Center for Creative Voices in Media

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VIA ELECTRONIC FILING

October 25, 2005

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W., TW-A325
Washington, DC 20554

Re: **The Commission's Cable Horizontal and Vertical Ownership Limits**
MM Docket No. 92-264

Adelphia Communications, Time Warner, Inc., Comcast Corp.
MB Docket No. 05-192

Dear Ms. Dortch:

Pursuant to the Commission's Rules, please find our attached report, *Cable's "Level Playing Field" – Not Level. No Field.,* filed as an Informal Written Ex Parte Communication in the above titled proceedings. We submitted this filing electronically through the Commission's Electronic Comment Filing System.

If you have any questions, please don't hesitate to contact me.

Sincerely,

Jonathan Rintels
Executive Director

Attachment

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<u>CABLE'S "LEVEL PLAYING FIELD" --</u>

<u>NOT LEVEL. NO FIELD.</u>

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INTRODUCTION AND SUMMARY

Congress established a number of key policy goals in The Cable Television Consumer Protection and Competition Act of 1992, including fostering "a diverse, robust, and competitive market in the acquisition and delivery of multichannel video programming" and ensuring "that cable operators did not use their dominant position in the multichannel video distribution (MVPD) market, acting unilaterally or jointly, to unfairly impede the flow of video programming to consumers.[1]

Today, thirteen years later, those policy goals remain just that – goals. They are not reality.

These goals are often reduced to a three-word shorthand: "level playing field." When there is a "level playing field" in the MVPD marketplace, a television network's ownership or affiliation with a cable or broadcast company does not determine whether that network gains carriage on a cable system, or on what tier or bundle it is carried. When there is a "level playing field," independent voices and diverse viewpoints from a multitude of sources are given an equal opportunity to reach consumers over cable. When there is a "level playing field," there is no guarantee of success for an independent cable network – but there is a fair opportunity to compete so that consumers have the power to decide which cable networks succeed and fail, regardless of whether or not they are owned by the cable operator.

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[1] 47 U.S.C. § 533(f)(2)(A), as cited in Second Further Notice of Proposed Rulemaking, *In the Matter of The Commission's Cable Horizontal and Vertical Ownership Limits and Attributable Rules,* MM Docket No. 92-264, p. 3.

Recently, The Hallmark Channel, a highly successful top-10 total-day household ratings cable network carried in 69 million cable subscribers' homes, with tremendous brand name recognition and a matchless reputation for quality family entertainment, put itself up for sale. Why? As stated by David Evans, CEO of Crown Media, the owner of The Hallmark Channel, *"(A)fter considering various factors, including the strong performance of the Hallmark Channel and the **prevailing current economic realities of being a one-channel business in our industry**, the board unanimously determined that now is the time to look at all alternatives."*[2]

In this paper, we examine the "prevailing current economic realities" of the cable industry that Mr. Evans so diplomatically and circumspectly describes. First, we examine the real-life experiences of savvy cable and Internet entrepreneurs as they encounter those "prevailing current economic realities" in cable. Then, some of the most prominent and successful entrepreneurs in not just America's cable industry, but all of American business -- pioneers like Leo Hindery, John Malone, Ted Turner, and Barry Diller – provide their own insights into the cable industry, and explain why many of them are limiting their investments in cable or avoiding the industry altogether. Lastly, we examine the strategy of Comcast, the nation's largest cable multiple system operator (MSO), which seeks to control to the greatest extent possible the content that it distributes through its cable, whether via cable television or the broadband Internet – a

[2] "Analysts Encourage Hallmark Moment," *Multichannel News*, August 19, 2005. Available: http://www.multichannel.com/article/CA6249775.html?display=Breaking+News&referral=SUPP [Accessed October 13, 2005.]

strategy that is diametrically opposed to Congress's goal of fostering a "level playing field."

Our conclusion: The "level playing field" is not just tilted. Rather, the "playing field" no longer exists. Instead, a more apt analogy is that the MVPD industry has become a small, highly exclusive private club of cable MSOs and owners of broadcast networks. New independent networks are unwelcome and need not apply for membership. Established independent networks such as The Hallmark Channel increasingly find that they need to do a deal with either a cable or broadcast company to stay in the club.

We call upon the Federal Communications Commission to fulfill its statutory responsibility to establish and safeguard the "level playing field" that Congress intended. And that "level playing field" must be extended to the provision of broadband Internet service with the adoption of enforceable rules that ensure "Net Neutrality." This will benefit not only creative artists and entrepreneurs, but all Americans. It will help restore to our nation's media the original, independent, and diverse creative voices that enrich our nation's culture and safeguard its democracy.

Finally, we are aware that the Commission has expressed a desire for empirical data in its ongoing cable proceedings, and that this submission is relentlessly "un"-empirical. Along with Common Cause and numerous other Citizen Commenters, Creative Voices filed Comments earlier in this proceeding chockablock with empirical data that support the conclusions in this submission. Other parties, notably Consumers Union, CFA, and Free Press, as well as The America Channel, also submitted compelling empirical data buttressing these conclusions.

However, we believe that recounting the real life experiences of participants in the industry, as well as of entrepreneurs with a long and successful track record in the industry, as they encounter the "prevailing current economic realities" of the cable business, are a necessary adjunct to empirical data in developing a complete picture and full understanding of what's going on in cable today, and why it is toxic to independent and diverse voices and viewpoints. To rely on empirical evidence alone without consideration of experiential evidence would be to study the cable industry with one eye wide shut. By reporting the real experiences, actions, and observations of real market participants encountering the real market conditions of today's cable industry, we hope to more fully flesh out the record before the Commission.

The Center for Creative Voices in Media is a nonprofit formed by creative artists to preserve in America's media the original, independent, and diverse creative voices that enrich our nation's culture and safeguard its democracy. Our Board of Advisors includes many prominent Oscar, Emmy, Tony, Peabody, and other award-winning media artists.

DORON GORSHEIN -- Independent Cable Network Entrepreneur

Many Americans, including President Bush, have commented that "September 11 changed everything" in America. And yet, as Doron Gorshein watched television a few months after terrorists struck America, and the wall to wall coverage of the terrorist attacks was replaced by the same television programming that was on pre-9/11, he was struck by the realization that 9/11 hadn't changed anything – on television, that is. As a viewer and consumer, Gorshein was dissatisfied. After all, if America had changed so much post 9/11, shouldn't America's television programming change? If Americans had come together, reached out to each other, and rededicated themselves to honoring and celebrating and understanding their "American-ness," as they certainly had in 9/11's aftermath, shouldn't American television reflect that? Shouldn't American television serve Americans' rekindled and enthusiastic desire to come together and celebrate our common bonds? And what better way to tell the ongoing story that is America than to use real people, not actors, telling real American stories from diverse American communities across the length and breadth of our nation?

Thus was born in Gorshein's mind the idea that became "The America Channel" – "real people, real stories." The America Channel (TAC) focuses on "community, connectivity, authenticity, and basic human interest" in a way that existing television networks did not then and still do not, even though "everything changed" on 9/11.

Gorshein knew how to turn his innovative idea into the reality of a new cable/satellite television network. As Vice President and Associate General Counsel at EchoStar Communications Corporation, Gorshein was intimately familiar with the cable and satellite television business, as well as the difficult process of planning and developing a new cable and satellite network.

In launching TAC, Gorshein and his investors appear to have done everything right. They retained Vanguard Media, which developed Golf Channel, SciFi, TechTV and others, to assist in the initial planning and development; they constructed an innovative business model to achieve success in the digital age; they conducted rigorous qualitative and quantitative research, the latter with the assistant of SmithGeiger, a leading firm representing CNN and other nets; and they spent roughly $1 million refining their programming and business model before ever approaching a single cable operator for carriage – a significant feat for a small, independent network.

