectrum, more bandwidth on the Internet so they can stream movies faster. I personally, the position of my administration, as well as a lot of the companies here, is that you don’t want to start getting a differentiation in how accessible the Internet is to different users. You want to leave it open so the next Google and the next Facebook can succeed.\(^\text{12}\)

to FCC Chairman Tom Wheeler:

Speaking to the startup organization 1776 on [September 4, 2014], Wheeler said that at 25 Mbps, “there is simply no competitive choice for most Americans. Stop and let that sink in . . . three-quarters of American homes have no competitive choice for the essential infrastructure for 21st century economics and democracy. Included in that is almost 20 percent who have no service at all.”

Even at lower speeds, 4 Mbps to 10 Mbps, Wheeler said, “the majority of Americans have a choice of only two providers. That is what economists call a ‘duopoly,’ a marketplace that is typically characterized by less than vibrant competition.”\(^\text{13}\)

And because the Comcast/TWC merger is anything but an incentive for competitive high-speed access, you’d think that combination is dead in the water. Not exactly. Impaired a bit, but still kicking. Local public utility commissions have already voiced some opinions (California, for example, will accept the merger, but with a host of strings), but the big federal decisions have yet to be announced.

As part of this body of approvals and rulemaking, the FCC was initially leaning in the direction of supporting a profit motive, tiered bandwidth access.

The Federal Communications Commission said on [April 23, 2014] that it would propose new rules that allow companies like Disney, Google or Netflix to pay Internet service providers like Comcast and Verizon for special, faster lanes to send video and other content to their customers.

The proposed changes would affect what is known as net
neutrality—the idea that no providers of legal Internet content should face discrimination in providing offerings to consumers, and that users should have equal access to see any legal content they choose.

The proposal comes three months after a federal appeals court struck down, for the second time, agency rules intended to guarantee a free and open Internet.

Those earlier rules effectively barred Internet service providers from making deals with services like Amazon or Netflix to allow those companies to pay to stream their products to viewers through a faster, express lane on the web. The court said that because the Internet is not considered a utility under federal law, it was not subject to that sort of regulation.¹⁴

Huh?

But net neutrality advocates asked why the FCC couldn’t simply reclassify these denizens of the web as public utilities as noted above. Hmmm... The above dual-tiered Internet access, fast and expensive or slow and cheap, was formally proposed by the FCC on May 15, 2014,¹⁵ and the public debate and commentary was contentious, to put it mildly. The FCC also then suggested that it might add a merger requirement for more competitive new fiber in the Comcast/TWC markets, but stopping the merger altogether appeared unlikely.

That was May 2014. The president kept touting total net neutrality—one high-speed and wide open highway—but his own FCC appointees weren’t yet ready to “go there.” The massive legal teams and lobbying crews from the merger boys produced a well-orchestrated series of presentations of how well the merger would work for consumers and longer-term bandwidth growth.

In the early stages of consideration, powerful blocs in opposition were either scared to offend their current or potential future transporters of content or simply were not well-organized to resist the Comcast/TWC machine. As time passed, however, the resistance began to bubble and then explode. What was a foregone conclusion of getting it done seemed to fade with each passing day . . . unless a Republican Congress could stymie the FCC with limiting legislation first . . . and get that bill past a veto-prone president.

Let’s see what the rulemaking process looked like in the first half of 2014. Clearly, the FCC was mightily confused. The proposed rules, set out in an almost-200-page gigantus of a report, also asked this question:

Some have suggested that the Commission go even beyond the requirements of the Open Internet Order to impose flat bans on pay-for-priority service. We seek comment on these suggestions, including whether all pay-for-priority practices, or some of them, could be treated as per se violations of the commercially reasonable standard or under any other standard
based on any source of legal authority. We emphasize that Section 706 could not be used to reach some conduct under this judicially recognized approach to circumvent the principle that the proposed rules will not, in any circumstances, constitute common carriage per se. If the Commission were to ultimately rely on a source of authority other than Section 706 to adopt a legal standard for broadband provider practices, such as Title II, we seek comment on whether and, if so, how we should prohibit all, or some, pay-for-priority arrangements, consistent with our authority, to protect and promote Internet openness.16

Whew! We’ll see those words again, as FCC Chairman Tom Wheeler addressed the issue again in February 2015,17 but simple was never destined to be part of this process.

There’s another nasty wrinkle that addresses our national priorities against the backdrop of our international treaty obligations. Want to make a complicated legal rat’s nest even messier? Two George Washington Law School professors, Arturo Carrillo and Dawn Nunziato, wrote a letter to FCC Chairman Wheeler, stating:

What is not common knowledge, but just as certain, is that the [FCC’s new multilayered web access structure set forth in its] Proposed Rules, or any others like them, would violate international law obligations of the United States in the areas of international trade and human rights. As a member of the World Trade Organization (WTO) and a party to the International Covenant on Civil and Political Rights, the United States is bound to respect principles of nondiscrimination and free expression when regulating essential communications media like the Internet. Any FCC rule that does not meaningfully protect net neutrality would run afoul of these legal obligations and expose the United States to legal action by other governments and individuals prejudiced by its actions.18

Was the pendulum actually swinging back toward true net neutrality? The raging storm continued as mega forces battled other mega forces.

**THE “RECLASSIFICATION WAR”: CORPORATE INTERESTS VS. CONTENT AND THE TECH BIGGIES**

How did the rest of the tech world view this challenge to what the bandwidth carriers (ISPs or Internet service providers) have been praying and lobbying for . . . with everything they have?

Nearly 150 Internet firms are banding together to call for more stringent net neutrality regulations on broadband providers.

In a letter to the Federal Communications Commission on [May 7, 2014], the companies asked federal regulators to reconsider a proposal that critics fear would allow Internet providers to charge for faster, better access to consumers. The list includes Amazon, Facebook, Google and Microsoft, along
with dozens of other firms that called the prospect of paid fast lanes “a threat to the Internet.”

“Instead of permitting individualized bargaining and discrimination,” the companies wrote, “the commission’s rules should protect users and Internet companies on both fixed and mobile platforms against blocking, discrimination and paid prioritization, and should make the market for Internet services more transparent.”

The companies have not gone so far as to demand the FCC “reclassify” Internet providers under Title II of the Communications Act—a move that would allow the commission to regulate ISPs more heavily, as it does with phone companies. The letter does not offer an alternative proposal.19

Swing, pendulum, swing!

What about the feelings of the creative community, the professionals who actually make the content that flows through them thar pipes? On the day before that FCC net neutrality decision,

Chris Keyser, president of the Writers Guild of America West, called net neutrality “the issue of our time for the creative community.”

. . . .

While the goal of net neutrality may be the status quo—to keep the Internet the way it is—the FCC’s proposed tough regulatory approach could impact Hollywood in two key areas: the pathways consumers take to receive programming, and the price they pay for it.

The current renaissance in TV is fueled, at least in part, by the expansion of cable programming as well as online video from providers like Netflix and Amazon. The concern is that this new “golden age of television” won’t last long if Internet service providers engage in so-called paid prioritization, that is, asking studios and networks to fork over money to get speedier and better access to subscribers.

