Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Expanding Consumers Video Navigation Choices	)	MB Docket No. 16-42
	)	
Commercial Availability of Navigation Devices	)	CS Docket No. 97-80

Reply Comments

of

Tech Knowledge

May 23, 2016

Executive Summary

The arguments made by proponents of the Wholesale Proposal affirm that its true purpose is to limit MVPDs' ability to exercise editorial discretion by forcibly overwriting MVPDs' video interfaces. The Communications Act, previous FCC findings, judicial precedent, and scientific studies in behavioral economics all demonstrate that the interface between consumers and MVPDs' video programing is itself a form of speech or is otherwise entitled to First Amendment protection because it is intrinsic to MVPDs' exercise of editorial discretion.

Consider Amazon's example in its comments in this proceeding — that the Wholesale Proposal would enable Amazon to suggest that an MVPD subscriber watch Amazon's own programming rather than an MVPDs' program. In the context of the printed news, that would be equivalent to a rule permitting the Washington Post (a newspaper owned by Amazon CEO Jeffrey P. Bezos) to slap a new front page on the Washington Examiner that contains the Post's chosen headlines and a message directing Examiner subscribers to read the Post instead. Though the Examiner's subscribers would still have access to the Examiner's content as a technical matter (by turning the page), the rule would have the effect of compelling the Examiner to publish (or subsidize the publishing of) that which it does not want to publish (the Post's headlines and advertising messages) while effectively overriding the Examiner's editorial decisions about what should be considered the "front page news" of the day. Similarly, the Wholesale Proposal would force MVPDs to publish that which they do not want to publish (i.e., mandatory "information flows") in order to enable third-parties to direct MVPD subscribers to watch third-party programming (and its associated advertising) that displaces MVPDs' own decisions regarding what programming should be highlighted on the video interface's "front page." Whether applied to print or video, such a rule would cut straight through the heart of the First Amendment's guarantee of press freedom.

Shifting control over the video choice architecture (and corresponding profits) from MVPDs (and the video programming vendors with whom they negotiate content licenses) to In-

ternet software companies (and their affiliated video programming vendors) would threaten the free flow of information and ideas by concentrating control over the video interface in the hands of a few, giant Internet software companies.

FCC and other data show that Internet software companies would have the *same incentives* as MVPDs to influence consumer behavior in the video marketplace but would have *far greater ability* to do so than MVPDs, because the largest Internet software companies (1) have greater scale and ability to reach consumers than MVPDs, but (2) would not be subject to regulatory constraints on MVPD market structure or public interest obligations. (See Tables 1-4 below.)

The fact that the Wholesale Proposal would permit a single Internet software company to leverage its existing dominance in a complementary online market (e.g., general Internet search) to obtain monopoly control over the video interface — and thus the ability to influence what consumers watch — without regard to the regulatory constraints or public interest obligations applicable to MVPDs "raises serious doubts about whether the [FCC] is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint."[1] In all other contexts involving television services, the FCC's motto appears to be, "With great power comes great responsibility."[2] But not here. The Wholesale Proposal would grant Internet software companies a right to control consumers' video interfaces without assuming any public interest obligations whatsoever.

The FCC cannot overcome these constitutional doubts merely by making an unsubstantiated claim that there is a substantive difference between competition among MVPDs generally and competition in the artificial market for navigation devices. The First Amendment requires the FCC to "explain[] why, in the pursuit of diversity, the independence of competing vertically integrated MVPDs is inferior to the independence of unaffiliated [navigation device companies]."[3] Behavioral

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[1] Brown v. Entm't Merchants Ass'n, 564 U.S. 786, 802 (2011).

[2] Raimi, S. (Director), Spider-Man (Motion Picture), Columbia TriStar Home Entertainment (2002).

[3] Time Warner Entm't Co., L.P. v. F.C.C., 240 F.3d 1126, 1139 (D.C. Cir. 2001).

economics and the highly-concentrated state of the relevant markets for Internet software companies indicate there is no data-based explanation for attempting to make such a distinction. There is only the FCC's naked preference for one set of speakers over another.

The Wholesale Proposal Is Content- and Speaker-Based

In its initial comments, Tech Knowledge discussed relevant First Amendment precedent in depth, but due to the exigencies of time, did not apply those precedents to the facts of this proceeding in an in-depth manner. These reply comments are intended to supplement Tech Knowledge's initial comments by applying the facts of this proceeding — in part as explicated by the initial comments of others — to relevant First Amendment principles in more detail.

The Wholesale Proposal Would Abridge MVPDs' Editorial Discretion

The arguments made by proponents of the Wholesale Proposal affirm that its purpose is to limit MVPDs' ability to exercise editorial discretion. For example, while its says the Wholesale Proposal is merely about accessing MVPD programming, at least "as a technical matter," Public Knowledge admits the Proposal would give non-MVPDs "a major competitive advantage" in providing video services (by allowing them to leverage simultaneously their massive customer bases and the popularity of MVPD programming in order to push their own, non-MVPD programming to consumers).[4] Amazon is explicit about the parenthetical addition in the preceding sentence. Amazon notes the Wholesale Proposal would enable it to "offer to a consumer—prior to when that consumer makes a viewing selection—suggestions about [non-MVPD] programs," which could "put consumers in a better position to discover" non-MVPD programming (including Amazon's own original series).[5] Google is similarly candid when it admits that "video is more abundant today than ever before,"[6] and describes the "problem" to be solved as helping consumers find "the *right* TV show, movie, or video clip"[7] (i.e., the shows Google wants consumers to see).

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[4] *See* Public Knowledge Comments, MB Docket No. 16-42, CS Docket No. 97-80 (filed Apr. 22, 2016) at pp. 40-41 ("While the FCC's proposal as a technical matter is about third-party devices and apps being able access to a subscriber's MVPD video subscription, it is likely that one of the major competitive advantages that competitive devices would have is giving viewers access to lawful content that is outside the MVPD ecosystem.").

[5] *See* Amazon Comments, MB Docket No. 16-42, CS Docket No. 97-80 (filed Apr. 22, 2016) at p. 6.

[6] NPRM at ¶ 17.

[7] See Google Comments, MB Docket No. 16-42, CS Docket No. 97-80 (filed Apr. 22, 2016) at p. 1 (emphasis added). It is, of course, merely implied that Google would determine which show is "right" for a particular consumer.

The comments of Wholesale Proposal proponents thus reflect the FCC's own expectation "that competition in interfaces, menus, search functions, and improved over-the-top integration will make it easier for consumers to find and watch minority and special interest programming"[8] (i.e., programming that is different from the minority and special interest programming MVPDs already offer).

Video Interfaces Are Entitled to First Amendment Protection

The premise of the Wholesale Proposal — that an MVPD's video interface is constitutionally separable from the MVPD's underlying programming — is fundamentally flawed. The interface between consumers and MVPD programming, including integrated search functionality, is itself core speech that is entitled to strict First Amendment scrutiny; and even if the video interface were not considered core speech in and of itself, an MVPD's interface would still be entitled to First Amendment protection due to its "close nexus" to the underlying video programming (which is clearly expressive speech).[9] Because MVPDs' video interfaces are constitutionally protected, a rule authorizing third parties to forcibly overwrite MVPDs' video interfaces would abridge MVPDs' First Amendment rights as speakers and their right to exercise editorial discretion as members of the press.

It appears the FCC does not view the video interface itself as speech or appreciate the essential role the video interface plays in MVPDs' exercise of editorial discretion. The First Amendment analysis in the NPRM treats the Wholesale Proposal as if it were merely a restriction on "commercial speech" that would occur solely as a result of the Proposal's "information flow" mandate.[10] Though the NPRM recognizes that the video interface itself affects competition in the commercial marketplace, it does not consider how the video interface affects the marketplace of ideas.

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[8] NPRM at ¶ 17.

[9] *See* City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 759 (1988).

[10] *See* NPRM at ¶ 45.

The Communications Act, previous FCC findings, judicial precedent, and scientific studies in behavioral economics all demonstrate that the interface between consumers and MVPDs' video programing is itself a form of speech or is otherwise entitled to First Amendment protection because it is intrinsic to MVPDs' exercise of editorial discretion.