TAC's qualitative market research revealed that Americans were hungry for "more resonant programming, more programming that deals with what makes America special, more community, more connectivity, and more authenticity on television – all in a family-friendly format."[3] In other words, a large segment of the American public shared Gorshein's disappointed and dissatisfied reaction to post- 9/11 television.

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[3] The America Channel filing in FCC MB Docket No. 04-227, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* July 23, 2004, p. 3.

But even more important than validating Gorshein's vision, TAC's aggregate market research results were "as high as any network ever tested by our distinguished market research firm and media advisory firm." Research results included:

A. **General**:

- **63%** of all respondents are "likely to watch" The America Channel.
- **More than 50%** of every age demographic said that they would be "likely to watch" The America Channel.
- **7** show concepts achieved a **40%** interest level or greater, and 10 show concepts achieved a 30% interest level or greater, with significant increases in certain key demographics, such as Female 25 to 49 and Male 18 to 24.
- **6** show concepts achieved a **50%** interest level or greater in at least one of these demographics.

B. **Comparative**:

- Respondents felt that The America Channel's content will be equal to or exceed that of top nonfiction networks such as *Discovery Channel, The History Channel, TLC, CNN, Fox News, Travel Channel* and others.

C. **Attitudinal**:

- **64%** want more content that they can watch with their families.
- **63%** want more content that deals with what makes America special.
- **58%** say current television does not reflect what they see as the "real America".
- **58%** want more content that connects them with other Americans.

D. **Behavioral**:

- **23%** of analog subscribers state they would probably or definitely consider upgrading if TAC was only available on digital cable service.
- **15%** of current digital subs state that they would be more likely to keep their digital service if TAC became available on digital cable.
- **12%** of cable subscribers overall, and **12%** of basic cable subscribers would consider switching to satellite if TAC was only available on a satellite subscription in their area.
- **18%** of multichannel subscribers would view TAC as a major enhancement to their current service and **66%** view it as providing some enhancement.[4]

Armed with these promising research results, Gorshein embarked on market-by-market visits to local cable operators across the nation. He received highly favorable reactions from these local markets to carrying TAC on their cable systems. He found his

[4] Id., pp. 3-4.

new network was "resonating deeply in Middle America."[5] But rather than characterize the local cable operators' reactions, let's let them speak for themselves:

> "The programming planned by The America Channel promises to be so powerful and resonant with our customers that there was no question in our mind that it belonged on expanded-basic analog cable so that it could reach the most possible viewers. We believe The America Channel should be a core offering for any cable operator." *– Alan Block (Buckeye Systems), in prepared statement following TAC analog carriage deal for 150,000 subscribers.*
>
> "I see hundreds of networks. This one is the real deal. People will get passionate about this network. Some networks are 'must-haves' because people are so passionate about them, for example Fox News or certain Sports Nets. But they still don't scale to the entire population. This network will generate the passion, but will also scale to the entire population. I think this is fantastic, I really like it... I agree with everything you're saying... I think you will be successful." – *Regional Division of major MSO.*
>
> "This is a great product. I really like it. I don't normally make calls for networks [to Corporate]; but I will for this one. You won't have a hard time convincing us to be a charter system." – *Top-30 DMA*.
>
> "This is exactly the kind of programming I like to watch. It just really sits well with me. This is really good." – *Top-30 DMA*.
>
> "You have a solid business model. I really like it." – *Top-75 DMA*.
>
> "The appeal of this network is strong enough and broad enough that we will give serious consideration to carrying it on analog. I also see this network generating additional revenue for us on analog, for example the local avails and pre-emption blocks that you're offering. This is really impressive… fantastic… unique... It is exactly aligned philosophically with what we are trying to do in our community."— *Top-100 DMA*.
>
> "This is phenomenal. When are you launching?" – *Top-20 DMA*.
>
> "I like it. It should get good play in our city. I see a different network each day -- This one has legs." – *Top-5 DMA*.
>
> "I think it's a great concept. I love it. I would definitely watch it." – *Top-100 DMA*.

[5] Id. p. 4.

“This is great… It is really neat. As an industry, Cable does not do enough of this kind of real-life content. The America Channel gives us a real opportunity to connect [with our subscribers.]” – *Top-50 DMA.*

“The only problem, if there is one, is that there are so many great stories from so many places that you’ll have trouble choosing which ones to air -- That’s a good problem to have… This is exactly what my wife and I like to watch… This product is awesome. We’ve only endorsed one other network in our history. This channel comes as close as any network to getting an endorsement.” – *Top-15 DMA*.

“This is like an analog channel. You…will give a lot of content ‘bang’ and a local feel that will further differentiate your product from the other networks. TAC looks better every day.” – *Top-10 DMA.*

“Conceptually, it resonated very strongly with me… [I]n the post 9-11 American psyche, I for one could use an occasional dose of those things I need to remind me just how fortunate I am to have been born in America. And if I (a.k.a. Joe Sixpack) like it, I'm sure many others will too. I thinks it's a pretty cool concept…” – *Letter from a Top-60 DMA system to MSO Corporate*. “I’m sold. Tell me what you want me to do for you.” – *Same system, in meeting with TAC.*

“This is really strong and unique. 60% of my constituency is Hispanic – the largest in the State. There is nothing on television, whether in English or Spanish, that does what this network does for my constituency. You have the ability to create greater understanding and harmony among the different people of America.” -- *Top-50 DMA*.

“This is a really good product. I will speak to [Corporate.]” – *Top-10 DMA*.

“This is powerful. I agree with everything you said.” – *Top-40 DMA*.

“Our region in particular will like it. No one is taking reality to this level. I meet with two networks a day – this one is particularly good.” – *Regional Division of major MSO*.

“This looks like an analog channel.” – *Top-30 DMA*.

”This is a really good product. It’s exactly what we need.” -- *Regional Division of major MSO*.

“This is great. It’s almost like an analog channel.” – *Top-30 DMA*.

At the local level, The America Channel was a winner. Among the cable executives in closest proximity to the wants and needs of customers and communities, The America Channel seemed to be a sure fire "must add" to cable.

But local market enthusiasm is not enough to launch a new cable network. As overwhelming as this praise for TAC was among local cable operators, Gorshein and his investors could not take the financial risk of launching the network until they had a deal with either Comcast or Time Warner Cable (TWC), the MSOs that are the parent companies of many of these enthusiastic local cable systems. Without deals with those two cable giants, which together control nearly half of America's cable homes, there would be no way for a network to achieve the size and scale necessary to attract the advertising dollars needed to achieve profitability. A study by Booz Allen Hamilton, commissioned not by public interest advocates but by the National Cable Television Association (NCTA) itself, states:

> ***Historically, advertisers have been less willing to support networks with less than 50% to 70% coverage of TV households (this threshold is often applied not only to cable but to syndicated broadcast programming). Those advertisers that do support networks before they reach 50% to 70% distribution do so because they want to "get in early" and develop relationships with networks they expect to grow significantly and typically pay lower advertising rates than for established networks.***[6]

As a result of these marketplace realities, few if any investors today will risk their capital on new independent cable networks without a deal in place with one, and preferably both, of the two giant MSOs. [More on this below.]

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[6] Booz, Allen Hamilton, *The a la Carte Paradox: Higher Consumer Costs and Reduced Programming Diversity: An Economic Analysis of the Implications of al la Carte Pricing on Cable Customers,* July 2004, p. 12.

Since late 2003, armed with the encouraging market research and enthusiastic raves from local cable operators, Gorshein has tried to land a deal with Comcast and TWC so that he might finally realize his dream of launching The America Channel. But at the MSO level, Gorshein and TAC have encountered a very different and very puzzling reaction -- far different from the reaction they received from consumers and local cable operators.

It is the reaction of a brick wall. No sale. No deal. No way. Comcast and TWC won't even let Gorshein and TAC have a so-called "hunting license" to make carriage deals on a system-by-system basis with their local operators – many of whom were the very local operators who raved about TAC!