That’s why Keyser thinks the FCC’s plan to reclassify the Internet as a Title II telecommunications service—perhaps the most robust of all its options—is important. “It’s the philosophy, which is that . . . they have the pipes but they can’t say what flows through it.”20

But quietly and not for public consumption (they preferred to sit on the sidelines), most Hollywood studios (Comcast/Universal’s opinion is obvious) evinced mixed feelings about pure net neutrality. They were not entirely sure if denying them the ability to pay to prioritize their content (the “fast lane” approach) might not be a good thing, allowing them to rise above the clutter. All this was flowing while Comcast executives continued to deny that they had even planned to determine

web priorities in the first place.

How did local politicians feel about the open web? In mid-June 2014, at a meeting of American mayors, the cry of “reclassification”—to treat bandwidth providers like utilities—rose to a scream.\textsuperscript{21} Ooooh. Pressure on the pendulum.

As other content providers who did not also own cable systems began to visualize what the merged Comcast/TWC landscape would look like, out came the airsick bags! The fuzzy line between the merger proposals and net neutrality continued to blur. “Reclassification” and “use Title II” echoed with increasing frequency in Washington. But what was a content provider to do in the meantime? Those whose business plans made them totally web-dependent?

These reluctant high-bandwidth users were busy making deals with the carriers with increasingly frequency, and the FCC is still looking at those contracts. We know about the Netflix deal, noted above, with the large Internet providers; after all, Netflix by itself accounts for about 34.9 percent of all U.S. traffic on the web.\textsuperscript{22} But Netflix was hardly the only big boy user making such deals. “Many large tech companies—including Google, Microsoft, Apple, Amazon and Facebook—have quietly brokered deals with Internet providers to ensure their content is not slowed as it travels through their networks . . . .”\textsuperscript{23}

Netflix, as the biggest bandwidth user, would seem to have had the biggest stake in the net neutrality war. Despite its reluctant agreement with several carriers for bandwidth (including Comcast, one of the petitioning merger candidates), Netflix still believed in clear net neutrality with no additional carriage fees. Its petition with the FCC stated:

Netflix does not pay Comcast for transit. Nor does Netflix pay Comcast for priority treatment of its traffic. In effect, Netflix pays access fees—without which Comcast has refused to provide sufficient capacity for Netflix’ movies and TV shows to enter its network and reach our mutual customers directly and without degradation.\textsuperscript{24}

Netflix also wanted the entire Internet recast as a telecommunications utility (Title II), allowing an entirely different (and much tighter) level of FCC governance (especially on rates).

The streaming service’s position, outlined in a filing with the FCC on [July 15, 2014], recommends that the commission take a bold regulatory move that is fiercely opposed by broadband providers like Comcast, AT&T and Verizon as unnecessary and burdensome. The Internet Assn., the trade association which represents major Internet companies like Netflix, Google, Facebook and eBay, [however, has] stopped short of recommending such an approach.

The FCC currently classifies the Internet as an information service, or “Title I” in regulatory jargon. Many public interest groups are recommending that the commission reclassify broadband as a “Title II” telecommunications service, giving
the FCC the same kind of authority it has over the phone company.

But Netflix, in its filing, argues that “Title II provides [the FCC with] a solid basis to adopt prohibitions on blocking and unreasonable discrimination by ISPs. Opposition to Title II is largely political, not legal.”

Why were these web users still making carriage deals? Only until the rules were finalized? What did these bandwidth devourers see that most of us do not? And as we shall see, the move toward using Title II—that section of the code used to regulate utilities—to govern bandwidth providers soon became one of the most important aspects of this entire battle.

Oh, it’s not complicated enough for you? Add this proposed solution to the mix: One of the biggest web portals, Mozilla, has argued for a two-tiered regulatory “telecommunications services” schema from the FCC: one for the big content purveyors (more heavily regulated) and another for consumers. Even if we were to transition (“reclassify”) these big carriers from information providers to telecommunications services, the question of whether they would fall within the purview of the kinds of regulations consumers expect the FCC to apply . . . well . . . depends. It is quite possible that this reclassification could itself deprive the FCC of the power to accomplish this goal (absent statutory changes). If a carrier only charges the consumers for bandwidth consumption, but does not also charge the content providers (like Netflix) for that prioritized access, the FCC just might not be able to implement Mozilla’s suggestion. You see, the statutory definition of a “telecommunications provider” is one that provides bandwidth access “for a fee.” Litigators, mount your horses!

Stanford University law scholar Barbara van Schewick sees a big issue in that construct:

If the FCC adopts Mozilla’s proposal, then the FCC’s net neutrality regulations wouldn’t cover Internet providers that don’t charge content companies an access fee. This might sound like a good thing for consumers, except that it wouldn’t prevent other forms of content discrimination, leaving open the possibility that ISPs find a way to get around the fee-based rule. (From a different perspective, though, it’s possible that unpaid prioritization would help differentiate one ISP from another, theoretically improving competition in areas that are served by more than a couple providers.)

More troubling to van Schewick, though, is how the phrase “for a fee” would complicate efforts to ban fee-based content prioritization. At a basic level, what Mozilla is asking the FCC to do is to single out fee-charging ISPs (because non-fee-charging ISPs would be exempted under the definition of “telecommunications service”) and then turn around and tell them, based on that very same part of the Communications Act, that they can’t charge those fees . . .
It’s not hard to envision someone challenging that move on the grounds that it amounts to arbitrary and capricious regulation, van Schewick told the FCC. 26

Oh boy! Makes you want to become a telecommunications lawyer, huh? Think of the fees! Ka-ching! But there have to be “more ideas” and “signs of desperation” within the government and those pressing the government? But wait, there’s more, again! Let’s see. What other “new” net neutrality solutions were then floating around the FCC? Perhaps a variation on some of the themes described above? Well, in addition to what we have seen, there was a concept that momentarily (fleeting?) gained traction with a desperate FCC staff looking for “something” in the middle. It can be described as a hybrid schema predicated on a division between “wholesale” and “retail” aspects of web delivery:

It would apply utility-like regulation to the wholesale portion, the exchange of data from the content provider to the Internet service provider for passage through to the end consumer. The retail portion, the transaction that sends data through the Internet service provider to the consumer and which allows the consumer to access any legal content on the Internet, would receive a lighter regulatory touch.

....

By taking a split-the-baby approach to net neutrality, the commission would seek to avoid putting consumer Internet service under a burdensome utility-like regulatory regime. Critics of such an approach say it would discourage investment and slow the type of technological advances that have fueled the growth of online systems.

However, the hybrid approach would apply Title II of the Communications Act of 1934 [as amended in 1996] to the connection between Internet service providers, or I.S.P.s, and content providers. For the purpose of agreeing to transport content from a company like Netflix through its network, an I.S.P. would be treated as a “common carrier,” subject to stricter regulation.

In that instance, an I.S.P., as a common carrier, could not give an unfair advantage to one content provider over another.