Cast in terms of behavioral economics, a video interface is a form of "choice architecture": the different ways in which a video interface presents choices to consumers about what they can (or should) affects the video choices consumers ultimately make. Research consistently shows that "small and apparently insignificant details [in a choice architecture] can have major impacts on people's behavior" and that "the power of these small details comes from focusing the attention of users in a particular direction."[11] Studies show that interfaces affect consumer behavior in numerous ways, including "through the choice of the default option,"[12] "the tendency to select options that are presented first in the list,"[13] and the way programming choices are framed[14] (e.g., by Amazon suggesting that someone watch its affiliated programming rather than an MVPD's programming). Indeed, the way the FCC has chosen to frame the current proceeding — as addressing an alleged market failure in set-top boxes rather than providing Internet software companies with free wholesale access to MVPD programming — is itself an example of the use of framing to influence consumer perception.

The FCC's theory that it can "empower consumers to choose how they wish to access" MVPD programming without abridging MVPDs' First Amendment rights is based on the miscon-

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[11] Richard H. Thaler and Cass R. Sunstein, "Nudge: Improving Decisions About Health, Wealth, and Happiness" at p. 3 (2008) [hereinafter "Thaler and Sunstein"], available at https://ethicslab.georgetown.edu/studio/wordpress/wp-content/uploads/2015/02/Richard_H._Thaler_Cass_R._Sunstein_Nudge_Impro_BookFi.org_.pdf.

[12] Emir Kamenica, Behavioral Economics and Psychology of Incentives, 13 Annu. Rev. Econ. 1, 1, 11 (2012) ("[N]umerous studies show that designating a particular option as the default greatly increases the extent to which that option is selected."), available at http://faculty.chicagobooth.edu/emir.kamenica/documents/behavioralIncentives.pdf.

[13] *Id*. at p. 13 (2012).

[14] *See* Thaler and Sunstein at pp. 36-37 (addressing the impact of framing in non-programming contexts).

ception that permitting Internet software companies to overwrite MVPDs' video choice architectures would not influence consumers' video choices.[15]

> In many situations, some organization or agent *must* make a choice that will affect the behavior of some other people. There is, in those situations, no way of avoiding nudging in some direction, and whether intended or not, these nudges will affect what people choose.[16]

Video interfaces are one of those "situations."

The fact that video interfaces affect consumer choices is already reflected in Section 534 of the Communications Act, which requires cable operators to carry broadcast "must carry" signals on the same "cable system channel number on which the local commercial television station is broadcast over the air."[17] On its face, this provision indicates that Congress understood that an MVPD's choice architecture matters (e.g., that the channel number a cable operator decides to assign to a local broadcast TV channel impacts the likelihood that consumers would access that channel), and legislative history confirms it.

> Channel position is important in ensuring the success of a [broadcast] signal carried on a cable system. The [House Commerce] Committee is aware that certain cable programmers offer cable systems financial incentives to be placed on a lower channel number where viewers initially "graze" in search of an attractive program. Eighty-five percent of the moves [of broadcast channel positions] reported in the FCC survey [in its 1990 cable TV report] were made for the cable system's "marketing" reasons. Local stations moved to a high channel number, often a location unexpected by their usual audience, may lose viewers and suffer a diminution of their capability of rendering program services in the public interest, a development that will harm all viewers, whether or not they subscribe to cable.[18]

The House report thus concluded that a cable operator's decision to change a broadcast TV station's channel position was "damaging to the public interest and to the policies and purposes of the Communication Act."[19] This finding in turn relied on the FCC's 1990 cable TV survey, which

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[15] Thaler and Sunstein at p. 10 ("The first misconception is that it is possible to avoid influencing people's choices.").

[16] *Id*.

[17] 47 U.S.C. § 534(b)(6).

[18] H.R. REP. 102-628, 55 (internal citations omitted).

[19] *Id*.

found that "[c]hannel repositioning results in lower audience measurement and lower rates that [broadcast TV] stations can charge for advertising."[20]

The demonstrable impact of choice architecture on speech makes the choice architecture of the press — including MVPDs' video interfaces — an essential element of the First Amendment's strict protection for editorial discretion. As the Supreme Court recognized with respect to printed newspapers in *Miami Herald Pub. Co. v. Tornillo*,[21] "a newspaper is more than a passive receptacle or conduit for news, comment, and advertising."[22] Even decisions regarding things as seemingly mundane as the physical size of a newspaper "constitute the exercise of editorial discretion,"[23] because a newspaper's size determines how much news can be accommodated on its first page and can thus be accorded the status of "front page news."

Consider Amazon's example in its comments in this proceeding — that the Wholesale Proposal would enable Amazon to suggest that an MVPD subscriber watch Amazon's own programming rather than an MVPDs' program. In the context of the printed news, that would be equivalent to a rule permitting the Washington Post (a newspaper owned by Amazon CEO Jeffrey P. Bezos) to slap a new front page on the Washington Examiner that contains the Post's chosen headlines and a message directing Examiner subscribers to read the Post instead. Though the Examiner's subscribers would still have access to the Examiner's content as a technical matter (by turning the page), the rule would have the effect of compelling the Examiner to publish (or subsidize the publishing of) that which it does not want to publish (the Post's headlines and advertising messages) while effectively overriding the Examiner's editorial decisions about what should be considered the "front page news" of the day. Similarly, the Wholesale Proposal would force MVPDs to publish that which they do not

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[20] Competition, Rate Deregulation & the Commission's Policies Relating to the Provision of Cable Television Serv., 5 FCC Rcd. 4962, ¶ 165 (1990).

[21] 418 U.S. 241, 258 (1974).

[22] *Id.*

[23] *Id.*

want to publish (i.e., mandatory "information flows") in order to enable third-parties to direct MVPD subscribers to watch third-party programming (and its associated advertising) that displaces MVPDs' own decisions regarding what programming should be highlighted on the video interface's "front page." Whether applied to print or video, such a rule would cut straight through the heart of the First Amendment's guarantee of press freedom.

The Wholesale Proposal Threatens the Free Flow of Information and Ideas

Internet software companies who support the Wholesale Proposal argue that it would increase diversity in video programming. But they do not address the First Amendment implications of the Proposal or explain how giving them control over the choice architecture for video programming through government fiat would somehow improve the status quo. Studies in behavioral economics demonstrate that giving Internet software companies the power to suggest that consumers should watch their shows rather than the shows offered by MVPDs would *not* result in a more neutral interface; it would merely shift control over the video choice architecture (and corresponding profits) from MVPDs (and the video programming vendors with whom they negotiate content licenses) to Internet software companies (and their affiliated video programming vendors) who have the *same* incentives as MVPDs to influence consumer behavior in the video marketplace.

Though their incentives are the same, the *ability* of Internet software companies to influence consumer video choices would be far greater than that of MVPDs, because the largest Internet software companies (1) have greater scale and ability to reach consumers than MVPDs, but (2) would not be subject to regulatory constraints on MVPD market structure or public interest obligations. A government rule shifting control over the video interface to Internet software companies would thus threaten the free flow of information and ideas rather than enhance it.

Internet Software Companies Have Incentives to Influence Consumers' Video Choices

To find evidence that Internet software companies have incentives to influence consumers' video choices, the FCC need look no further than their ongoing behavior in the Internet market-

place. The largest Internet software companies already use their enormous scale to influence the choices consumers make about the services they should use and the products they should buy, and even their voting behavior in political elections. This evidence indicates that, if the software companies who already dominate information flows on the Internet are given control over the video interface by fiat, those companies will waste no time in using their government-granted power to start influencing the choices consumers make about video programming as well.

Google: Internet Search and Mobile Operating Systems

The European Commission (EC) has opened formal investigations and issued statements of objections regarding Google's abuse of its dominant position in the Internet software markets for general internet search services, licensable smart mobile operating systems, and app stores for the Android mobile operating system.[24] In each case, the alleged abuse has been based on Google's desire to influence consumers' choices through its anticompetitive manipulation of Internet interfaces (i.e., its use of software-based choice architectures).