In stark contrast to the cable MSOs' outright rejection of The America Channel, Verizon has recently announced that its new FiOS fiber-to-the-premises (FTTP) broadband video network, under construction in 15 states, will carry The America Channel as well as other independent networks such as Blackbelt TV, Expo TV, LIME, and the Pentagon Channel. "These specialty channels add to the robustness of our channel lineup," said Terry Denson, vice president of programming and marketing for FiOS TV. "Viewers are looking for programming that speaks to their specific interests, and these channels deliver quality content to their audiences 24 hours a day."[7] Soon to be

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[7] "Verizon Signs 5 Additional Programming Deals for Verizon FiOS. TV Viewers Will Find Channels Devoted to Their Interests," Verizon Press Release, August 29, 2005. Available: http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=92808 [Accessed October 6, 2005.]

announced are carriage deals for TAC with three other telcos providing video distribution, including SBC, representing carriage on approximately 75% of the projected telco video distribution space.[8]

Gorshein has encountered the stark reality of today's cable network marketplace: Because Comcast and TWC are not only cable distributors, but also cable programmers with significant ownership of cable networks, they have little incentive to grant carriage to new independent networks that will compete with their own networks for ratings, advertising dollars, and channel capacity. On the contrary, when a fully-distributed cable channel can be worth billions of dollars and generate hundreds of millions of dollars in annual revenue, these MSOs have strong incentives to deny carriage to new cable networks in which they have no ownership interest.

Data compiled by TAC indicate that of 114 new independent networks seeking carriage, Comcast launched one, The NFL Network, and TWC launched one, The Sportsman Channel, each as a national non-premium channel. Six of the 114 received premium carriage (added subscriber fee required) from Comcast, while four received premium carriage from TWC.[9]

Indeed, some new networks do gain carriage. However, the reason is that they are not independent networks, but rather are affiliated with a broadcast network or the MSO itself. For the MSO, it obviously has a very strong financial incentive to give carriage to

[8] *Ex Parte Filing of The America Channel* in MB Docket No. 05-192 (filed October 21, 2005),
[9] *Petition to Deny of The America Channel*, MB Docket No. 05-192 (filed July 21, 2005), p. 40.

its own affiliated network. As for the broadcast networks, using retransmission consent and other leverage over the MSOs, they are able to turn their control of their established and desirable broadcast and cable network(s) into carriage for their new affiliated cable channels. TAC found Comcast granted national standard or premium carriage to 11 of 19 new cable networks affiliated with broadcasters or the MSOs themselves. TWC granted such carriage to 9 of 19 new affiliated cable networks.[10]

Comcast readily grants carriage to networks with which it has a financial affiliation. All 20 of the networks Comcast has a financial interest in are carried as “linear” networks by Comcast, as opposed to “Video on Demand.” This is despite Comcast’s attempts to shunt non-affiliated new networks over to VOD, claiming that “the future of television is not going to be adding channel 343 to the digital lineup, but it's going to be to migrate more and more programming over to on-demand, which really is a superior way to watch programming.”[11] By its actions, Comcast is making VOD the future of television not for its own channels, but only for independent channels.

In today’s cable environment, networks owned by an MSO, such as Comcast’s G4 Video Game Network or Outdoor Life Network, get carriage on their parents’ cable systems not by virtue of their superior programming, but simply by virtue of their pedigree. As for new networks created by owners of existing highly-demanded networks, an MTV can easily spawn a new MTV2 network and gain MSO nationwide carriage. A VH1 can breed new cable networks like VH1 Classic, VH1 Soul, VH1 Country, and

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[10] Id., p. 41.
[11] Id., p. 43.

VHUno, and gain sufficient nationwide carriage to make each of them viable. But a new independent network without affiliation with one or more preexisting broadcast or cable networks already in high demand does not have sufficient economic leverage to gain MSO carriage.

Such has been the fate of The America Channel, despite overwhelming qualitative and quantitative evidence that it would be a hit with viewers, providing them with a unique viewing experience that has been missing from American television since a few weeks after 9/11. Indeed, such has been the fate of almost every independent cable network, either existing or proposed.

So when you hear "9/11 Changed Everything," there's one thing it didn't change – American television. The consumers who so overwhelmingly expressed a desire to subscribe to a new cable network like The America Channel devoted to "real people, real stories" and "community, connectivity, authenticity, and basic human interest" are having that desire thwarted, as are the local cable operators which want to give them TAC.

Doron Gorshein has never sought a guarantee of cable carriage for TAC. All he seeks is the "level playing field" that the law and regulatory policy are supposed to provide. Instead, as TAC's experience vividly demonstrates, the problem is not that the playing field for independent networks is un-level. Rather, the problem is that the very idea of a "level playing field" has become a cruel hoax. Policymakers and regulators have failed in their duty to the American public to enforce existing laws mandating that "level playing field." They have broken their promises to entrepreneurs like Gorshein.

And that's a tragedy not only for the dreams of Doron Gorshein, but for the American public.

AL GORE and JOEL HYATT – Independent Cable Network Entrepreneurs

Few cable networks in history have launched with more anticipation and "buzz" than Current. Created by former Vice President Al Gore and partner Joel Hyatt, Current describes itself as "not a traditional TV network; watching Current, you'll see more, on more topics, from more points of view. And much of it comes straight from you (the viewers)."[12] Current says it is "something new: journalistic and relevant, but unencumbered by old conventions." It describes itself as "non-fiction, and our focus is what's going on in the world. So in that respect we are 'newsier' than, say, TBS. But this isn't CNN, either -- both because our focus isn't on live! breaking! coverage! and because we tend to approach stories in a very different way."[13]

And what Current takes great pains to say is that despite the presence of Al Gore as Chairman, Current is not "The Al Gore Network" or the Democrats' answer to the Fox News Channel. To those charges, Current pleads for a chance to prove itself an independent voice and not anyone's "mouthpiece": "Hey, the proof's in the programming!" says Current. "Come and watch."[14]

The start-up of Current was so well-publicized and eagerly anticipated that professionals and amateurs submitted over 3,000 videotapes to Current's website for

[12] Current website, "About Current." Available: http://www.current.tv/about/ [Accessed August 31, 2005.]
[13] Current website, "Current FAQs." Available: http://www.current.tv/faq/ [Accessed August 31, 2005.] Punctuation as it appears on the website.
[14] Id.

airing on the network before it even launched.[15] These videotape submissions came in response to Current's call for content from its hoped-for audience, the 18-34 year-olds who are the most desirable demographic for advertisers. Current's approach to programming its network is unique; it is "the first network in history whose programming is supplied in part by the very audience who watches it."[16] The network says that approximately 25 percent of its content is submitted by its audience.[17]

Current's desired audience is highly Internet-savvy, and many no doubt possess a broadband Net connection for better viewing of video content on the Web. Therefore, Current has created a state of the art website to act as a partner and extension of the cable network. This has led some to ask why Current is even bothering to create a cable network at all? Why not just an online Web Network? Current's answer is simple:

> *Right now, at this moment in history, TV is the most powerful medium in the world. Its reach and influence are unparalleled. It makes or breaks products and politicians alike, paints our picture of the world, and glues our culture together And yet, who controls it? Now, you do.*[18]

Well, perhaps the Current viewer "controls" TV in households that actually receive Current. But for a network with this "buzz" and this advertiser-friendly demographic, Current is available in surprisingly few homes. It launched with approximately 20 million cable and satellite households, primarily on DirecTV and certain Comcast and Time Warner Cable systems. Importantly, Current did not achieve

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[15] "For Gore, a Reincarnation on the Other Side of the Camera," *New York Times*, July 23, 2005, p. C-1.
[16] "Current TV Debuts Today," press release, August 1, 2005. Available: http://www.current.tv/pdf/Current_Launch.pdf [Accessed August 30, 2005.]
[17] "Q&A: Current TV's Joel Hyatt," *Red Herring*, August 18, 2005. Available: http://www.redherring.com/Article.aspx?a=13229&hed=Q%26amp%3BA%3A+Current+TV's+Joel+Hyatt+# [Accessed August 31, 2005.]
[18] About Current TV. Available: http://www.current.tv/about/ [Accessed August 30, 2005.]

that modest level of households by successfully selling itself to MSOs. Instead, Current "bought" this carriage in 2004 when it purchased an existing cable network, Newsworld International. Newsworld had programmed its American cable channel with content supplied by the Canadian Broadcasting Corporation. The American audience will little note nor long remember Newsworld, and few mourned its passing from our nation's 500 Channel Universe. Yet, in the earlier days of cable, before round upon round of increasing horizontal and vertical consolidation eliminated even a semblance of a "level playing field," Newsworld had managed to gain carriage on cable and satellite systems serving those 20 million homes. Those homes now get Newsworld's successor, Current.