Paid prioritization, where a content provider pays for a fast lane to consumers, would be restricted unless it could be proved to be just and reasonable. 27

“Unfair advantage”? “Just and reasonable”? Clear as a bell! The price we pay for having a practically unamendable statute (read: Congressional gridlock) that has outlived both its usefulness and relevance in a technological world that has long since evolved well beyond such legal reach.
Instantly, reactions flew through the ether:

Craig Aaron, president of Free Press, a consumer advocacy group that has called for full Title II recategorization, likened the hybrid approach to Frankenstein’s monster.

“The F.C.C. has already tried twice before to invent new classifications on the fly instead of clear rules grounded in the law,” Mr. Aaron said. “And twice their efforts have been rejected [by the courts]. This flimsy fabrication will be no different. And this approach will only serve to squander the political support of millions and millions of Americans who have weighed in at the agency asking for strong rules that will stand up in court.”

Public Knowledge, another consumer group, had kinder words for the policy. “Although there are many details that do not appear to have been worked out,” said Gene Kimmelman, the group’s president, “we are confident that the proposal they’re considering could use Title II and other regulatory tools in a manner that effectively addresses the most important issues in the debate.”

Mr. Kimmelman cautioned, however, that details mattered. “It is critical,” he said, “that the chairman explains how it will protect the core tenets of an open Internet that consumers expect and businesses require,” he said. “This includes, but is not limited to, explaining what sort of prioritization is allowed—and if allowed, why that level of prioritization is not harmful.”

Internet service providers are expected to be wary, at best, about the proposal, and AT&T, one of the largest, said [October 31, 2014] on its Twitter feed that “any use of Title II would be problematic.”

Are you getting a headache from all this? Oh yeah, that same AT&T that is being fined and required to provide consumer/state refunds by the FCC in the amount of $105 million for “cramming” charges (adding little additional recurring payments, often without a consumer’s knowledge, for stuff like extra ringtones, wallpapers, etc.).

Failing and looking for clarity in the legislative mud, by the end of 2014 FCC Chairman Tom Wheeler was beginning to see that “television is television,” over the air, cable, or the web. Duh! In December, FCC chairman Tom Wheeler proposed a change in regulations that would have companies distributing TV online treated the same as cable and satellite providers, allowing them access to broadcast TV content. “Big company control over access to programming should not keep programs from being available on the Internet,” said Wheeler in a statement. “We propose to break that bottleneck.” Wheeler’s Notice of Proposed Rulemaking is just the first step in a possible recategorization that would come too late to save Aereo, but the founder and
CEO of the shuttered company, Chet Kanojia, said it would be “a real win for creators and consumers.”

FCC decision-creep kept migrating in ways that made the Comcast/TWC boys very nervous. You see, they were hoping that narrow-bandwidth competitors, those providing 4 Mbps to 14 Mbps, would be seen as truly competitive with the vastly higher-bandwidth providers like Comcast and TWC. In a fully competitive market (where at least 15 percent of true alternative bandwidth competition exists in that market), the purveyors of bandwidth get to set their own rates (versus facing rate-setting regulation). The FCC, getting wise to those tricks, upped the definition of broadband to 25 Mbps in late January 2015, effectively reducing the number of companies that would be truly competitive to Comcast/TWC in many of those larger markets. That was a huge hint to the big bad merger boys that the tide just might have turned in a really big way.

So many controversial choices, so little time! Throw it against the wall and see if it sticks! Administrative lawyers rejoice! Go ahead and buy that second home and the Porsche you have been eyeing for months. God and the FCC are on your side! As new FCC rulemaking pushes back against the precepts underlying the Comcast/TWC merger, isn’t litigation sure to follow? And like those on the wholesale side of the transaction aren’t going to find some way of passing the cost inherent in that regulatory split back to the consumer, one way or another? Rates will remain high, average American Internet infrastructure will remain among the most expensive and least elegant in the developed world, and the big bad boys will implement their own high-priced “workarounds.” But the optics of being gentler to consumers will seem better. Even with the FCC net neutrality decision, maybe we ain’t seen the end of more proposals yet!

FCC Chairman Tom Wheeler changed the tilt of the playing field in his op-ed contribution to Wired, which reads in part:

Originally, I believed that the FCC could assure internet openness through a determination of “commercial reasonableness” under Section 706 of the Telecommunications Act of 1996. While a recent court decision seemed to draw a roadmap for using this approach, I became concerned that this relatively new concept might, down the road, be interpreted to mean what is reasonable for commercial interests, not consumers.

That is why I am proposing that the FCC use its Title II authority to implement and enforce open internet protections.

Using this authority, I am submitting to my colleagues the strongest open internet protections ever proposed by the FCC. These enforceable, bright-line rules will ban paid prioritization, and the blocking and throttling of lawful content and services. I propose to fully apply—for the first time ever—those bright-line rules to mobile broadband. My proposal assures the rights of internet users to go where they want, when they want, and the rights of innovators to introduce new products without
asking anyone’s permission.

All of this can be accomplished while encouraging investment in broadband networks. To preserve incentives for broadband operators to invest in their networks, my proposal will modernize Title II, tailoring it for the 21st century, in order to provide returns necessary to construct competitive networks. For example, there will be no rate regulation, no tariffs, no last-mile unbundling. Over the last 21 years, the wireless industry has invested almost $300 billion under similar rules, proving that modernized Title II regulation can encourage investment and competition.

Congress wisely gave the FCC the power to update its rules to keep pace with innovation. Under that authority my proposal includes a general conduct rule that can be used to stop new and novel threats to the internet. This means the action we take will be strong enough and flexible enough not only to deal with the realities of today, but also to establish ground rules for the as yet unimagined.30

Sounds like an old fashioned Gospel revival, don’t it?! Title II of the Telecommunications Act was rapidly rising to the top! Imagine that. Regulating the Internet as if it were a utility instead of a warm and fuzzy content provider. Hmm. Take that merger boys! Stand by litigators! Oh, and the February 26, 2015, rule pretty much mirrored that editorial.31

GOP Congress? What’s your take?

A House of Representatives oversight committee is investigating possible improper influence by the White House on the FCC’s new broadband and net neutrality rules. Rep. Jason Chaffetz (R-Utah), chairman of the House Oversight and Government Reform Committee, on [February 6, 2015] wrote to FCC Chairman Tom Wheeler requesting all documented communications between the Commission and the White House regarding the issue. Two days prior, Wheeler had made public the outlines of an FCC proposal to ban broadband providers from blocking, slowing or speeding up websites in exchange for payment.32

While in a rare crossover of interests, both houses of Congress, bridging across the partisan aisle for very different reasons, have supported legislation to ban states from imposing consumer-directed sales taxes on broadband Internet access, the underlying battle to enable or rein in the FCC continued escalating. As part of the GOP battle with the White House, on February 9, 2015,

Senate Homeland Security and Governmental Affairs Chairman Ron Johnson (R., Wis.) sent a letter to FCC Chairman Tom Wheeler giving him two weeks to provide documents related to the proposal, along with a written explanation of “what new factors” led him to conclude that an earlier approach [a permissible tiered-speed web access] was “no longer
appropriate.”

... .