In April 2015, the EC issued a statement of objection alleging Google "has abused its dominant position in the markets for general internet search services in the European Economic Area (EEA) by systematically favouring its own comparison shopping product in its general search results pages."[25] The EC is concerned that Google's practice of showing Google Shopping more prominently in its search results may "artificially divert traffic from rival comparison shopping services" and harm consumers by preventing them from seeing "the most relevant results" in response to their search queries.[26] If the FCC adopts its Wholesale Proposal, Google could similarly leverage its dom-

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[24] European Union, Press Release, Antitrust: Commission sends Statement of Objections to Google on Android operating system and applications (Apr. 20, 2016) [hereinafter "2016 Statement of Objections"], available at http://europa.eu/rapid/press-release_IP-16-1492_en.htm.

[25] European Union, Press Release, Antitrust: Commission sends Statement of Objections to Google on comparison shopping service; opens separate formal investigation on Android (Apr. 15, 2015), available at http://europa.eu/rapid/press-release_IP-15-4780_en.htm.

[26] *Id.*

inance of Internet search in the U.S. to favor its own video programming (e.g., YouTube) over programming provided by MVPDs and other third-parties when providing the "integrated search across MVPD content and over-the-top content" described in the NPRM.[27]

In April 2016, the EC issued a statement of objection alleging that Google violated antitrust laws by (1) "requiring manufacturers to pre-install Google Search and Google's Chrome browser and requiring them to set Google Search as default search service on their devices, as a condition to license certain Google proprietary apps"; (2) "preventing manufacturers from selling smart mobile devices running on competing operating systems based on the Android open source code"; and (3) "giving financial incentives to manufacturers and mobile network operators on condition that they exclusively pre-install Google Search on their devices."[28] The European "Commission's investigation showed that it is commercially important for manufacturers of devices using the Android operating system to pre-install on those devices the Play Store, Google's app store for Android"[29] (the "choice of the default option" in terms of behavioral economics). Because Google has made licensing the Play Store conditional on Google Search being pre-installed and set as default search service on Android devices, rival search engines are not able to become the default search service on the significant majority of Android devices sold in the EEA. Google has similarly made licensing the Play Store condition on pre-installation of its Chrome browser, another "important entry point for search queries on mobile devices."[30] This has the effect of reducing the incentives of manufacturers to pre-install competing search apps browsers as well as the incentives of consumers to download such apps and browsers.[31]

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[27] NPRM at ¶ 27.

[28] 2016 Statement of Objections.

[29] *Id.*

[30] *Id.*

[31] *Id.*

Amazon: Books

Amazon "now sells more than a third of new print books, a level no single bookseller has ever reached before, and it closely controls the dominant e-book platform."[32] According to the New York Times, Amazon reportedly controls an estimated two-thirds (66%) of e-book sales, though some publishers say its market share is much higher.[33]

Amazon has used its dominance over book sales to limit the availability of certain books and control pricing in a manner that has harmed consumers, authors, and publishers. During a high-profile dispute between it and Hachette Book Group, one of the largest publishing companies in America, Amazon abused its dominant position as a bookseller to block advance orders for Hachette books, delay shipping Hachette books for weeks, eliminate price discounts for Hachette books, and redirect readers to non-Hachette books through modifications to Amazon's search engine and pop-up windows.[34] According to Authors United, Amazon drove down the sales on Amazon.com of more than 8,000 titles by 3,000 authors by 50% to 90% in all formats over an 8-month period, which meant that tens of millions of books that would otherwise have been sold were not.[35]

It shouldn't be surprising that, once Amazon proved it could dictate terms to one of America's "Big Six" publishers, Amazon now sets e-book prices.[36] Under its preferred "wholesale model" for book sales, Amazon negotiates different revenue splits with different publishers and 'co-op' fees to promote particular books through Amazon's web interface and search engine (i.e., its choice ar-

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[32] David Streitfeld, Accusing Amazon of Antitrust Violations, Authors and Booksellers Demand Inquiry, NEW YORK TIMES (Jul. 13, 2015) [hereinafter "Streitfeld"], available at http://www.nytimes.com/2015/07/14/technology/accusing-amazon-of-antitrust-violations-authors-and-booksellers-demand-us-inquiry.html?_r=1.

[33] *Id.*

[34] *See* L. Gordon Crovitz, The Antitrust Book Boomerang, THE WALL STREET JOURNAL (Jun. 1, 2014) [hereinafter Crovitz], available at http://www.wsj.com/articles/gordon-crovitz-the-antitrust-book-boomerang-1401661151; Letter from Authors United to the Hon. William J. Baer, Assistant Attorney General for the Antitrust Division, United States Department of Justice at p. 7 (Jul. 13, 2015) [hereinafter "Authors United"], available at https://assets.documentcloud.org/documents/2164312/letter-to-the-justice-department.pdf.

[35] Authors United at p. 7.

[36] *See* Crovitz.

chitecture).[37] Amazon has thus consolidated influence over what books most e-book consumers read from 6 different publishing houses to 1 company: Amazon.

Ironically, Amazon obtained dominance over e-book choices through a government effort to "restore competition" in the e-book market (similar to the "competition" justification on which the Wholesale Proposal rests).[38] When Apple launched the iPad, it tried to enter the e-book market, despite "Amazon's virtually uncontested dominance" in that market.[39] Because Amazon was using book sales as a loss-leader to promote its Kindle e-book reader (i.e., Amazon was charging below-market prices for e-books — at the expense of publishers and authors — to obtain profit in a complementary market segment), Apple believed the only way it could enter the market profitably was through an agreement with the largest publishers that they would no longer permit Amazon to set prices. Apple was successful in obtaining the agreement of 5 of the "Big Six" publishers in the U.S. to use an "agency model" for pricing e-books, but its efforts were invalidated in a federal antitrust judgment.[40] The antitrust court focused its analysis on the narrow issue of book publishers' attempt to coordinate e-book prices and ignored the broader, potentially pro-competitive effort of Apple to enter the e-book distribution market "that had been dominated by a monopolist [i.e., Amazon] and insulated from competition through below-cost pricing."[41]

The result of this narrowly-focused antitrust ruling is that Amazon reestablished its monopoly power to set e-book prices and influence what books consumers read. Amazon's market share has soared as Barnes & Noble pulled back on its Nook e-reader (and its retail stores cratered), Sony

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[37] *See id*.

[38] *See id*.

[39] United States v. Apple, Inc., 791 F.3d 290, 340 (2d Cir. 2015) (Lohier, C.J., concurring in part and concurring in the judgment), cert. denied, 136 S. Ct. 1376 (2016).

[40] *See generally id.*

[41] United States v. Apple, Inc., 791 F.3d 290, 349 (2d Cir. 2015) (Dennis Jacobs, C.J., dissenting), cert. denied, 136 S. Ct. 1376 (2016)

and Samsung exited the e-reader market altogether, and Apple focused its efforts elsewhere.[42] But the biggest losers have been authors, publishers, and consumers. While the "book business has become more dependent on Amazon," books have become "almost an afterthought to the company itself."[43] The quality and quantity of e-books available to consumers is not Amazon's primary concern. For Amazon, e-books are simply a means to "boost sales of its profitable Kindles and Amazon Prime [video] subscriptions."[44]

Facebook and Internet Search Engines: Political Elections

From a First Amendment perspective, it is critical to realize that the choice architectures dominated by Internet software companies are capable of far more than merely influencing what services consumers use and what products consumers buy. Multiple scientific studies have shown that Internet software companies with massive user bases, like Facebook and Google, can use their web interfaces to influence voter behavior and, at least in theory, determine the outcome of political elections.

It is undisputed that Facebook has intentionally influenced selective voter behavior in multiple elections already. The results of a study conducted by Facebook and scientists from the University of California, San Diego, on Election Day 2010 "show that the messages [published by Facebook] directly influenced political self-expression, information seeking and real-world voting behaviour of millions of people."[45] Facebook conducted more voter experiments during the 2012 and 2014 elections, at least some of which were aimed specifically at determining how its web interface

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[42] *See* Crovitz.

[43] Streitfeld.

[44] *See* Crovitz.