But by August 1, 2005, when Current replaced CBC – Newsworld content in those 20 million households with its new and innovative programming, things had changed dramatically in the world of cable. New independent networks are unable to gain carriage on the large MSOs that control access to the 500 Channel Universe. Since Current replaced Newsworld on the DirecTV satellite system, DirecTV has extended its carriage contract for 10 years. But as of September 7, 2005, not one cable system has yet either added Current to its lineup or extended the existing Newsworld contract for carriage.[19]

In other words, despite taking a little-watched and little-known staid Canadian news channel and replacing its Canadian-generated content with American audience-generated programming aimed squarely at an American audience with a demographic most desirable to advertisers; after successfully

[19] Email from Mark Goldman, COO, Current TV, to Jonathan Rintels, dated September 7, 2005.

executing a high-profile re-launch of the channel; after garnering generally good reviews from critics as well as its target audience; after creating an innovative and highly-interactive website to accompany the new channel that generates a tremendous amount of web traffic and interest in the network; after receiving thousands of videotapes from audience members seeking to provide programming for the channel; after offering a unique programming concept unlike that found anywhere else in the "500 Channel Universe"; and after amassing considerably more audience demand and "buzz" than the Newsworld International network it replaced, Current has not signed up one single additional cable or satellite household above and beyond what it inherited when it purchased Newsworld International.

Current's website says that, thanks to the launch of Current, its audience now controls their TV. But that control may be fleeting if Current cannot expand to reach the 50 million cable household threshold that is required today for financial success. When asked about this, CEO Hyatt optimistically responds:

> *We think it will be very hard for cable companies not to carry us given the support we are getting from people in communities who want access to a network that is about what is going on in their lives, with their voices.*
>
> *We think it is such compelling offering that if you are a cable company somewhere that is not carrying it, we think the demand by consumers will be that that won't last very long.*

We hope Hyatt is right. But he is new to the cable business. At this point, Current seems to be running into the same brick wall with MSOs that The America Channel ran into. While new networks affiliated with the MSOs themselves or the broadcast networks gain carriage, independent Current cannot get beyond the 20 million households it inherited when it bought Newsworld International.

To extend the carriage agreements with Comcast that it already has, and to try to gain carriage on other Comcast systems, Current recently called on its fans to attend a "Take Back TV" rally on October 20, 2005 in front of Comcast's corporate headquarters in Philadelphia. Answering that call, seven thousand Current fans showed up in person to urge Comcast to make Current widely available on its local systems.[20] In contrast, consider a cable channel like G4 Video Game Network, which is owned by Comcast itself and therefore enjoys such widespread nationwide carriage on Comcast systems that it is present in nearly half of America's television homes. G4 has so few viewers show up in their own living rooms to watch it on television that it won't release ratings data.[21]

As the "Take Back TV" rally dramatically demonstrated, there are a vast number of cable subscribers who want Current, but can't get it because Comcast and Time Warner Cable, and others, will not grant it carriage beyond those systems that were locked into pre-existing carriage contracts with its predecessor, Newsworld International. While Current claims its viewers control their TV, the truth is that for most Americans, control of their TV rests with the cable MSOs like Comcast and Time Warner Cable.

[20] "Network's Fans Rally Outside Comcast," *Philadelphia Inquirer*, October 21, 2005. Available: http://www.philly.com/mld/inquirer/business/12960536.htm [Accessed October 21, 2005.]
[21] "Niche Videogame Network Takes Aim at Broader Market," *The Wall Street Journal*, August 31, 2005.

CRAIG HAFFNER -- Independent Cable Programming Producer

Craig Haffner is a storyteller. Starting in 1974, Haffner enjoyed a successful career as a national and local broadcast television executive, rising in 1983 to become Program Director for KABC, the ABC Network's owned-and-operated Los Angeles broadcast television station. In that position, his particular passion for nonfiction storytelling caused him to pioneer, develop and produce "Eye on LA," the highest-rated daily local early evening television show in the history of the ABC-owned stations.

Yet Haffner found that the broadcasters were rarely interested in letting him tell the nonfiction stories he found fascinating. "The networks found nonfiction dull," Haffner recalls. "Nonfiction appealed to the wrong audience for them." The problem was that broadcasters were fixated on attracting the large, young audience most attractive to advertisers. They believed that nonfiction stories attracted smaller, older audiences.[22]

To tell nonfiction stories on broadcast television, Haffner had to make unwelcome and unsettling compromises to appeal to the audience that broadcast TV wanted. His topics had to skew "young." His storytelling style had to be overly "sensational." He had to write and produce not for adults, but for adolescents.

But Haffner knew he was not alone in his enthusiasm for the great nonfiction stories of American and world history. Too many people had complained to him that

[22] Interview with Craig Haffner, September 7, 2005.

there were four, five, or six TV channels – yet nothing was on. Why wasn't there ever anything on television for intelligent adults?

In 1986, Haffner saw the then-emerging basic cable networks as a place where he might tell the nonfiction stories he could not tell on broadcast television. With two partners, he founded Greystone Communications to produce documentaries and other nonfiction programming for the Arts & Entertainment Network (A&E), TNN, and later, The History Channel.

In cable, Haffner found his niche – an enthusiastic audience for his nonfiction works, large enough to be profitable for both his production company and the cable network that distributed his programming, but too small for the broadcast networks to envy. Greystone quickly grew, employing 150 people full time in nonfiction television production and occupying over 25,000 square feet of space in North Hollywood, California. In addition to the hundreds of hours of programming Greystone has produced for A&E, The History Channel, and TNN, it has produced dozens of hours of programming for CBS, NBC, ABC, HGTV, UPN, and Lifetime. Greystone productions include *Wake Island: Alamo of the Pacific*; *The True Story of Seabiscuit*; *Civil War Combat: Battle of Chancellorsville*; *The Real West*; *Egypt Beyond the Pyramids*; *In Search of History: Egypt's Great Queen*; *The American Revolution*; and *D-Day: The Total Story*. Today, Greystone is a diversified entertainment company consisting of five divisions: television, film, home video, retail and the Internet. Haffner also created and was the Executive Producer of 65 episodes of *Brute Force*; 65 episodes of *The Real West*; and 52 episodes of *Civil War Journal*, all for the A&E Network.