“Since the FCC is an independent agency that derives its authority from Congress and not the White House, it is highly concerning that the White House would seek to take on this level of involvement in the regulatory process of the FCC, or attempt to supplant completely the agency’s decision-making apparatus,” Mr. Johnson wrote in the letter, which demands documents by Feb. 23. 33

But could a gridlocked Congress remotely pass anything that would “rein in” these sweeping net neutrality changes? Really?

Republicans on Capitol Hill, who once criticized the plan as “Obamacare for the Internet,” now say they are unlikely to pass a legislative response that would undo perhaps the biggest policy shift since the Internet became a reality.

“We’re not going to get a signed bill that doesn’t have Democrats’ support,” said Senator John Thune, Republican of South Dakota and chairman of the Senate Commerce Committee. “This is an issue that needs to have bipartisan support.”34

Congress “net neutralized”? Apparently, Thune read this article, and his handlers backpedaled as fast as they could.

Contradicting a report by the New York Times [on February 24, 2015] that Thune had “all but surrendered” to Democrats and the FCC days ahead of an agency vote on net neutrality, a committee spokesperson said that the chairman of the Senate Commerce Committee is still committed to finding a legislative solution. Although a bill won’t come together before the FCC votes, as many critics of the agency were hoping, GOP outreach to Democrats will continue. 35

The Easter Bunny’s ears pricked up.

Dissent within the FCC itself pitted Democratic appointees (the majority) championing open flow and GOP commission members telling us how bad a single open Internet would be for business, especially the smaller entrepreneurial players:

Among those opposed to the increased regulations are Ajit Pai, a Republican member of the FCC: He has said that the ruling “saddles small, independent businesses and entrepreneurs with heavy-handed regulations that will push them out of the market.” Shark Tank investor, and billionaire owner of the Dallas Mavericks, Mark Cuban calls net neutrality “a demonization of big companies” like Comcast, and that the latest FCC revision will “[f@*k] everything up.”

But if you talk to small business owners themselves, they tend to strongly disagree. One hundred companies—including Yelp,
GitHub, Foursquare Labs, Etsy, Kickstarter, and Tumblr—wrote to the FCC [in mid-February 2015], saying, “Any claim that a net neutrality plan based in Title II would somehow burden ‘small, independent businesses and entrepreneurs with heavy-handed regulations that will push them out of the market’ is simply not true.”

It was getting uglier by the minute, but the FCC passed that controversial measure, didn’t it? Stand by courts, here they come!

Nevertheless, net neutrality isn’t actually the approval or disapproval of the Comcast/TWC merger, is it? Oh, it seriously impacts the merger and any resulting operating content and bandwidth provider, but it is technically a separate issue. So what about that merger?

HAVEN’T WE BEEN HERE BEFORE?
The FCC has faced mergers and massive (at the time, anyway, percentage-wise) consolidation of broadband before. And while the old AT&T/MediaOne (who?) merger of 2000 may have faded from memory, it does represent a time when the FCC and the Department of Justice (DOJ) actually stopped and reconfigured a merger that would have placed 40 percent of the nascent bandwidth market in the hands of a single company. But recent trends seem to support megamergers, and the issues facing both the FCC and the DOJ are not as easily addressed as this earlier event. The fly in the consumer ointment may be a perception of lots of new local market alternatives, even if they represent fewer capabilities.

In the case of MediaOne, regulators made AT&T sell off its newly acquired stake in Road Runner [which wound up at TWC] as a way to address the potential gatekeeping problem. But today’s case isn’t as simple, largely because the Internet has become far more than an information retrieval system. It’s now a platform for a host of applications that were traditionally provided by distinct industries. These industries are now in the process of converging and moving online, and Comcast conveniently sits at the intersection of them all. Even if regulators thought that Comcast should sell off some part of its business to keep it from becoming too powerful, it isn’t clear what it could spin off.

....

Like all analogies, this one isn’t perfect. For one thing, while the Justice Department foresaw a national market for broadband in the MediaOne case, the FCC was much more reluctant to do so. So long as consumers could choose among a number of different ISPs in the same market, the FCC reasoned, a merger wasn’t necessarily problematic for competition. The FCC said much the same thing in a different order in 2002.

....

In any case, it’s clear that Comcast’s position in content and
distribution creates incentives for it to get the best deals that it can in negotiations with other cable and Internet companies. And it’s those relationships—not the one between consumers and their local ISP—that could create the most serious harms.

In part to mollify those concerns, Comcast has voluntarily offered to sell off 3.9 million subscribers. After those divestitures, Comcast would control around 30 percent of the pay-TV market. If that figure sounds weirdly specific, it isn’t an accident.

When Congress wrote the laws governing cable in 1992, it specifically asked the FCC for a limit on cable ownership. The agency tried a number of times to implement a formal rule. Those efforts kept falling apart, but it had the long-term effect of creating a norm about cable ownership. Now, the 30-percent cap on cable marketshare has become something of an unspoken rule at the FCC.\(^\text{37}\)

Uh oh! That doesn’t sound good. But wait, consumers, there’re even more legal speed bumps along the way!

**“RECLASSIFICATION”**: CATCH 22

The carriers still have a secret weapon lurking in their legal quiver, assuming that the FCC is even able to sustain jurisdiction over these bandwidth providers as utilities (the “reclassification” issue) per its February 26, 2015, decision. Title II of the 1996 (another era in our digitally driven world!) Telecommunications Act allows the FCC to ban allowing carriers to have the right to impose “unjust” or “unreasonable” discrimination over bandwidth users. Huh? While carriers can’t purposely slow down a user’s bandwidth (digital speed bumps, if you will) unless he or she pays more, the question was often framed to ask if such carriers could, under any currently permitted FCC action, charge more money to give someone a better line or faster access? Huh, again?

Even supporters of “strong” net neutrality acknowledge the loophole exists.

“The first big problem with the ‘unreasonable discrimination’ approach is that it’s utterly unworkable,” wrote Chris Riley, Mozilla’s senior policy engineer, in a blog post on net neutrality as far back as 2010, when the FCC was writing an earlier version of its net neutrality rules. “What does ‘unreasonable discrimination’ even mean? Is it ‘reasonable’ for a network operator to block BitTorrent or another peer-to-peer program, just because it sometimes uses a lot of bandwidth? That’s in the eye of the beholder.”\(^\text{38}\)

Could the FCC even have provided the exclusive definition of what is “just” or “reasonable”? Was this reality one more push of the pendulum toward true net neutrality?

Where Google (among several others) is layering in new fiber-optic networks, they’re bragging that all their connectivity is already a “fast
lane. AT&T has also announced a rollout of new very high-speed (1 Gbps) fiber-optic networks in cities across the United States, including the Silicon Valley itself. Does this suggest that when we move to full fiber, this whole idea of net neutrality becomes moot . . . or will those carriers with premium pricing be able to let go? Assuming wide-open fiber bandwidth, is net neutrality even an issue? Litigators, don your crash helmets and prepare to do battle! Is that the sound of lawyer saliva splattering to the floor? But until there is full fiber access, expect ugly to remain ugly. Legal phraseology and the three-card Monte seem to find a few shared characteristics in this space.