[45] Bond, Robert M., Fariss, Christopher J., Jones, Jason J., Kramer, Adam D. I., Marlow, Cameron, Settle, Jaime E., and Fowler, James H., "A 61-million-person experiment in social influence and political mobilization," 489 NATURE 295, 295 (2012), available at http://dx.doi.org/10.1038/nature11421.

would affect user behavior.[46] For example, Facebook tested whether the location of a voting button on its webpage had any effect in motivating a user to declare that he or she were voting,[47] and whether re-ranking the appearance of articles in users' newsfeeds would have an effect on voter behavior (and found that it did).[48] Facebook has been criticized for not telling its users about these and other experiments, which some (perhaps correctly) have attributed to politics: "Facebook officials likely do not want Republicans on Capitol Hill to realize that their voter megaphone isn't a neutral get-out-the-vote mechanism."[49]

The potential for Facebook to use its more than 167 million U.S. users (and more than 1 billion total users) to manipulate elections recently resurfaced, when Facebook employees asked in a company poll, "What responsibility does Facebook have to help prevent President Trump in 2017?"[50] Facebook has the ability to remove pro-Trump stories and media from its website without disclosing it is doing so, and might already have done so. According to Gizmodo journalist Michael Nunez, former journalists who worked as news curators at Facebook recently alleged that Facebook's curators "routinely suppressed news stories of interest to conservative readers from the social network's influential 'trending' news section."[51] Facebook has stated that it does "not insert stories artificially into trending topics, and [does] not instruct [its] reviewers to do so"; but, according to

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[46] Micah L. Sifry, "Facebook Wants You to Vote on Tuesday. Here's How It Messed With Your Feed in 2012.," MOTHERJONES (Oct. 31, 2014), available at http://www.motherjones.com/politics/2014/10/can-voting-facebook-button-improve-voter-turnout.

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] Michael Nunez, "Facebook Employees Asked Mark Zuckerberg If They Should Try to Stop a Donald Trump Presidency," Gizmodo (Apr. 15, 2016), available at http://gizmodo.com/facebook-employees-asked-mark-zuckerberg-if-they-should-1771012990.

[51] Michael Nunez, "Former Facebook Workers: We Routinely Suppressed Conservative News," Gizmodo (May 9, 2016), available at http://gizmodo.com/facebook-employees-asked-mark-zuckerberg-if-they-should-1771012990.

the Guardian, "Leaked internal guidelines show human intervention at almost every stage of [Facebook's] news operation, akin to a traditional media organization."[52]

Research has also shown that "Internet search rankings have a significant impact on consumer choices."[53] The results of five double-blind, randomized controlled experiments that were published by the Proceedings of the National Academy of Sciences in a peer-reviewed paper demonstrated:

> (i) biased search rankings can shift the voting preferences of undecided voters by 20% or more, (ii) the shift can be much higher in some demographic groups, and (iii) search ranking bias can be masked so that people show no awareness of the manipulation.[54]

The paper concludes these data "suggest that a search engine company has the power to influence the results of a substantial number of elections with impunity."[55]

Internet Software Companies Have Greater Scale and Reach More Consumers than MVPDs

Each of the largest Internet software interfaces have far greater scale (i.e., have the ability to reach more consumers) and actually do reach more consumers than each of the largest MVPDs, which suggests the ability of the largest Internet software companies' web interfaces to influence consumers is broader and more powerful than MVPDs' "set-top box" interfaces.

FCC data show that most MVPDs are capable of serving far fewer than half of all households in the United States.[56] The number of "homes passed" by an MVPD is the maximum number of households its video interface can reach. According to the FCC's most recent video competition

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[52] Sam Thielman, "Facebook news selection is in hands of editors not algorithms, documents show," Guardian (May 12, 2016), available at https://www.theguardian.com/technology/2016/may/12/facebook-trending-news-leaked-documents-editor-guidelines.

[53] Robert Epstein and Ronald E. Robertson, "The search engine manipulation effect (SEME) and its possible impact on the outcomes of elections," PNAS vol. 112 no. 33 at p. 1 (2014), available at http://www.pnas.org/content/112/33/E4512.abstract.

[54] *Id.*

[55] *Id.*

[56] Table 1 is derived from Table III.A.1 in the FCC's 2017 Video Competition Report.

report, as of 2014, the largest cable operator's network (Comcast's) passed only 41% of homes in the United States.

Table 1. Homes Passed by MVPDs (2014)

MVPD	% of Homes Passed
DIRECTV	100%
DISH Network	100%
Comcast	41%
Time Warner	23%
Verizon FiOS	23%
Charter	10%
Cox	8%
Cablevision	4%

The largest Internet software companies, however, are capable of reaching all U.S. homes that have access to broadband Internet service. According to the FCC's most recent broadband progress report, as of 2014, 90% to 99% of the U.S. population had access to broadband Internet access service, with the differences in percentage depending on the measurement criteria used.[57] In other words, all Internet software companies can reach, at a minimum, 90% of the U.S. population.

Table 2. U.S. Population Passed by Broadband (2014)

Measurement Criteria	% of Pop. Passed
Fixed (satellite excluded)	
25 Mbps/3 Mbps	90%
10 Mbps/1 Mbps	94%
4 Mbps/1 Mbps	95%
Fixed (satellite included)	
10 Mbps/1 Mbps	99.6%
4 Mbps/1 Mbps	99.6%
Mobile (LTE)	
LTE service (all throughputs)	99%
10 Mbps/1 Mbps	47%

[57] 2016 Broadband Progress Report, FCC 16-6 at ¶ 80, n. 242, ¶ 83, App. F (2016), available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-6A1.pdf. For the purpose of this report, the FCC considered the total U.S. population to be 323.785 million. *See id.* at ¶ 79, n. 241.

Data indicate that the number of consumers that any one MVPD actually reaches is also far less than the number of consumers that the largest Internet software companies actually reach (and can thus influence).

According to data presented at the Media Bureau Workshop on the State of the Video Marketplace held on March 21, 2016, the largest MVPD (AT&T/DIRECTV) has only 25.4 million U.S. subscribers — i.e., its video interface can actually influence only about 19% of the U.S. population's video choices.[58]

Table 3. MVPD Subscribers as % U.S. Households (2015)

MVPD	Total U.S. Subscribers	% of Homes Reached
AT&T/DIRECTV	25,424,000	19%
Comcast	22,347,000	17%
DISH	12,897,000	10%
Time Warner	11,035,000	8%
Verizon FiOS	5,827,000	4%
Charter	4,430,000	3%
Cox	4,360,000	3%
Cablevision	2,594,000	2%

In contrast, each of the 5 most popular Internet software companies actually reaches more than half of the U.S. population.[59] In particular, the Internet search market segment — which would presumably begin providing "integrated video search" if the FCC adopts the Wholesale proposal —

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[58] *See* Bruce Leichtman, President & Principal Analyst, Leichtman Research Group, Inc., Evolution of the Video Marketplace and the Future of Television, presented to FCC on March 21, 2016, available at https://www.fcc.gov/news-events/events/2016/03/media-bureau-workshop-state-video-marketplace#acc2. This number might be overstated because it is based on reported subscriber numbers that do not solely represent residential households. The figures in Table 3 were derived using 133.5 million as the total number of households, which is consistent with the number used by the FCC in its 17th Video Competition Report.

[59] *See* Statista, Most popular multi-platform web properties in the United States in February 2016, based on number of unique visitors (in millions), available at http://www.statista.com/statistics/271412/most-visited-us-web-properties-based-on-number-of-visitors/. The population percentages in this table might be slightly overstated, because they were derived using a total U.S. population of 323.785 million, which is consistent with the number used by the FCC in its 2016 Broadband Progress Report (analyzing broadband deployment in 2014).

is far more concentrated than the MVPD market segment. Google alone accounts for a 69% to 85% share of the Internet search engine market in the U.S.[60]

Table 4. U.S. Monthly Unique Web Visitors (Feb. 2015)

Internet Software Company	Unique Visitors (per mo.)	% of Pop. Reached
Google Sites	243,600,000	75%
Facebook	206,480,000	64%
Yahoo! Sites	204,420,000	63%
Microsoft Sites	201,310,000	62%
Amazon Sites	171,830,000	53%

The FCC should expect to see relatively high levels of concentration in certain market segments served by Internet software companies because, paradoxically, Internet software services that are offered to consumers for free and have zero switching costs (e.g., Internet search engines) tend to yield a winner-take-all market for the market leader. "This is because, faced with a choice between two products, in the absence of switching costs [or another difference in "price"] users will choose the better one, even if it is only slightly better."[61] And Internet search engines get "better" through usage; search engines enhance the accuracy and value of their search results by accumulating more data. As a result, first mover advantages in the Internet search engine and similar online markets can be especially powerful.