Greystone's television division continues to produce many episodes of A&E's Emmy Award-winning series *Biography,* and production will soon begin on the fourth season of The History Channel's highest rated series, *Tales of the Gun*. For TNN, Greystone produced its fifth season of *The Life & Times Of...,* one of TNN's highest rated series. The series profiles top-selling personalities in the realm of country music. In addition, Greystone is currently producing numerous specials for A&E and The History Channel including: *The Unfinished Civil War, Civil War Combat*, *The True Story of Tora Tora Tora, What if...?* and *Haunted History.* For HGTV, Greystone has completed the one-hour special, *The Shape of Things to Come* and is producing the third season of HGTV's *America's Homestyles.*

Greystone has won Emmy Awards for its programming and most recently received a National Educators Award for its three hour program *Ellis Island.* Haffner has served as the co-chairman of the National Trust for Historic Gettysburg, co-chairman of the TV Responds/Academy of Television Arts and Science, and on the Board of the LAPD Historical Society. He is a currently a member of the National Council of the Humanities.

Despite Greystone's success, Haffner is concerned about the future of the business he created and nurtured. "Up until the late 1990s," he recounts, "cable provided a platform for new creative voices who had no other outlet." While broadcast television was broadly casting to the most lucrative demographic slice of the American public, basic cable networks profitably distributed programming that strongly appealed to other slices of the audience.

"Cable today has changed," Haffner laments. "With the consolidation of networks, the broadcast model of television programming has taken over cable. Now, there is one guy making the financial decisions for eight channels. The broadcast herd mentality – chasing one kind of programming or one slice of the audience – is now also the cable mentality. What cable networks allow us to produce now is very different from what we were allowed to produce in the 1990's." Today, for example, the programming of A&E features youth-skewing originals such as *Growing Up Gotti* and *Dog the Bounty Hunter,* along with quick repeats of network shows such as *CSI: Miami* and *Crossing Jordan.* It bears little resemblance to the A&E that carried programming, including Haffner's, that once appealed to a demographic unserved by broadcasters.

But, surely, even with the rampant consolidation of cable network channel ownership, there is still the "500 Channel Universe?" Surely there are opportunities for an independent producer with Craig Haffner's credentials to tell the stories he is still so passionate about telling? "Just because there are lots of channels does not mean that there is a lot of diversity out there," Haffner observes. "Do we really need 100 channels that appeal to 22 year-olds? We've run counter to creating an arena where creative people can express themselves to the best of their abilities. Why isn't there room in the broader marketplace for additional creative voices and content?"

Unable to find the opportunities in cable to tell the nonfiction stories that have brought him awards and acclaim, Haffner has reduced Greystone's staff and output. He must now, as he says, "reevaluate how he can tell his stories." He wonders where today's outlets are for the audiences that once were served by cable networks that have now 'gone broadcast?' "There are no open channels left for the niche audiences that cable once served," he observes. "And there are no new independent cable channels getting cable carriage."

Like many creative artists, Haffner hopes the Internet will be the next "safe haven" for original, independent, and diverse programming. Yet he is wary, as if he's seen this movie before and history may be about to repeat itself. "Cable was once the 'safe haven' and broadcast eventually co-opted it. Now, we're hoping the Internet will be the 'safe haven' from broadcast and cable."

"But who controls access to the Internet?" asks Haffner. A keen observer of the industry, Haffner is aware that cable companies and telcos provide the broadband pipes necessary for quality video transmission to the vast majority of American households receiving broadband.[23] Will companies that offer "cable TV," whether a cable or

[23] 94 percent of Americans with broadband receive it from a cable or telephone company. *High-Speed Services for Internet Access: Status as of December 31, 2004*, FCC Wireline Bureau, July 2005.

telephone company, allow independent producers and consumers to send and receive "television" over their broadband pipes, circumventing their cable TV system?

Haffner is not optimistic. The Supreme Court's decision in *Brand X* gives these companies the right to offer their customers only the websites they care to offer. In reliance on the promise that regulators would ensure a "level playing field" in cable, Haffner built a successful cable production business. But that "level playing field" never materialized. As a rational and savvy businessman, should he now invest in an Internet production business when regulators have expressly promised that they will not enforce a level playing field, but allow broadband gatekeepers to discriminate?

<u>DANIEL MYRICK – Independent Internet Program Producer</u>

Many of America's creative artists hope that the rapidly approaching broadband Internet of tomorrow -- high-speed, low-cost, and utterly pervasive -- will empower them to directly reach their audience so that they might better realize their creative vision. But creative entrepreneurs such as Daniel Myrick, director and co-creator of the micro-budget megahit *The Blair Witch Project,* are already distributing high quality video programming over the Net. Frustrated by the chokehold that MSOs and broadcast conglomerates have over video distribution, Myrick decided to bypass them and directly connect with his audience by distributing his latest "webisodic" dramatic serial, *The Strand: Venice California*, exclusively over the broadband Internet.

"There are a handful of executives out there who are the gatekeepers of what gets made and seen -- or not," says Myrick. "So we just decided to do it ourselves. You've already got the largest distribution network in the world already on your desktop, and the end-user experience is getting better every day." Available exclusively online, each 50 minute "webisode" of *The Strand* is distributed in streaming video. The writing, directing, acting, music, production values are at least as good as those of broadcast television shows. Filmed entirely on location in Venice using the latest digital technology, *The Strand's* budget was $75,000, which vividly illustrates digital media's potential to shrink both production and distribution costs. Myrick plans to earn a profit by selling a license to view each webisode for 99 cents, doing advertising and other promotional deals on his site, and selling *Strand*-related paraphernalia.

Says Myrick, "For me as a creative, the webisodic format allows me to do so much more exploration of characters and story without constraints on language or topic. Unlike a Fox show that needs 3 million viewers a week or it's canceled, I only need a fraction of that and I can be filming forever. At Sundance, we were the only ones out there not looking for distribution." With so much money at risk using more traditional methods of production and distribution, Myrick believes innovation and creativity suffer. Using the Internet lowers the financial risk, which allows the media maker to take more creative risks. The result is a dramatic increase in creative freedom.

But the broadband Internet's potential to become a distribution platform for creative artists like Myrick may never be realized. When consumers use 56K "dial up" to access the Internet via modem over slow telephone company lines, those telcos must operate as "common carriers." Under "common carrier" regulations, these companies must open their lines to competing Internet service providers (ISPs) such as Earthlink, AOL, and Brand X, a small ISP in the San Francisco area. They must also allow consumers to surf to any website they want, just as they must let consumers call any telephone number.

But in a highly controversial ruling, the Federal Communications Commission (FCC) decided cable companies such as Comcast offering broadband Internet access were exempt from "common carrier" regulation. Internet Service Providers Earthlink and Brand X successfully appealed that FCC decision in the Ninth Circuit Court of Appeals. But in June 2005, the Supreme Court reversed the lower court and upheld the FCC's original determination. In early August, the Commission then extended the *Brand X* decision to give telephone companies' broadband DSL Internet access service the same exemption from "common carrier" status.

The *Brand X* case is an excellent example of the way arcane technical distinctions which are debated in Washington, such as whether broadband is subject to "common carrier" regulation, can have tremendous potential implications for media artists. As a result of these FCC decisions, a cable or telephone company broadband provider no longer must provide its customers with access to the entire Internet. Instead, it now has the power to control where its customers surf and on what terms. In other words, it is free to offer its broadband customers a "proprietary" Internet of websites that pay it for carriage. Or, if a customer types in a website, and the company operates a competing website, the company has the power to divert the customer to its own website and deny access to its competitor.

Imagine a company with that power to discriminate and its reaction to Daniel Myrick distributing *The Strand* directly to its customers over the broadband Internet. Will a cable company stand by idly while content creators and owners such as Myrick use its very own cable to compete with its cable networks or do an end run around its cable television system? Will telephone companies such as SBC and Verizon, now launching their own television distribution systems over their broadband pipes, be any more hospitable to Myrick's competing programming?

In a competitive marketplace for broadband Internet access, this wouldn't matter so much. Consumers who don't want the cable or telephone company controlling their Internet could easily get their broadband access elsewhere. But according to the FCC's July 2005 report on High Speed Internet Access, in December 2004 approximately 94 percent of Americans subscribing to high speed Internet access received it from either their local cable or a telephone company. Of those Americans, many have just two choices for high speed Internet access -- cable or telco. Others have only one realistic broadband option. Today's reality is that for many consumers who want broadband, the marketplace is not competitive.