For example, sensing that perhaps the FCC might indeed reclassify bandwidth carriers as utilities (as that agency actually did), AT&T concocted a weird "user-directed prioritization" fallback where it isn't the content providers that pay for priority, it is the end-user consumers. Huh?

AT&T claims the FCC could implement a fast lane ban and still comply with the court ruling "by concluding that paid prioritization is a per se commercially unreasonable practice under the theory that it threatens the open Internet." But in the next sentence, AT&T says that "User-directed prioritization, as distinct from paid prioritization arrangements, would remain permissible."39

Simply, AT&T would provide its customers with various bandwidth packages (obviously at different prices), and within that bandwidth allocation, a user would be forced . . . er, they would have the ability to . . . allocate which content gets which priority.

Same result? Oh, yeah! Somebody pays more for speed and access. If it walks like a duck . . . Too many "duck" theories in this space. Stanford’s Barbara van Schewick has her own version of "user-directed prioritization," and because it’s one of the many new ideas on the block, the FCC once seemed as if it were "leaning in" and buying into the notion, but the pendulum moved toward a purer form of net neutrality? Her version would have banned letting the big providers buy their way into the speed zones unless the users requested that result. Had that construct been enacted, the carriers would have been laughing—all the way to the bank—because under this "new" idea, they still would have had someone to pay them more money for bandwidth speed access: the same-old/same-old or YOU! Quack! Quack! Quack! If the FCC new net neutrality rule holds, they lose. If a court overturns that new net neutrality ruling . . . ah . . . we’ll see.

And then there is the general public, initially struggling simply to understand what was at stake . . . if they even cared. With a little help from TV talk show comic John Oliver, "net neutrality" became the hottest topic in FCC history.

“I would like to address internet-commenters out there directly. Good evening, monsters. This may be the moment you’ve spent your whole lives training for . . . For once in your life, we need you to channel that anger—that badly spelt bile that you normally reserve for unforgiveable attacks on
actresses you seem to think have put on weight, or politicians
that you disagree with, or photos of your ex-girlfriend getting
on with her life . . . We need you to get out and, for once in
your lives, focus your indiscriminate rage in a useful direction.
Seize your moment my lovely trolls, turn on caps lock, and fly
my pretties, fly, fly!”

The resulting public comments crashed the FCC website!

With the most comments ever filed with that administrative body, the
FCC is facing a tough set of choices. There are too many forces that
believe it has to do something significant and soon, but the incumbents
who love the controlled and limited competitive universe that exists
now expect to fight tooth and nail against anything that could even
slightly level the playing field. I am seeing violent storm clouds on the
horizon, and with the net neutrality rule in place, we can expect to see
efforts to reverse or limit its impact in court.

Can the FCC indeed even regulate this new range of online providers—
reclassify if you will—under its mandate under Title II of the 1996
Telecommunications Act? And if so, what is the plan that the FCC
thinks can rise to the surface and perhaps be implemented if courts
push back? They don’t have to deal with that . . . yet. Is television
indeed simply the consolidation of “content” delivered to consumers by
signals through, well, different wires, airways, or satellite? FCC
Chairman Tom Wheeler seems to think so.

The FCC’s proposal, which is still in its initial stages, would
classify certain online video services in the same category as
cable and satellite TV providers (“multichannel video
programming distributors,” in the legal terminology). The
change would make it easier for the online companies to offer
popular channels.

Under the plan, the online services would have the same right
as cable companies to negotiate fairly for access to broadcast
networks such as Fox and CBS. TV providers that also own
cable channels (such as Comcast) wouldn’t be allowed to block
their online rivals from carrying those channels. [Uh oh!]

The proposal would apply only to online services that offer
multiple streams of pre-scheduled programming. So the rules
wouldn’t cover Netflix and Hulu, which allow subscribers to
watch videos whenever they want. But it would apply to
services that are in the works from Sony, Dish Network, and
Verizon. The controversial website Aereo, which shut down
earlier this year after a loss at the Supreme Court, could also
make a comeback.

. . . .

Major cable companies are getting worried they could face
stiffer competition from online video, thanks to [this]
government proposal.41
Potential 2016 Democratic presidential candidate, a Yale-educated lawyer by training, Hillary Clinton believes that reclassification was really the only tool the FCC had to implement net neutrality:

“I think that for the FCC to do what they want to do to try to create net neutrality as the norm, they have a hook to hang it on,” she said, adding that she thought Wheeler and supporters were proposing to re-regulate broadband under Title II of the Communications Act because “it’s the only hook they’ve got.”42

War isn’t pretty, and there are always casualties and collateral damage. Still, the legal spectrum here faces even greater challenges based on market restraints imposed by incumbents over the years. So fasten your seatbelts, and stand by for more interestingly vile realities.

ENDNOTES

1. 47 U.S.C. §§ 201 et seq.


4. Id. § 153(50), (53).


9. Id. at 17–18.


switch/wp/2014/08/05/obama-strikes-a-populist-tone-on-net-neutrality/.


15. See Press Release, FCC, **FCC Launches Broad Rulemaking on How Best to Protect and Promote the Open Internet (May 15, 2014)**,


17. See infra note 30 and accompanying text.


21. See Ted Johnson, **Mayors Call for Preventing “Paid Prioritization” on Internet**, Variety (June 23, 2014),

22. **Sandvine Report: Netflix Dominates (Still), Amazon Instant Video Growing**, Sandvine (Nov. 20, 2014),

23. Gerry Smith, **Net Neutrality Fans Aren’t Going to Like This Chart**, HuffPost Tech (May 21, 2014),


25. Id.


28. Id.


31. See supra note 2.


cable-threatens-to-create-internet-fast-lanes-even-if-the-fcc-beefs-up-net-neutrality/


The Television Wars

Part III: Sports—The Final Chapter

BY PETER J. DEKOM

In the first two segments of this series, we looked at the new world of television through the twisted eyes of the Aereo debacle and tangled viciously with FCC battles wrapping into merger mania, local municipalities muscling out cable competitors, and the ugliest of the vile, the net neutrality wars. Which brings us to what may be a very critical, if not determining, television content segment: Sports programming may just be the ultimate decider of the future of “television.”

THE REAL MUSCLES OF SPORTS PROGRAMMING

NBC got $4.5 million per 30-second spot (sold out!) for the 2015 Super Bowl. They got halftime performers to pay them for the exposure. Thank you Katy Perry! Sports! NBC Universal agreed “to pay $7.75 billion for the exclusive broadcast rights to the six Olympic Games from 2022 to 2032, highlighting with that staggering sum the supreme value that media companies are placing on live event programming in a market disrupted by modern viewing habits.”[1] A third of consumer cable dollars come from sports. One-third!

“NBC’s ‘Sunday Night Football’ remains the champion of ‘C3,’ but CBS’s new ‘NFL Thursday Night’—eight weeks of NFL games that are new to the Eye—is projected to be the second-most fertile ground for ad viewers in the 2014–2015 TV season[.]”[2] The sports industry was stunned in early October when the NBA basically doubled its former license fees in new deals with Time Warner Cable (TWC) and Disney’s ESPN.