Internet Software Companies Are Not Constrained by Video Regulations Applicable to TV

The stark differences in scale and market concentration between Internet software companies and MVPDs is not, however, merely the result of market forces or market economics. It is, at least in part, the product of the distinctly different regulatory regimes that are applicable to Internet software companies on the one hand (which are generally unregulated) and to traditional TV ser-

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[60] Compare Statista, available at http://www.statista.com/statistics/267161/market-share-of-search-engines-in-the-united-states/ (estimating Google's search engine share as approximately 69% in Jan. 2016), with StatCounter, available at http://gs.statcounter.com/#all-search_engine-US-monthly-201504-201604 (estimating Google's search engine share as approximately 85% in Apr. 2016).

[61] See Rich Skrenta, Winner-Take-All: Google and the Third Age of Computing, Skrentablog (Jan. 1, 2007), available at http://www.skrenta.com/2007/01/winnertakeall_google_and_the_t.html.

vices on the other (i.e., MVPDs and broadcast TV stations, which are subject to extensive regulation).

Strict FCC Regulation of Traditional TV Companies

"It has long been a basic tenet of national communications policy that the 'widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.'"[62] To fulfill this tenet, Congress and the FCC have long relied on comprehensive regulation of traditional TV companies, including (but not limited to):

- Ex ante "media ownership" regulations intended to limit concentration in the MVPD and broadcast TV industries in order to enhance diversity and "localism" in the production and distribution of video programming, radio broadcasting (i.e., audio content), and printed news, including:
  - The national cable MVPD ownership limit provision, which requires the FCC to establish reasonable limits on the number of cable subscribers served by an individual cable operator through its ownership or control of local cable systems (traditionally set at 30%)[63];
  - The cable MVPD vertical ownership limit (also known as the "channel occupancy" limit), which requires the FCC to establish "reasonable limits on the number of channels on a cable system that can be occupied by a video programmer in which a cable operator has an attributable interest"[64] (traditionally set at 40%)[65];

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[62] Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 663-64 (1994) (quoting United States v. Midwest Video Corp., 406 U.S. 649, 668, n. 27 (1972) (plurality opinion) (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945))).

[63] *See* 47 U.S.C. § 533(f)(1)(A).

[64] *See* 47 U.S.C. § 533(f)(1)(B).

[65] *See* Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992 Horizontal and Vertical Ownership Limits, Second Report and Order, FCC 93-456 at ¶ 68 (1993), reversed and remanded by Time Warner Entertainment Co. v. FCC, 240 F.3d 1126, 1137-39 (D.C. Cir. 2001). The FCC issued an NPRM to reconsider the 40% limit in 2008, but has not yet revisited the issue. *See* The Commission's Cable Horizontal and Vertical Ownership Limits, Fourth Report & Order and Further Notice of Proposed Rulemaking, FCC 07-219, 23 FCC Rcd. 2134 at ¶ 3 (2008), vacated on other grounds by Comcast Corp. v. FCC, 579 F.3d 1 (D.C. Cir. 2009).

- The cable MVPD/incumbent local telephone company cross-ownership limit, which prohibits a cable MVPD from having more than a 10% financial or management interest in an incumbent local telephone company that is providing local exchange service in the cable operator's franchise area and *vice versa*[66];
- The cable MVPD/BRS-SMATV limit, which prohibits a cable MVPD from owning a Broadband Radio Service system (also known as a wireless cable system) or a Satellite Master Antenna Television (SMATV) system in markets that are not subject to effective competition[67];
- The national broadcast TV ownership limit prohibiting a single company from having a "cognizable interest" in TV stations that have an aggregate national audience reach exceeding thirty-nine percent (39%) (i.e., TV stations with signals reaching more than 39% of U.S. television households)[68];
- The local broadcast TV ownership limit prohibiting a single company from owning more than two TV stations in a single designated market area (DMA) and limiting the ownership of more than one TV station in a single DMA to specific circumstances[69];
- The joint sales limit, which restricts contracts for the joint sale of broadcast TV advertising[70];
- The dual network limit on mergers between or among the "top four" broadcast programming networks (ABC, CBS, Fox, and NBC)[71];

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[66] *See* 47 U.S.C. §§ 572(a)-(b). By their terms, these statutory provision apply to any local telephone company, but the FCC has forborne from applying these provisions to "competitive local exchange carriers." *See* Petition for Declaratory Ruling to Clarify 47 U.S.C. § 572, Order, FCC 12-111, 27 FCC Rcd. 11532 (2012).

[67] *See* 47 U.S.C. § 533(a).

[68] *See* 1996 Act at § 202(c). *See also* 47 C.F.R. § 73.3555(e).

[69] *See* 47 C.F.R. § 73.3555(b).

[70] *See* 47 C.F.R. § 73.3555, Note 2(k).

[71] *See* 47 C.F.R. § 73.658(g) (providing that "[a] television broadcast station may affiliate with a person or entity that maintains two or more networks of television broadcast stations unless such dual or multiple networks are composed of two or more persons or entities that, on February 8, 1996, were 'networks' as defined in [Section] 73.3613(a)(1) of the Commission's regulations").

- The newspaper/broadcast cross-ownership limit, which prohibits common ownership of a TV station and a daily newspaper if the television station's Grade A service contour completely encompasses the newspaper's city of publication[72]; and
- The radio/television cross-ownership limit, which limits the number of commercial radio and television stations a firm is permitted to own in the same market.[73]

- Post hoc FCC review of mergers involving MVPDs or broadcast TV stations (typically in addition to a separate review by the DOJ and FTC);
- Programming diversity regulations governing the contractual relationships (1) between MVPDs and video programming vendors (including program carriage, program access, and leased access, requirements as well as limitations on exclusive programming agreements) and (2) between MVPDs and broadcast TV stations (including retransmission consent requirements and must carry);
- "Localism" regulations intended to promote the production of video programming that addresses local issues, including (1) limits on the geographic area covered by broadcast TV stations, (2) local broadcast TV and MVPD "PEG" programming requirements, and (2) regulations providing for FCC enforcement of local TV stations' exclusive programming distribution agreements (known as "non-duplication" and "syndicated exclusivity" agreements);
- Political advertising regulations governing the non-discriminatory sale of political advertisements by MVPDs and broadcast TV stations and disclosure obligations with respect to the buyers of such political advertisements;
- Equal employment opportunity regulations imposing specific obligations on MVPDs with respect to their provision of such opportunities; and
- Privacy regulations imposing specific privacy obligations on MVPDs.

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[72] *See* 47 C.F.R. § 73.3555(d)(1).

[73] *See* 47 C.F.R. § 73.3555(c)(2).

Laissez-Faire Approach to Internet Software Companies

In stark contrast to its treatment of other media companies, the FCC has generally exempted Internet software companies from any form of ex ante or post hoc regulation. The agency has disclaimed any interest in (1) imposing ex ante regulation on the structure of Internet software markets,[74] (2) reviewing mergers between Internet software companies, or (3) protecting consumers from the practices of Internet software companies relating to privacy and other matters.

The Proposed Regulatory Disparity Raises Serious Doubts About the FCC's Motives

The fact that the Wholesale Proposal would permit a single Internet software company to leverage its existing dominance in a complementary online market (e.g., general Internet search) to obtain monopoly control over the video interface — and thus the ability to influence what consumers watch — without regard to the regulatory constraints applicable to MVPDs "raises serious doubts about whether the [FCC] is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint."[75] In all other contexts involving television services, the FCC's motto appears to be, "With great power comes great responsibility."[76] But not here. The Wholesale Proposal would grant Internet software companies a right to control MVPDs' video interfaces without assuming any public interest obligations whatsoever.

It is not likely to be mere coincidence that the same Internet software companies who wholeheartedly support the Wholesale Proposal — e.g., Google and Amazon — vehemently opposed the FCC's previous attempt to give them government-mandated rights to access MVPD programming, because the FCC's previous proposal would have required Internet software companies to comply with the regulatory obligations applicable to MVPDs — e.g., media ownership, diversity,

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[74] *See* Protecting and Promoting the Open Internet, Report and Order on Remand and Declaratory Ruling and Order, FCC 15-24, 30 FCC Rcd. 5601 at ¶¶ 186-214 (Mar. 12, 2015).