As oligopoly gatekeepers, cable and telephone broadband providers have the power to demand payment from content creators such as Myrick for access to their broadband customers. They have the power to divert customers who try to download *The Strand* to a different download site that they own and operate where they can try to sell them a different program. They can require *The Strand* to reach their customers not by the Internet, but by their proprietary service. Or they can simply block any and all broadband access to *The Strand,* period.

Indeed, these cable and telephone companies have the power to become extremely powerful "gatekeepers" for all kinds of Internet content and services. For consumers unfortunate enough to have no choice for broadband access other than these oligopoly gatekeepers, their Internet may bear more resemblance to a "souped-up" cable television system than the wide open Internet we enjoy today. Some analysts believe this "closed"

Internet model will resemble the early "walled garden" days of America Online, where its customers were limited to AOL content. For many consumers, their only broadband Internet may be either the walled garden of the cable company or the walled garden of the phone company.

The implications of *Brand X* and the ongoing battle over whether the Internet will be "open" or "closed" can hardly be overstated. FCC Commissioner Michael J. Copps observes, "This Internet may be dying. It may be dying because entrenched interests are positioning themselves to control the Internet's choke-points and they are lobbying the FCC to aid and abet them… We seem to be buying into a warped vision that open networks should be replaced by closed networks and that traditional user accessibility can be superseded by a new power to discriminate. Let this vision prevail and the winners will be entrenched interests with far greater power than they have today to design and control the Internet of the future."

Recently, the FCC issued a "Policy Statement" expressing a preference for open, "neutral" networks that give Americans the freedom to surf the entire Internet over broadband. But many criticize the FCC "Net Neutrality" policy statement as unenforceable and full of loopholes that would not prevent cable or phone companies from exercising gatekeeper power over the Internet. Many advocates, including the Center for Creative Voices in Media, are calling on the Commission and Congress to enact "Net Neutrality" into law, thereby guaranteeing the right of Americans to access the entire Internet over broadband.

If the cable and telephone companies succeed in establishing themselves as toll collectors on the information superhighway, the result will be an Internet that never fulfills the high hopes of many creative artists and media producers, including Dan Myrick. As is the case in cable television, powerful cable MSOs and the telcos will have little interest in establishing a "level playing field" on the Internet. They will make it difficult or impossible for their customers to access video websites that are in competition with their own offerings.

Without a guarantee of Net Neutrality, the implications of the *Brand X* decision are this: instead of the Internet eliminating the chokehold over video distribution so long enjoyed by broadcasters and now enjoyed by large cable MSOs, cable companies and telcos may now extend this distribution chokehold to the Internet. Rather than the Internet becoming a new "level playing field," the history of broadcasting and cable – where "level playing fields" have either been eliminated or never materialized – will simply repeat itself.

LEO HINDERY – Cable Pioneer, Regional Sports Network Founder

As the 1998 International Cable Executive of the Year, the 1999 National Cable Television Association Cable Television Operator of the Year, the former President of Tele-Communications, Inc. (TCI), the former CEO of AT&T Broadband, and the founder and former CEO of YES, a successful regional sports network, Leo Hindery has enjoyed a long and illustrious career as a top executive in all facets of the cable industry. Today, as Managing Partner of InterMedia Partners, a media private equity fund, Hindery remains actively involved in the industry as an investor.

After his experience launching YES as an independently-owned cable sports network, however, Hindery is generally not investing these days in any more independent cable networks, except, in very selective situations, those with very dedicated, committed and supportive audiences.[24] Indeed, Hindery's and YES's well-chronicled battle to gain carriage on Cablevision's systems in the New York area is a cautionary tale to any entrepreneur who would try to launch a new, independent cable network.

In YES, Hindery ultimately created a powerhouse regional sports network that held the long-term telecast rights of the New York Yankees, the New Jersey Nets, and the English football club Manchester United, together with Big East and Ivy League conference sports. And at its launch in March 2002, YES had negotiated long-term carriage agreements with DirecTV and with 36 of the region's 37 cable operators.[25]

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[24] Interview with Leo Hindery, October 10, 2005.
[25] Testimony of Leo Hindery to Senate Commerce Committee, May 6, 2003.

At launch, only one cable operator had not agreed to carry YES, but that operator, Cablevision, was notably by far the largest cable operator in the New York City region. Not coincidentally, Cablevision owned both of that region's only other regional sports networks and had previously owned the broadcast rights of the Yankees and the Nets. Recounts Hindery, "(I)t took a federal antitrust suit, legislative initiatives throughout the area, especially in New Jersey, and several consumer lawsuits to finally convince Cablevision to carry YES, after a year of saying 'no way' to us and to its customers."[26]

Hindery's experience leading YES in its battle for carriage on Cablevision dramatically demonstrated to him that a "level playing field" does not exist in cable. He testified to the Senate Commerce Committee in 2003:

> *When I testified here in the past* (as TCI's and, later, AT&T Broadband's top executive), *I commented to the Senators that additional cable industry regulation would probably not be required. Notably, I also promised, at least for the companies I managed, that customers should expect cable rate increases which would approximate general inflation, that consolidation would bring noticeable benefits to consumers, and that my company would never abuse its enormous market powers to the detriment of independent programmers. I believe the record will show that when I was around, TCI and later AT&T kept those promises.*
>
> *Sadly, however, I find myself today deeply concerned about the future of independent programmers which do not have ready access to multi-channel distribution simply because they are not vertically integrated. And I find it beyond irresponsible for cable industry leaders to blame programmers for their often excessive rate increases, when the facts clearly belie this contention and especially when more than half of the channels available to consumers are actually owned by cable companies.*[27]

[26] Id.
[27] Id.

Hindery noted that in 1974, President Gerald Ford appointed a high-level Cabinet Committee on Cable Communication to develop proposals "for a new policy that [would] allow cable to be integrated into our nation's communications media."[28] In its Report to the President, the Cabinet Committee's first recommendation was that "control of cable distribution should be separated from control of programming and other services provided over the channels on those distribution facilities."[29] According to a later 1991 Report issued by the Annenberg Washington Program for Communications Policy Studies, "(I)n urging this almost total separations policy, the Committee stated that it was better to avert the possible adverse effects of joint ownership ('vertical integration') at the outset than 'to create the incentives for abuse and invite detailed government regulation to deal with the effects." [30]

Sadly, these recommendations were not adopted by either Congress or the FCC. And as a consequence, today the "incentives for abuse" of vertical integration predicted by the Committee have been realized, making a mockery of the policy goal of establishing in cable a "level playing field." As Hindery testified, "every day independent programmers are held hostage by large multi-channel operators which either own numerous and significant competing programming services or which through consolidation have accumulated extraordinary amounts of market power."[31]

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[28] Cabinet Committee on Cable Communications, Report to the President, 1974.
[29] Id.
[30] "Cable Television Leased Access," *A Report of The Annenberg Washington Program Communications Policy Studies, Northwestern University,* 1991. Available: http://www.annenberg.northwestern.edu/pubs/cable/default.htm [Accessed October 11, 2005.]
[31] Testimony of Leo Hindery to Senate Commerce Committee, May 6, 2003.

Acknowledging that "(T)he cable industry consolidation genie is out of the bottle, and he isn't going back in," Hindery offered the Senate Committee three common-sense "fixes" which could help restore the "level playing field," preserve the existence of independent, unaffiliated programmers, and assure the vitality of all cable television programming.