March Madness, which rolled well into April this year, pretty much tells you that not only are sports the driver of so much television, but unlike Oscar telecast ratings (which dropped 18 percent in...
2015 from 2014), more people are watching athletic events than ever. The April 6, 2015, NCAA basketball championship game between Duke and Wisconsin "delivered the event's top overnight rating in 18 years, surging more than 30% above last year's number and dominating the primetime ratings race for CBS."[3] Overall, “the 2015 NCAA Tournament coverage across CBS, TBS, TNT and truTV averaged a 7.8/16 in the overnights, up 13% from last year and the best in 22 years (7.9/17 in 1993 [when there were a tiny fraction of the viable channels we have today]).”[4]

What’s going on here?

Sports may be the real "decider" as to the future of just about any form of "television." "For many many consumers, the decision whether to become or remain a pay-tv subscriber indeed may largely turn on high-value sports programming," said Jeffrey Silva, a telecom and media analyst. 'It’s gold, just huge.'”[5] Sports is immediate, television in the now, in real time, where a recording isn’t remotely as exciting as watching the competition live. Most competitive sports consume hours of continuous programming, the easy button for too many telecasters. Entire channels are devoted to a single sport or even a single league.

And even if the individual sports don’t pay for themselves in terms of ad sales, the ability to promote the rest of a network’s programming within popular sports event programming cannot be underestimated. After all, skipping commercials and recording for later viewing simply are not issues: 98 percent of all sports are watched live! Bathroom and snack breaks maybe . . . but not so much!

No sports and you might expect cable/satellite services to lose customers faster than the Titanic took on water. Sports are the glue that holds a huge pile of customers to their angry world of outrageous monthly cable bills. For years, the major college and professional sports teams—and their leagues and conferences—entered into television licensing agreements with all kinds of telecasters. Local teams were usually available (but not always) on basic cable services or broadcast stations, but out-of-market games required specific subscription from consumers who wanted that extra. And license fees, generally renegotiated every three or four years, generally rose at the top end of inflation numbers plus a bit.

You can see how important sports are today in AT&T’s requirement that DirecTV lock down NFL rights as a condition to their proposed merger, a combination that was finally approved by the FCC in late July 2015. And while the NFL cannot currently step on its contractual telecasting/streaming rights to present entire games live online to consumers (including deals with CBS, Fox, NBC, ESPN, and even its own network), like many leagues, it is tiptoeing
toward web-delivered content, which may eventually include the games themselves. The NFL has “taken to the digital field” with the kickoff of NFL Now, “an Internet-video service offering gridiron fans hundreds of hours of free content and a $1.99-per-month premium package with access to even more. But while NFL Now will include highlights from in-progress games, it won’t stream live broadcasts over the Internet.”[6]

And make no mistake, while NBA (yeah, the league that doubled its license fees!) and NHL ratings are not remotely this competitive, the fall 2014 broadcast ratings were dominated by Monday and Thursday night NFL games, taking nine out of the 10 highest spots over the initial weeks of the season. What’s that worth to advertisers and a network trying to promote its entire fall premiere season?

Traditional telecasters have to balance the huge costs that sports franchises are demanding for carriage against the harsh reality that without sports, their grip on content delivery to the American public would slip quickly away. But so far, with the exception of battles like the one over the Los Angeles Dodgers discussed below, the incumbents are still writing the big checks, and some (but not all) of the biggest major sport franchises are staying put. For now. The NFL won’t go for more than online “highlights” as noted above, but why are they being so limited?

With the start of the NFL regular season, television gets back its biggest audience. But don’t expect to see any live games online, without having to pay for cable or satellite, anytime soon.

Even as traditional television adapts to the Internet, the NFL doesn’t feel the rush. They don’t have to: their biggest audience is on broadcast, cable and satellite TV, and they are making around $9 billion each year to license the rights to broadcast their games. That figure could reach $25 billion by 2027, predicts NFL Commissioner Roger Goodell. The league has contracts with cable and broadcasters, worth billions of dollars, that will last the next seven years.

Still, NFL executives are trying to figure out how to grow their digital business. They’ve made trips to Silicon Valley where they’ve met with Google chief executive Larry Page and other industry executives. Some tech execs have expressed interest in partnerships to bring games online direct to consumers, similar to Major League Baseball’s MLB.TV [or the National Hockey League’s NHL.TV].[7]

Does the fact that even the NFL is talking to the digital alternative providers suggest that it knows that the web is likely the long-term winner? Fox Sports has even figured out how to make local market games available over the web . . . with a huge catch: “Gridiron fans must subscribe to a participating cable or telco TV provider to
access the Fox Sports Go service; DirecTV and Dish Network customers are, for now, out of luck. Moreover, because of the league’s exclusive rights deal with Verizon Wireless the Fox Sports service won’t be available on mobile phones.”[8]

Not to mention a few bumps along the road that the NFL doesn’t seem to have addressed sufficiently in the eyes of too many actual and potential viewers. How do league reactions to player spousal abuse and Super Bowl deflategate impact consumer loyalty? The NFL has already begun to detect a slow disconnect with younger viewers that does not augur well for the longer term.

And what about other new sports leagues that have formed in response to the obvious increase in the value of sports programming or existing teams? Are they smelling the blood money in the water?

It’s pretty obvious that teams, leagues, and conferences (notice that there are few more college conferences these days making deals!) have now figured out that they are necessities for cable systems to survive. Knowing the value of sports today, their “asks” for going-forward renewals or new licenses are now multiples of their old license fees. Double and triple even. For DirecTV viewers, wonder why there are no Los Angeles Dodgers games even if you live in LA? Think this is the fate for Clippers fans as well? Both franchises sold for record-shattering prices at or over $2 billion each, which pretty much mandates huge chargebacks to consumers. Here’s the trend: “American sports teams in general, since the 2012, have sold, on average, for 55% more than the most recent Forbes franchise valuation of the team.”[9]

Will this backfire, force consumers to buy these sports packages à la carte from the web, and kill the cablecasters who don’t, forgive the expression, step up to the plate? For those cable providers who have accepted these new license fees, to moderate the cost impact on their overstretched customers, they have dropped marginal networks, lessening the diversity of choices as predicted. TWC, which paid $8.35 billion for a 25-year hold on Dodgers telecasting rights, is finding a lot of resistance from other carriers to paying the associated license fee.

Responding to pressure from Rep. Brad Sherman (D-Cal.) and five other congresspeople, TWC even offered to submit to binding arbitration, knowing that the arbitrator would have to take into consideration that huge payment, but it is precisely that perceived overpayment that the other content providers (like DirecTV) object to. They easily rejected the arbitration offer. Sherman then suggested that the arbitrators also be able to “take into consideration all relevant data regarding regional sports networks not only in Los Angeles but across the country.”[10] This might lift DirecTV over top and into a resolution? Hmmm!
FCC chairman Tom Wheeler, in a strongly worded letter to Time Warner Cable CEO Rob Marcus, said that the agency “will intervene as appropriate” to resolve the dispute that has kept the Dodgers unavailable to some 70% of viewers in the Los Angeles region.