[75] Brown v. Entm't Merchants Ass'n, 564 U.S. 786, 802 (2011).

[76] Raimi, S. (Director), Spider-Man (Motion Picture), Columbia TriStar Home Entertainment (2002).

localism, and political advertising regulations.[77] In December 2014, the FCC commenced its *MVPD Classification* proceeding, in which it proposed to "update [its] rules to better reflect the fact that video services are being provided increasingly over the Internet" by defining certain online video distributors as MVPDs.[78] This proposal was "intended to 'enable cable operators to untether their video offerings from their current infrastructure, and could encourage them to migrate their traditional services to Internet delivery.'"[79] To the extent Internet software companies would be classified as MVPDs, this proposal would also have given them the right to invoke the FCC's program access rules so that they would have a regulatory right to license cable MVPDs' video programming.

Internet software companies apparently support the *MVPD Classification* proceeding's *goal* of "untethering" cable MVPDs video offerings from their infrastructure, but they want that untethering to work like the FCC's net neutrality rules: Internet software companies want to profit from using untethered MVPD programming without bearing any of the public interest responsibilities that are borne by MVPDs. The Digital Media Association ("DiMA"), who represents "the world's leading Internet companies," including Google's YouTube, Amazon, and Apple,[80] met with senior FCC officials on July 21, 2015, to "highlight[] the tremendous innovation — resulting in vibrant competitive alternatives for consumers — that has recently occurred in the marketplace for online video content," and "questioned the case for government regulation at the present time."[81] The DiMA also recommended that, if the FCC adopts rules, those rules should allow "those [online

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[77] *See* Promoting Innovation & Competition in the Provision of Multichannel Video Programming Distribution Servs., 29 FCC Rcd. 15995 (2014) [hereinafter "*MVPD Classification*"] (proposing to include online video distributors in the definition of MVPD).

[78] *Id*. at 15996, ¶ 1.

[79] Fox Television Stations, Inc. v. AereoKiller, 115 F. Supp. 3d 1152, 1170 (C.D. Cal. 2015) (quoting *MVPD Classification* at ¶ 3).

[80] Comments of the Digital Media Association, MB Docket No. 14-261 at p. 2 n.1 (filed Mar. 3, 2015), available at http://apps.fcc.gov/ecfs/comment/view?id=60001025585 and attached hereto as Appendix A.

[81] Letter from Gregory Alan Barnes, General Counsel, Digital Medial Association, to Marlene H. Dortch, Secretary, FCC at p. 1 (filed July 23, 2015), available at http://apps.fcc.gov/ecfs/comment/view?id=60001094928 and attached hereto as Appendix B.

video distributors] that the Commission believes would benefit from MVPD status with the ability to decide whether to receive such benefits and be subject to the attendant responsibilities associated with such a decision."[82]

Shortly after this meeting, on July 30, 2015, the Washington Post reported that the *MVPD Classification* proceeding was "terrifying Apple, Amazon and Microsoft."[83] According to the Washington Post, smaller online video distributors favored the proposal, but big tech firms didn't like it.[84]

> 'This is a classic example of a solution in search of a problem. Our concern is that the entire space is in the nascent stage, and we're still tinkering with existing business models to respond to consumer demands,' said Gregory Barnes, general counsel of the Digital Media Association, a lobbying group that represents the tech firms. 'We don't know where the sweet spot is yet, and our fear is that if you regulate a subset of the industry, it will eliminate our ability to experiment in the future.'[85]

For the largest Internet software companies, "the worst case scenario" is that they would be "subject to rate regulations and public interest obligations, such as carrying local public access programs."[86]

In what could be considered an uncanny coincidence, on the same day the Washington Post outed big Internet Software companies' fear of serving the public interest, Senators Ed Markey and Richard Blumenthal released their report decrying the cost of set-top boxes, which appears to have been an impetus for the big-tech-giveaway proposed in the current proceeding.[87]

A few months later, the DiMA met with the FCC one last time in the MVPD Classification proceeding to remind the FCC of "the tremendous innovation that has recently occurred in the marketplace for online video content" and advise the FCC that, "[t]o the extent the Commission

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[82] *Id.*

[83] Cecilia Kang, This idea by the FCC is terrifying Apple, Amazon and Microsoft, WASHINGTON POST (Jul. 30, 2015), available at https://www.washingtonpost.com/news/the-switch/wp/2015/07/30/this-idea-by-the-fcc-is-terrifying-apple-amazon-and-microsoft/.

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *See* Markey, Blumenthal Decry Lack of Choice, Competition in Pay-TV Video Box Marketplace [hereinafter "*Markey-Blumenthal Report*"], available at http://www.markey.senate.gov/news/press-releases/markey-blumenthal-decry-lack-of-choice-competition-in-pay-tv-video-box-marketplace.

decides to move forward with this proceeding," it should wait until it has completed its annual report on competition in the video marketplace and other related proceedings, which would "considerably inform efforts in the [*MVPD Classification*] rulemaking."[88]

It appears the DiMA's lobbying and the *Markey-Blumenthal Report* ultimately persuaded the FCC to sideline the *MVPD Classification* proceeding and offer the Wholesale Proposal — a proposal that would give the largest Internet software companies access to MVPD programming without any of the pesky public interest obligations imposed on MVPDs, and as an added bonus, without any obligation to pay the corresponding licensing fees to video programming vendors either. Put another way, the Wholesale Proposal would replicate the Internet software companies' net neutrality business model for television.

The First Amendment Requires the FCC to Explain Why Effective Competition Among MVPDs Is Insufficient

It is a clever plan, and they might have gotten away with it too, if it weren't for that meddling First Amendment. The FCC's long and consistent history of regulation aimed at avoiding undue influence over consumers' video programming choices and the DiMA's repeated assertions in the *MVPD Classification* proceeding of the "tremendous innovation" in online video both "raise serious doubts" about the FCC's asserted interest in this proceeding — the alleged need to promote an unspecified level of additional competition in the entirely artificial market for "navigation devices." The FCC cannot overcome these doubts by making an unsubstantiated claim that there is a substantive difference between competition among MVPDs generally and competition in the artificial market for navigation devices. The First Amendment requires the FCC to "explain[] why, in the pursuit of diversity, the independence of competing vertically integrated MVPDs is inferior to the independence of unaffiliated [navigation device companies]."[89] The above discussion of behavioral

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[88] Letter from Gregory Alan Barnes, General Counsel, Digital Medial Association, to Marlene H. Dortch, Secretary, FCC at p. 1 (filed Sep. 11, 2015), available at http://apps.fcc.gov/ecfs/comment/view?id=60001299224 and attache hereto as Appendix C.

[89] Time Warner Entm't Co., L.P. v. F.C.C., 240 F.3d 1126, 1139 (D.C. Cir. 2001).

economics and the highly-concentrated state of the relevant markets for Internet software companies indicate there is no data-based explanation for attempting to make such a distinction. There is only the FCC's naked preference for one set of speakers over another.

Respectfully submitted,

TECH KNOWLEDGE

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Appendix A

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services	)	MB Docket No. 14-261

To: The Commission

COMMENTS OF THE DIGITAL MEDIA ASSOCIATION

Introduction and Summary

The Digital Media Association ("DiMA") files these comments to urge the Commission, as it considers how to respond to the continuing development of the media market, to proceed with care and caution. The current over the top ("OTT") market is vibrant and growing, and the Commission should move carefully to avoid unintended consequences that could stunt the growth of this developing field. Accordingly, any changes to the definition of multi-video programming distributor ("MVPD") should be mindful of the potential for unintended consequences and thus be narrowly tailored to a well-defined class of online video programming distributors ("OVDs"). In short, the Commission should follow a "light touch" regulatory approach to ensure that OTT providers can continue to offer the same innovative and high-quality services they have produced thus far.

DiMA comes to this debate as the representative of the digital media industry: webcasters, online media, digital services, and technology innovators. DiMA's member companies offer products and services that have revolutionized consumer media and

democratized access to media and information by attracting millions of viewing hours online to the new and repurposed content that is now available when consumers want to watch it. The innovative products and services that DiMA member companies bring to market have changed—and will continue to change—commerce and daily life, as well as how Americans obtain and enjoy news, entertainment, and sports.[1] As a result of the tremendous innovation of DiMA members, consumers are able to enjoy a wide variety of content on a growing number of devices, both at home, and on the go. DiMA believes this vital perspective should inform the Commission's next steps in the rapidly changing and still evolving online video space.