> *First, there must be 'parity,' or non-discrimination, in the way programming services are treated, regardless of ownership.*
>
> *Second, all programmers should receive the fair market value of their programming, regardless of whether or not the programming service is affiliated or unaffiliated.*
>
> *Third, cable operators must make decisions related to program acquisitions, to pricing of programming to customers, and to packaging in a truly content neutral manner.*[32]

Hindery pointed out ample precedent for these "fixes." "The reason I do not include the satellite broadcast industry in this recommendation," testified Hindery, "is that, with prescient sensitivity, News Corp. has already committed to full 'program access' as a precondition to its pending acquisition of DirecTV. But now, it truly is the cable industry's turn to fully embrace 'program access.'"[33]

Hindery's citing of News Corp. and DirecTV, along with his own experience as the founder of a regional sports network, are especially relevant in view of one of the most consumer-unfriendly practices of the largest cable MSOs – namely, their attempts to exclusively control the televising of regional "must see" sports teams and sporting events. As the FCC has noted, *"cable operators may be able to offset competitive pressures from*

[32] Id.
[33] Id.

DBS, and thus may be able to impose larger price increases without losing subscribers to DBS where they are able to transmit vertically-integrated regional sports networks terrestrially, or are able to reach exclusive carriage agreements with non-vertically-integrated regional sports networks."[34]

The YES Network's battle to gain carriage on Cablevision in New York clearly demonstrates this Big Cable MSO strategy. Cablevision wanted for its own regional sports networks the exclusive right to televise the Yankees and other "must see" regional sporting events in order to offer programming that its satellite competitors could not. To gain these rights, and to establish itself as the place in the New York region where Yankee fans could see the Yankees, Cablevision "declared war" on YES by denying it carriage on the Cablevision systems.

Many have also pointed to Comcast's "hardball" refusal to show Washington Nationals baseball games on its many Washington D.C. area cable systems as a manifestation of this same Big Cable strategy to offer "exclusive" programming. In many of its regional markets, Comcast either already controls or actively seeks for its affiliated regional sports networks exclusive rights to televise regional "must see" major league and college sporting events. For example, Comcast (along with Time Warner Cable) is a co-owner of the new sports network in New York that will carry the Mets beginning in 2006, and of the sports network in Chicago that carries the Cubs, the White Sox, the Bulls and the Black Hawks.

[34] *In the Matter of Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act,* Eleventh Annual Report, p. 21.

An independent network that controls these valuable rights to regional "must see" sports is antithetical to Comcast' "exclusivity" strategy, because consumers might also be able to access that content elsewhere. In Washington and Baltimore, starting in 2007, Comcast's existing SportsNet regional network will lose the right to telecast on cable both Washington Nationals and Baltimore Orioles games. Instead, these rights will go to a new sports network, MASN, controlled by Orioles owner Peter Angelos.[35] To regain control of the right to televise these "must see" sports in the DC/Baltimore area, Comcast filed a lawsuit against Angelos and MASN, which was quickly tossed out of court.[36]

However, Comcast did not stop there in its quest to retain control of these "must see" sports rights. Even though Comcast would not lose the right to televise Nationals and Orioles games until 2007, Comcast, in an obvious power play and show of strength, pulled the plug on the 2005 baseball games on its cable systems. As a result, baseball fans in Washington who were Comcast subscribers and who had waited over three decades for major league baseball to return to the city, were denied the opportunity to watch their new team – even as that team made an unexpectedly strong run for the playoffs and captured the hearts of the city.

Comcast's abuse of its exclusive control of "must see" sports rights does not stop with regional sports networks. Its nationally-distributed OLN Network recently landed

[35] "Nats Caught in a TV Rundown; Rights to Air Games At Center of Dispute," *Washington Post*, June 25, 2005, p. A-1.
[36] "Orioles given clearance to air games regionally; Comcast suit dismissed; broadcast to start in '07, *Baltimore Sun*, July 28, 2005, p. 1A.

the rights to nationally televise National Hockey League games. America's hockey fans are eager to watch the NHL again after last year's season was cancelled due to labor problems. However, viewers of OLN on DISH (DBS) or Cablevision (cable) systems appear doomed to yet another season without nationally-televised hockey. Comcast blacked out hockey games on OLN on these systems to compel those distributors to carry OLN on lower-priced tiers.[37] Responding to these strong-arm tactics, Cablevision refused and DISH dropped OLN entirely. In response, OLN called upon DISH subscribers to "explore other cable and satellite options that carry OLN," such as subscribing instead to Comcast, OLN's owner.[38]

Increasingly, Comcast is expanding beyond control of exclusive sports rights to a larger overall "exclusivity" strategy that seeks to control <u>all</u> the content it distributes on its cable systems. Its failed takeover attempt of Disney in 2004, which would have put Comcast in control of not only the ABC broadcast network but also of Disney's hugely valuable cable networks such as ESPN and its progeny, ABC Family Channel, Disney Channel, Toon Disney, etc., was an obvious attempt to execute this corporate strategy.[39] More successful was Comcast's recent purchase of MGM in partnership with Sony, which will give it an ownership interest in MGM's large and valuable film and television library as well as access to Sony's similarly valuable library of films and TV. Comcast

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[37] "Now You Almost See Hockey, Now You Don't," *New York Times,* October 20, 2005. Available: http://www.nytimes.com/2005/10/20/sports/hockey/20tv.html?adxnnl=1&emc=eta1&adxnnlx=1129817359-LZfzr8CWnTG3aCydk7L3Dg [Accessed October 20, 2005.]

[38] "Dish Sends OLN to Penalty Box," *Multichannel News*, October 21, 2005. Available: http://www.multichannel.com/article/CA6276715.html?display=Breaking+News [Accessed October 21, 2005.]

[39] "Comcast Aiming to Control the Content it Delivers," *Philadelphia Inquirer*, July 10, 2005. Available: http://www.philly.com/mld/philly/business/12095299.htm [Accessed October 4, 2005.]

has declared its intention to use these libraries to program new premium movie channels which will be exclusive to Comcast in its service areas.[40] [More on the Comcast "control of content" strategy below.]

As Hindery says, "(I)t is time, I believe, for the content playing field to be leveled, as first commented on by the Ford Committee, and for vertical integration to cease to be an opportunity for discrimination."[41]

[40] "Sony wins MGM; Comcast Throws in With Group Buying Studio Holdings," *San Francisco Chronicle*, September 14, 2005. Available: http://sfgate.com/cgi-bin/article.cgi?f=/c/a/2004/09/14/BUGQ08OAVA1.DTL [Accessed October 14, 2005.]

[41] Testimony of Leo Hindery to Senate Commerce Committee, May 6, 2003.

JOHN MALONE – Cable Pioneer

On April 4, 2005, Broadcasting & Cable published an interview with cable pioneer John Malone, conducted by Mark Robichaux.[42] Few would argue that Malone is one of the savviest operators in – and observers of – the cable industry. Nicknamed "Darth Vader" for his tough tactics as a negotiator, Malone helped build tiny TCI into the largest cable MSO in the nation before it was sold in 1999 to AT&T for $54 billion. Today, Malone controls and owns a significant percentage of Liberty Media, which owns stakes in many cable and broadcast properties, including Discovery Communications (Discovery Channel), and News Corporation (all Fox broadcast and cable networks). The B&C interview is excerpted below.

B&C: You're now negotiating on the other side of the table. You own networks that you want Comcast to carry.

Malone: They kicked the shit out of us! So we know from the purchasing side they're very tough. With Starz in particular but, sure, with all of their programming purchases, they are very tough.

But you're Darth Vader.

I used to be. I used to have the market power to be Darth Vader. I don't anymore.

Do you miss being Darth Vader?

I miss the market power, absolutely. When you've got market power, it's a lot easier to be right. When you don't have market power, it's much harder. So, sure. But I also think Brian Roberts' politics are much better than mine ever were. On the other hand, I

[42] "From Darth Vader to Yoda," *Broadcasting & Cable*, April 4, 2005. Available: http://www.broadcastingcable.com/article/CA514729.html?display=Search+Results&text=john+malone [Accessed September 19, 2005.]

think he's being probably more brutal to his vendors than I ever was. Now the industry is down to just a few players. Maybe the whole industry meets in a phone booth.