His letter on [July 29] follows calls from members of Congress for the FCC to mediate the dispute between Time Warner Cable and other multichannel providers, including DirecTV.

But Wheeler’s letter to Marcus appeared to pin the blame on TWC for letting the dispute linger for so long.[11]

At the very tail end of the 2014 regular season, with a trickle of games remaining, suddenly an almost meaningless deal was made with a local television station—KDOC—to carry those few regular season Dodger games. There is a war going on out there, and the combatants want to send their signals loud and clear. Are you listening to the noise? If no one agrees to take this huge cost to those consumers, what is going to happen? With the FCC extending the time period for the Comcast/TWC merger review, the 2015 baseball season began with the Dodgers sitting in the same narrow/expensive TWC cable niche—which still excluded DirecTV—as when the 2014 season ended. Would conditions permitting a merger, should that occur, require an end to this misery? Hah! What merger?!

Sensing that FCC scrutiny would never allow TWC and Comcast to merge, in April 2015, the companies simply called off their deal. By late May, another, smaller suiter stepped into the fray as Charter Communications (which was working out a deal with Bright House) and TWC announced a merger of their operations. A TWC press release stated: “The combination of Charter, Time Warner Cable and Bright House will create a leading broadband services and technology company serving 23.9 million customers in 41 states.”[12] Not as big as the Comcast combination, but big . . . and Dodger games were clearly part of this mix.

But with all of these combinations, FCC scrutiny, and consumer resistance to rising cable rates, exactly where is this freight train heading? Are their countervailing forces that might actually reduce the value of sport franchises? Remember the Aereo case?

National Football League games have become some of the most popular programming on television; last fall, 34 of the 35 most-watched TV shows were NFL games. But the league tightly controls its games, collecting hefty fees from broadcasters, cable and satellite companies. If you’re a football fan who wants to watch games live-streamed to your device, good luck finding a way without paying for cable or satellite.

If Aereo prevails in the ruling [but they didn’t!], the foundation of
the NFL’s television business could crumble. The league has already signed billions of dollars worth of contracts with broadcasters and cable companies for the rights to air its games for the next seven years. But a thriving Aereo could help fans bypass the broadcasters, devaluing their expensive contracts with the NFL.

If Aereo loses [Oh boy, did it! It wound up selling customer lists!], the NFL will be able to continue charging cable and broadcast companies billions of dollars for exclusive rights, and the options for consumers who love watching football will remain largely the same.[13]

And that’s just the NFL, a scandal-plagued league that still remains the most popular sport on American television. With Aereo’s loss, it’s still as nasty as ever for consumers out there. They are shelling out more and more to get sports.

Stability and predictability in the U.S. major league sports industry is anything but static or stable. In early September 2014, FCC Chair Tom Wheeler announced plans to reconsider the 1975 FCC-approved rights of professional sports teams to require local telecasting blackouts when the physical events were not sold out—he believed these blackout rules were obsolete. After all, the era of stadia with 40 percent of the seats filled is long past. When sellouts do not occur, the seat capacity is usually substantially filled anyway. Local businesses had taken to buying out small numbers of remaining seats to prevent the blackout, but today, that rule is simply not serving the general public while only creating a very minor benefit to the local teams. As September 2014 came to a close, the FCC formerly killed the blackout rules. It seems a lot that what once was sacred in professional sports . . . just isn’t anymore.

But wait . . . one more fly in the ointment (pot of honey?) that, this time at least, might augur in favor of consumers and against unilateral league-mandated pricing structures for sports consumers in search of better television economics. It seems that these television pricing structures are themselves under an entirely new attack by angry fans who have had enough with high costs in buying big "packages" of unwanted sporting events just to see specific out-of-market teams play.

Some fans were so angry that they took their case (a class action—Garber v. Office of the Commissioner of Baseball[14]) to a New York federal district court. The dispute involves MLB and NHL fans who contend that they are "forced to pay high out-of-market package fees to watch their favored teams and that leagues’ teams are an 'illegal cartel' that make 'agreements to eliminate competition in the distribution of games over the Internet and television.'”[15] The lawsuit looks at “how clubs contract with
regional sports networks (RSNs), who then provide telecasts to the league free of charge for out-of-market packages with in-market online territorial restrictions.”[16]

Fox Sports executive Robert Hacker restates the issues with a lot more clarity:

The central allegations in Garber are as follows: With the exception of nationally televised games, a multichannel video programming distributor (MVPD) subscriber gets access to their local RSN which only televises local “in-market” games. For a consumer to obtain "out-of-market” games, they must purchase a league package (such as NHL Center Ice and MLB Extra Innings) that includes all out-of-market games. The leagues (NHL, MLB) control those rights and license them directly to the MVPDs. The agreements between the RSNs and the teams include the same in-market/out-of-market restrictions, as do the agreements between the RSNs and the MVPDs. Plaintiffs allege this is anti-competitive and constitutes an antitrust violation.[17]

The leagues’ response? Antitrust exemption they cried. Huh?

For most sports leagues to function, everyone had assumed that they needed strict rules to control not only the participating teams but also the players themselves. But that degree of league-desired market control—to assure that the teams within a league were athletically balanced (think draft picks, for example, and bans on simply buying better players without restriction) to keep the sport interesting—could easily have been viewed as violative of antitrust laws. Courts sympathized with the problem and granted the desired antitrust exemption, and the notion of that exemption has been a basic tenet of American sports, especially baseball, for a very, very long time.

The antitrust exemption dates back to a 1922 Supreme Court ruling, Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs, which dealt with a former competitor to the American and National Leagues.[18] The Court held that baseball was “purely state affairs” and not interstate commerce, even if players traveled, which was “a mere incident, not the essential thing.”[19] The Supreme Court had more opportunities to address the antitrust exemption in its 1953 decision in Toolson v. New York Yankees, Inc.[20] and 1972 decision in Flood v. Kuhn, [21] which dealt with the restriction on player movement and compensation. “Since then, there’s been debate about the scope of the exemption—whether it covers labor matters or more—and faced with a challenge to its television territory rights system [in the Garber case], MLB invoked the antitrust exemption to bar the plaintiffs’ claims.”[22] Surely, thought the leagues involved in Garber, we are not going to be forced to change a damned thing.

Okay, there had been a little erosion in the courts, but nothing to
worry about or so the owners thought. A 2010 Supreme Court decision, American Needle, Inc. v. National Football League,[23] took a whack at that sports industry’s antitrust-exempt status, striking down an NFL attempt to centralize and control commercial vendor licensing across the 32-team league. But American Needle was not about viewing the games themselves, so most pro-league execs didn’t lose a whole lot of sleep about their “exemption.”

Folks have been taking shots at that exemption ever since, however, and now the sports industry is facing some serious assaults. But that Garber case, well, it was the beginning of the biggest headache for pro-sports leagues. On August 8, 2014, major leagues were stunned by a preliminary ruling in the Garber litigation: District Judge Shira Scheindlin (Judge Judy’s husband!) rejected summary judgment motions brought by the MLB, NHL, Comcast, and DirecTV based on the historical exemption case. "And in the process, the judge decided that MLB’s nearly century-old antitrust exemption doesn’t apply ‘to a subject that is not central to the business of baseball, and that Congress did not intend to exempt—namely, baseball’s contracts for television broadcasting rights.’”[24] Uh oh! Think about the broader ramifications of that statement.