I. The OTT Market Is Vibrant and Growing

The marketplace for online video content has undergone a revolution over the last several years. Services such as Amazon Instant Video, Apple TV, Sony, and Xbox Video, have transformed the way the public consumes video content, enabling consumers to watch video almost anywhere, at any time, on a variety of devices. To respond to the changing tastes of consumers who increasingly are opting to consume video content online in addition to through traditional broadcast, cable, or satellite platforms, OTT providers have developed, and now offer to consumers, both new platforms and new content.[2] Leading OTT providers today offer

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[1] The Digital Media Association represents some of the world's leading Internet companies including: Amazon.com, Apple, Live365, Microsoft, Pandora, RealNetworks/Rhapsody, Slacker, and Google's YouTube.

[2] *See TV Makers Design for Streaming Video to Stay Relevant,* ASSOCIATED PRESS, Jan. 6, 2015, *available at* http://www.nytimes.com/aponline/2015/01/06/technology/ap-us-tec-gadget-show-future-of-tv.html (referencing a report from The Diffusion Group, a research firm that specializes in Internet video, that predicts online video will account for a third of all video viewing in 2020, up from about 10 percent in 2013). *See also* Timothy Stenovec, *Netflix Actually Won Big At Last Night's Emmys*, HUFFINGTON POST (Aug. 26, 2014, 5:07 PM), http://www.huffingtonpost.com/2014/08/26/netflix-emmys_n_5717765.html (noting that consumer time spent watching video on the Internet, on platforms such as Amazon Instant Video, Netflix, and YouTube increased 54 percent in 2014, according to Nielsen).

millions of movies and television shows to be streamed or downloaded instantly, and have attracted millions of subscribers. For instance, Amazon.com offers over 40,000 titles on its Amazon Instant Video service, and Apple TV users can access the 85,000 movies and 300,000 TV shows available on iTunes.[3]

Not only has the OTT market generated an offering of remarkable quantity to millions of consumers, the limited content it has produced, has included programming of exceptional quality. OTT programming was recognized with television's highest awards at the recent Golden Globe® ceremony. Specifically, Amazon's original series *Transparent* won awards for Best TV Series, Musical or Comedy and Best Actor in a TV Series, Musical or Comedy, for star Jeffrey Tambor.[4] Kevin Spacey won Best Actor in a TV Series, Drama for the Netflix original series *House of Cards*,[5] while Robin Wright won last year's award for Best Actress in a TV Series, Drama for the same show[6]. Last year, Netflix original productions also won seven Creative Arts Emmys.[7]

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[3] *Amazon Instant Video*, AMAZON (2015), http://www.amazon.com/Instant-Video/b?node=2858778011; *iTunes Overview*, APPLE (2015), https://www.apple.com/itunes/video/.

[4] *2015 Golden Globe Award Winners*, GOLDEN GLOBE® AWARDS, http://www.goldenglobes.com/golden_globe_winners (last visited Feb. 23, 2015).

[5] *Id.*

[6] *2014 Golden Globe Award Winners*, GOLDEN GLOBE® AWARDS, http://www.goldenglobes.com/golden_globe_winners/2014 (last visited Feb. 24, 2015).

[7] *See* Press Release, Academy of Television Arts & Sciences, 66th Emmy Awards (Aug. 16, 2014) (*available at* http://www.emmys.com/sites/default/files/Downloads/2014-creative-arts-winners-v1.pdf).

Throughout this success, the OTT market has continued to grow and diversify. Early this year, DISH announced the launch of its Sling TV Service.[8] Sling TV will offer live and on-demand Internet-based access to a variety of cable television channels at approximately a fifth of the cost of an average cable or satellite subscription.[9] Recent announcements by HBO and CBS further illustrate the innovation and profound changes taking place online. Last October, HBO announced that it plans to begin offering a stand-alone, over-the-top service for its programming that would be accessible without a cable or satellite subscription.[10] The next day, CBS announced the launch of its "All Access" service, which offers users access to thousands of episodes of classic television programs from the CBS library as well as new and past episodes from the network's current shows.[11] And more innovation is underway as Sony is preparing its own online content package of traditional cable channels.[12] It bears emphasis that these new services, which are radically transforming online viewing habits, all have grown in response to evolving consumer demands and without government intervention or assistance.

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[8] *See* Emily Steel, *Dish Network Unveils Sling TV, a Streaming Service to Rival Cable (and It Has ESPN)*, N.Y. TIMES, Jan. 5, 2015, at B3.

[9] *See id.*

[10] *See* Emily Steel, *HBO Plans New Streaming Service, With Eye on Cord Cutters*, N.Y. TIMES, Oct. 15, 2014, at B1.

[11] *See* Emily Steel, *Cord-Cutters Rejoice: CBS Joins Web Stream*, N.Y. TIMES, Oct. 16, 2014, at A1.

[12] *See id* ("Sony is preparing an Internet product expected to include programming from Viacom, the parent of networks like Comedy Central, MTV and Nickelodeon. DirecTV also said that it would start an online video service. A similar service from Showtime, the premium cable network owned by CBS, is likely in the not too distant future,' [CBS Chief Executive Leslie] Moonves said.").

II. In Light of These Trends, DiMA's Leading OTT Content Providers Urge the FCC to Move with Caution to Avoid Any Unintended Consequences

This tremendous investment by online companies to acquire distribution rights to current content and to produce original content all has taken place in the present regulatory landscape, which has entailed virtually no government involvement. The flourishing field of online video delivery demonstrates that companies are experimenting with various business models and already making available to consumers a variety of offerings: recent TV shows, older TV shows, recent movies, older movies, foreign movies and foreign TV shows, and original content. The OTT space has attracted investment and innovation from every leading content provider in the country; these companies are investing millions of dollars in content and technology to develop new online video content offerings. For instance, in the third quarter of 2014 alone, Amazon invested $100 million into developing original content.[13]

DiMA's concern is that the rules proposed by the Commission possibly could stifle ongoing experimentation. Excessive or ill-advised regulation at this point could deter continued investment. The tremendous developments in OTT services have emerged in an environment that permits innovators to be flexible and unencumbered. Changing this environment with the addition of regulation could alter the foundation that has supported these developments and that has encouraged investment for continued growth. The Commission's good intentions could thus end up back-firing, reducing resources and opportunities for these innovators rather than expanding them. To avoid these unintended consequences, the Commission should proceed with caution when deciding whether and how to impose regulatory obligations on OTT providers.

[13] *See* Emily Steel, *Amazon Tries Adding Art to Its Data*, N.Y. TIMES, Aug. 15, 2014, at B1.

III. At a Minimum, Changes to the MVPD Definition Should be Modest and Narrowly Tailored to a Well-Defined Class of OVDs

If the Commission does ultimately decide to act in this area, the resulting changes to the MVPD definition should be limited and narrowly tailored to a well-defined class of OVDs. To this end, DiMA appreciates the fact that the current proposed rulemaking rejects a "one size fits all" approach and instead draws important distinctions between Internet-based distributors that make available for purchase, by subscribers or customers, multiple continuous linear streams of video programming ("Internet-based MVPDs") on the one hand, and other Internet-based providers of video content (*e.g.*, subscription on-demand, transactional on-demand, ad-based linear and on-demand, or transactional linear content) on the other.[14] Even if the Commission decides to subject the former group to some type of regulation, DiMA members strongly believe the latter group should not be subjected to regulation.

Moreover, to the extent the Commission seeks to offer more types of OVDs the opportunity to receive the benefits of MVPD status, it is important that the Commission uses a flexible approach that leaves the decision of whether to receive those benefits—and be subject to the attendant responsibilities—to the OVDs themselves. As the Commission noted in the NPRM, MVPD status comes with both regulatory privileges and obligations: MVPDs may take advantage of program access rules, but also have obligations relating to program carriage and good faith negotiation with broadcasters for retransmission consent.[15] However, it is doubtful

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[14] *See Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, Notice of Proposed Rulemaking, MB Docket No. 14-261, FCC 14-210, at ¶ 13 (rel. Dec. 19, 2014).