Relying on the antitrust argument that had prevailed almost a century earlier, major leagues have argued that controlling and equalizing revenues across teams is the only way to maximize competitive balance, preventing one team from accumulating the power to buy more “better players” than the rest. The thought of losing that antitrust exemption is and was terrifying to the big economic incumbents. Still, the trial roamed down that dangerous path.

In early 2015, in a "short" order denying the MLB's petition for a writ of mandamus, "an appellate panel rejected the MLB's argument that it must intervene because a New York federal judge erroneously refused to apply the well-settled baseball antitrust exemption."[25] On May 16, 2015, Judge Scheindlin certified the case to continue as a class action but limited the plaintiffs to injunctive relief (not money damages).

The Garber case will now move forward towards a trial to be held at a yet-to-be-determined date (likely sometime in 2016 or 2017). The legality of MLB’s television practices will be judged under the so-called “rule of reason,” a balancing test in which the court will determine whether MLB’s restrictions are, on balance, pro- or anti-competitive, and thus legal or illegal. While the plaintiffs will argue that the policies are clearly anti-competitive . . . MLB has several credible arguments it can assert in defense of the existing rules. Ultimately, then, it is still too early to predict who will prevail at trial.”[26]
I guess we can see this battle wending its way back up the federal appellate structure for years to come, but the ultimate decision could reconfigure the economics of sports telecasting (digital and traditional) forever.

Seems that Garber (just based on those preliminary rulings) has been scaring folks and inspiring both litigation and even some settlements. DirecTV settled with consumers in a class action over out-of-market NHL games where consumers only wanted to follow one team.[27] Now it’s the NFL deal with DirecTV that is drawing particular interest from consumers over its Sunday Ticket pro-football package.[28] Same issues. Full package vs. single out-of-market teams.

Even owners of sports bars and other commercial establishments find the exclusive relationship between the NFL and DirecTV abhorrent.[29] The $12 billion class action complaint alleges:

DirecTV’s arrangement with the NFL allows the Defendants to restrict the output of, and raise the prices for, the live broadcast of NFL Sunday afternoon out of market games. . . . Of the 4 major professional sports in this country—baseball, basketball, hockey, and football—the only one with an exclusive out of market broadcasting arrangement is the NFL/DirecTV Sunday Ticket. Major League Baseball (“MLB”), the National Basketball Association (“NBA”), and the National Hockey League (“NHL”) all distribute live out of market games through multiple MVPDs, including, for example, DirecTV, Dish Network, Comcast, Cox Cable and Time Warner. As a result, DirecTV does not charge nearly as much for access to MLB Extra Innings, NBA League Pass, and NHL Center Ice, which provide access to more games per week over a longer season than the NFL.

Have the floodgates opened?

Even municipalities are swinging at the sports antitrust exemption piñata. There is one more action before the federal Ninth Circuit where the City of San Jose is attempting to lure baseball’s Oakland Athletics a bit farther south, but MLB stands firmly in the way.[30] “The city of San Jose steps up to the plate to challenge the baseball industry’s 92-year-old exemption from the antitrust laws, Circuit Judge Alex Kozinski began. ‘It joins a long line of litigants that have sought to overturn one of federal law’s most enduring anomalies.’”[31] It’s a longshot, but longshots have defined our appellate decisions since this nation began.

Even as trends are pushing back against the seeming monolithic “bigness” and domination of professional sports, there are new combinations that are moving in the opposite direction. With the cost and sophistication of digital telecasting rising, the NHL seems to have thrown in the towel on keeping up with the digital “Joneses.”
The National Hockey League and Major League Baseball Advanced Media are now teammates, announcing a “groundbreaking” digital media rights partnership between the two organizations. The six-year deal will look to launch a fully integrated global hub of digital content that includes video, live game streaming, social media, fantasy, apps, along with statistical and analytical content. In addition it hands MLBAM the rights to distribute live out-of-market games, including through the NHL GameCenter LIVE and NHL Center Ice subscription services. Through the agreement, MLBAM will now take over NHL.com, including the League’s seven native language sites, Club websites and operate NHL apps. On the TV front, MLB Network will now offer studio space and production resources for the NHL Network for distribution in the United States and certain international markets. MLBAM expects to fully launch its NHL presence in January 2016.[32]

Any antitrust ramifications? Hmmmm.

But as much as companies, courts, and regulators think they are controlling this new digital content universe, it really is consumer behavior that sets the pace . . . and if consumers don’t like a ruling, it seems that they simply will ignore it.

CONCLUSION OR ONLY THE BEGINNING?

In the end, everything in the morass of competing interests and overwhelming complexity is completely linked to every other part. Go lawyers!

Where does this all end? It doesn’t! Where will the little guys go to reach an audience? Everywhere. What will television look like in five years? Not remotely what it looks like now. And exactly how much will consumers bear as the biggest baddest boyz turn them upside down to shake every nickel and dime they can? It seems they know that consumers are stuck on content; the delivery platform may change, but the addiction to “connectivity” continues to grow. Especially sports. The priority of the “stuff” that consumers cannot live without has changed radically and augurs well for those bad boyz. According to a Pew study released on February 27, 2014:

- 53% of internet users say the internet would be, at minimum, “very hard” to give up, compared with 38% in 2006. That amounts to 46% of all adults who now say the internet would be very hard to give up.
- 49% of cell phone owners say the same thing about their cell, up from to 43% in 2006. That amounts to 44% of all adults who now say cell phones would be very hard to give up.
- Overall, 35% of all adults say their television would be very hard to give up, a share that has dipped from 44% who said that in 2006.
28% of landline telephone owners say their phone would be very hard to give up, a major drop from 2006 when 48% of landline owners said it would be very hard to give up their wired phone. That amounts to 17% of all adults who now say their landline phones would be very hard to give up.[33]

Read dem tea leaves! Oops, gotta go. My home NHL team, the Los Angeles Kings, are on television right now . . . and I don’t want to miss the game. Oh, but one more little story as they warm up:

I’d like to end this seemingly endless series of articles with the story of one New Mexico cable TV consumer who may just be the most angry of the lot: “Unanticipated Comcast fees made one Albuquerque woman so angry she pulled a gun on a worker for the cable company . . . . Gloria Baca-Lucero, 48, was charged with aggravated assault with a deadly weapon [on July 28, 2104] and booked into jail. She was released later that day.”[34] Is there a cable-industry equivalent to “stand your ground” or “justifiable homicide”? Will our addiction to sports make the pain feel any better?

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ENDNOTES


[4]. Id.


[6]. Todd Spangler, Internet-Video Service on Apple TV, Xbox, Roku and Other Devices, Variety (Aug. 7, 2014),


[16]. *Id.*

[17]. Peter Dekom, *A League of Their Own*, Unshred Am.

[19]. Id. at 208–09.
[22]. Gardner, supra note 15.