[15] *See id.* at ¶ 36 (enumerating several regulatory privileges and obligations of MVPD status, including: "the right to seek relief under the program access rules and the retransmission consent rules" and requirements regarding competitive availability of navigation devices, good faith (continued…)

that all OTT providers wish to distribute television broadcast stations or avail themselves of program access or program carriage rules. If that is the case, any actions the Commission takes in this proceeding should leave those OTT providers unaffected. In that way, the Commission would "do no harm."

The Commission tentatively concludes in the NPRM that "the statutory definition of MVPD includes certain Internet-based distributors of video programming," specifically identifying "all entities that make available for purchase, by subscribers or customers, multiple streams of video programming distributed at a prescheduled time." The Commission should add a criterion to this proposed definition: an OVD should qualify as an MVPD only if it also seeks to take advantage of the FCC's program access or retransmission consent rules. That is, the statutory definition of MVPD should include those entities that make available for purchase, by subscribers or customers, multiple continuous streams of video programming distributed at a prescheduled time and which utilize the FCC's regulatory framework to obtain linear cable programming from a vertically-integrated cable or satellite programming vendor or linear broadcast video programming from a television broadcaster.

This approach leaves the choice of how best to offer consumers innovative, high-quality services where it belongs: with the OVDs and not with the FCC. Some OVDs may decide to continue with the approach that has thus far served them well, while others may determine that they can best serve consumers by benefiting from the Commission's program access and retransmission consent rules and fulfilling related responsibilities. The market will guide those

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negotiation with broadcasters for retransmission consent, equal employment opportunity hiring, closed captioning, video description, access to emergency information, signal leakage, inside wiring, and the loudness of commercials).

decisions, and for entities that want to avail themselves of the Commission's rules, the door will be open.

IV. If the FCC Decides to Regulate Internet-based MVPDs Going Forward, It Should Apply a "Light Touch"

As noted above, online video distribution is experiencing a period of tremendous growth and innovation. The combination of rapidly evolving technology, high consumer demand for online video, and low barriers to entry has created an environment in which many entrants, large and small, have been able to thrive, bringing new viewing options to consumers as well as new avenues for distribution to content producers.

While DiMA members appreciate the Commission's intent to assist the development of the growing OTT field, the value of MVPD status for a modern digital media platform has yet to be determined. Subjecting newly covered Internet-based MVPDs to regulations adopted for traditional, facilities-based MVPDs could adversely affect the growth of the entire industry. The Commission should therefore proceed cautiously and refrain from imposing the many regulatory MVPD obligations on OTT providers as they continue to experiment to meet the demands of a quickly-evolving market. At most, the Commission should apply a "light touch" and only the most relevant MVPD requirements to ensure that OVDs continue to have the flexibility and resources necessary to offer novel and nimble approaches to the distribution of online content.

V. Conclusion

Our present time has been heralded as the new "golden age of television." As demonstrated by recent Golden Globe® awards, however, all of the best "television" is no longer only on traditional television at all, or distributed by any MVPD. In reality, the concept of "television" is evolving to adapt to consumers' changing tastes and needs. The Commission

should be slow to interfere with this process, which has worked fairly well so far. Accordingly, its actions in this space, if any, should be modest and should reflect considerable caution.

Respectfully submitted,

/s/ Gregory Alan Barnes
DIGITAL MEDIA ASSOCIATION
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March 3, 2015

Appendix B

www.digmedia.org DiMA Digital Media Association

July 23, 2015

Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, DC 20554

Re: Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services; MB Docket No. 14-261

Dear Ms. Dortch:

On July 21, 2015, Caroline Curtin, Policy Counsel, Microsoft; Christine Enemark, Associate General Counsel and Sarah Hudgins, Manager of Public Policy, both of Amazon.com; Rob Carter of Harris, Wiltshire & Grannis representing Apple Inc.; and I met with Bill Lake, Michelle Carey, Nancy Murphy, Steve Broeckaert, Brendan Murray, Kathy Berthot, Tom Hastings, Ryan Brunner, Julie Shursky, Brittani Zacco, Raphael Sznajder, Daniel Shiman and Jaclyn Haughom of the Media Bureau; Alison Neplokh of the Office of Strategic Planning and Policy Analysis; Susan Aaron of the Office of General Counsel; and Lyle Elder of the Enforcement Bureau to discuss matters at issue in the above-referenced proceeding.

During the meeting, we summarized the arguments set forth in DiMA's comments. In particular, we highlighted the tremendous innovation - resulting in vibrant competitive alternatives for consumers - that has recently occurred in the marketplace for online video content. We noted that several of the nation's leading online video distributors ("OVDs") currently make available millions of movies and television shows to be streamed or downloaded instantly by consumers; and that much of that programming is of exceptional quality. In light of such developments, we questioned the case for government regulation at the present time.

We also reiterated our prior recommendation that the Commission - should it decide to proceed - adopt a flexible approach allowing those OVDs that the Commission believes would benefit from MVPD status with the ability to decide whether to receive such benefits and be subject to the attendant responsibilities associated with such a decision.

Finally, we noted that subjecting newly covered OVDs to regulations adopted for traditional, facilities-based MVPDs could adversely affect the continued growth of the marketplace for online video content. As such, we urged the Commission to refrain from imposing the numerous existing MVPD-tailored obligations on OVDs, as they continue to experiment to meet the demands of a quickly-evolving market.

Respectfully submitted,

/s/ Gregory Alan Barnes
General Counsel, DiMA
gbarnes@digmedia.org

cc: Bill Lake
Michelle Carey
Nancy Murphy
Steve Broeckaert
Brendan Murray
Kathy Berthot
Tom Hastings
Ryan Brunner
Julie Shursky
Brittani Zacco
Raphael Sznajder
Daniel Shiman
Jaclyn Haughom
Alison Neplokh
Susan Aaron
Lyle Elder

Appendix C

www.digmedia.org DiMA Digital Media Association

September 11, 2015

Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, DC 20554

Re: Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services; MB Docket No. 14-261

Dear Ms. Dortch:

On September 9, 2015, Gunnar Halley, Senior Attorney and Paula Boyd, Director of Government and Regulatory Affairs, both of Microsoft; Sarah Hudgins, Manager of Public Policy, Amazon.com; and I met separately with Chanelle Hardy, Chief of Staff and Media Adviser to Commissioner Mignon Clyburn; and with Valery Galasso, Policy Adviser to Commissioner Jessica Rosenworcel to discuss matters in the above-referenced proceeding.

During the meetings, we summarized the arguments set forth in DiMA's comments. In particular, we highlighted the tremendous innovation that has recently occurred in the marketplace for online video content. We noted that several of the nation's leading online video distributors ("OVDs") currently make available millions of movies and television shows to be streamed or downloaded instantly by consumers; and that much of that programming is of exceptional quality. In light of such developments, we questioned the need for government regulation at the present time.

To the extent the Commission decides to move forward with this proceeding, we also expressed our agreement with those that have maintained that the Commission should first resolve a number of outstanding issues - including the resolution of its current review of the "good faith" negotiation requirements under retransmission consent, the possible revision of its program access rules and the completion of its annual report on competition in the video marketplace - prior to proceeding with the current rulemaking. Completion of these matters first would considerably inform efforts in the current rulemaking.

We reiterated our previous recommendation that the Commission (should it decide to proceed) adopt a flexible approach allowing OVDs to choose whether to opt-in to such a scheme if they perceive a benefit in the regulatory framework; thereby making those distributors eligible to receive any of the attendant benefits and subject to any (and all) of the specified obligations. Finally, similar to others, we noted that there remains a number of difficult policy and technical questions and this proceeding may benefit from a Further Notice of Proposed Rulemaking.[1]

Pursuant to the FCC's rules, I have filed a copy of this notice in the above-referenced proceedings. If you require any additional information please contact the undersigned.

Respectfully submitted,

/s/ Gregory Alan Barnes

General Counsel, DiMA
gbarnes@digmedia.org

cc: Chanelle Hardy
Valery Galasso

[1] Letter from Monica S. Desai, Counsel to YipTV, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-261, at 3 (filed August 17, 2015). *See also*, letter from Stephen Traylor, Executive Director of the National Association of Telecommunications Officers and Advisors ("NATOA"), to Marlene H. Dortch, Secretary, FCC, MB
Docket No. 14-261, at 1 (filed September 1, 2015).