You said the industry was turning into a handful of big operators.

I'm not sure it's an industry anymore. I think it may be just a few big guys, a couple of big guys—and they either work together or they don't—and a bunch of little guys the big guys don't pay much attention to anymore. Basically, the consolidation of the business has got to the point where I don't believe that an independent programmer has any chance whatsoever of doing anything unless he's heavily invested in and supported by one of the major distributors.

But you were in this very catbird seat just eight years ago. This now sounds like a different tune.

TCI was never big enough that we could stop anything. We were big enough that we could help something that was a good idea to get going, but we could never kill anybody. But there's no way on earth that you can be successful in the U.S. distributing a channel that Brian Roberts doesn't carry, particularly if he has one that competes with it. And probably pretty soon the same can be said of Rupert Murdoch. I think the consolidation has gone that far. I'm not saying that's good or bad. I'm just saying that's true.

Do you think the government will step in at some point?

I don't know. I mean the government stepped in and gave retransmission consent to the broadcasters, which pretty well wiped out any chance that independent programmers had anyway, right? I mean, if you look at what happened since retransmission consent was signed, virtually all programming, all the networks that are successful have evolved toward ownership by a broadcast network. So you've seen the consolidation both on the broadcast network side and on the distribution side to the point where small independents really don't have a chance.

Can I believe my ears? Darth Vader taking up for the little guy now?

I'm just expressing the view that that's the stage consolidation has reached. I get guys in here with good programming ideas asking me how to get distribution for them, and I tell them the same thing, which is you gotta go make a deal with Comcast or with News Corp. or you probably ought to abandon your idea or wait until the Internet and then offer it as a streaming-video Web site and that will eventually succeed in providing an alternate route to the end consumer. But right now, you can't start something with traditional cable-network economics and hope to be successful. It's just not in the cards.

Other savvy investors share Hindery's and Malone's view that the investment prospects are bleak for new independent networks in today's cable industry. In "How Come the Vultures Don't Flock to Cable?" *Cableworld's* Simon Applebaum reports: "The general attitude among venture capital executives reached for this article is that investment in new cable-related ventures will be the exception, compared to information technology or IT products and health care. That's in spite of a number of recent cable tech and content deals."[43]

That gloomy assessment comes in spite of the fact that "the amount of money VCs raised in 2004 for future use was about double that of 2003--$17 billion vs. $8.7

[43] "How Come the Vultures Don't Flock to Cable?" *Cableworld*, April 4, 2005. Available: http://www.cableworld.com/cgi/cw/show_mag.cgi?pub=cw&mon=040405&file=howcomethe.htm [Accessed September 19, 2005.]

billion. That's the most money VCs have raised in one year since 2000, when Internet stocks tanked."

Why are VCs holding back from investing in cable programming ventures? Writes Applebaum, "Their No. 1 hurdle: Any cable-related venture that seeks funding must have a deal in place with Comcast or Time Warner Cable. If one or both multi-system operators isn't (sic) on board, kiss the capital goodbye."[44]

"'If you're selling into the cable space and you're not selling this in with one of those guys, you don't have a business,' says Alan Beasley, a partner in Redpoint Ventures, a Silicon Valley venture capital firm. 'We've gotten to know Comcast and Time Warner very well, along with Cox, and it would be very unlikely for us to enter into a cable venture without their support.'"[45]

While there are "other big MSOs and plenty of small or midsize operators VCs could approach with a promising enterprise, 'The problem is, so many of the other MSOs wait until [they see] what Comcast or Time Warner does,' says Gary Lauder, who runs Lauder Partners, a California-based VC firm with a long track record in cable investment.[46]

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[44] Ibid.
[45] Ibid.
[46] Ibid.

“’Operators want to control anything that stands between themselves and their subscribers, rather than foster talent from other companies and let them help the operators’ business,’ Beasley adds. ‘That has to change.’”[47]

[47] Ibid.

TED TURNER – Cable Pioneer

Everyone agrees there will never be another Ted Turner. Brash, bold, flamboyant, the entrepreneurial Turner became a "Founding Father" of the cable business when he hit on the idea of bouncing the signal of his tiny, struggling Atlanta UHF broadcast television station off a satellite and offering it to distant cable operators for retransmission over their wires. In typical Turner understatement, he created the "superstation."

In 1980, Turner bet his company on the launch of the Cable News Network because, as he said, "the news was pretty negative and pretty biased. I didn't want Walter Cronkite telling me how to think." While CNN is now known around the world, the origin of its name was another Turner masterstroke of entrepreneurial ingenuity. Says Turner, "We put 'cable' in the first name because it would be very difficult for people at the cable company to tell customers who call them 'No, we don't carry the Cable News Network.' Customers would say, 'Why not? It sounds like it's owned by the cable industry. You are the cable company.' I thought if it was confusing enough, it would help us get to where we are."[48] He was right. More new Turner cable networks such as TCM and TNT followed.

But Turner saw that rampant consolidation in the media business spelled trouble for his smaller cable networks. "I knew we would eventually not be able to play at the

[48] "Ted Turner Laments Cable Mergers," *Wired*, November 28, 2001. Available: http://www.wired.com/news/business/0,1367,48706,00.html [Accessed September 16, 2005.]

top level without a [broadcast] network," he said. "I didn't want to be a fringe player in the broadcasting business."[49] He sold Turner Communications to Time Warner in 1996, a move he now calls "the biggest mistake" he ever made,[50] even though he remains on the company's Board of Directors.

Turner does not shy away from criticizing his own media conglomerate or the handful of others that he believes exercise excessive control over today's media. These companies, says Turner, are "big jerks" with "mixed agendas" that go "beyond broadcasting into other areas," including "keeping the government happy."[51]

"I think it's sad we're losing so much diversity of thought and opinion," Turner says. In an article he authored for *Washington Monthly*, Turner wrote, *"This is a fight about freedom -- the freedom of independent entrepreneurs to start and run a media business, and the freedom of citizens to get news, information, and entertainment from a wide variety of sources, at least some of which are truly independent and not run by people facing the pressure of quarterly earnings reports. No one should underestimate the danger. Big media companies want to eliminate all ownership limits. With the removal of these limits, immense media power will pass into the hands of a very few corporations and individuals.*

[49] Id.
[50] "Ted Turner at NATPE: Bullish on Bison Burgers, Fed Up with Media Mergers," *Jack Meyers Media Village*, Available: http://www.mediavillage.com/jmentr/2005/01/26/jmer-01-26-05/ [Accessed September 16, 2005.]
[51] Id.

"What will news be like when there are no independent news organizations to go after stories the big corporations avoid? Who really wants to find out? Safeguarding the welfare of the public cannot be the first concern of a large publicly traded media company. Its job is to seek profits. But if the government writes the rules in a way that encourages the entry into the market of entrepreneurs -- men and women with big dreams, new ideas, and a willingness to take long-term risks -- the economy will be stronger, and the country will be better off." [52]

Specifically referring to consolidation among cable MSOs, Turner laments, "We're getting to the point where there's going to be two cable companies left. I doubt the government will let the last two merge, but you never know."[53] He castigates government for "not doing its job. The role of the government ought to be like the role of a referee in boxing, keeping the big guys from killing the little guys. If the little guy gets knocked down, the referee should send the big guy to his corner, count the little guy out, and then help him back up."[54]

Turner sounds like he's spoiling for a fight: to get back in the cable programming business and take on both the media conglomerates and the MSOs. With his savvy, courage, and connections, if any man could succeed in the cable programming business, it's probably Turner. But every successful entrepreneur must be a realist as well as a dreamer, and Turner is no exception. It is "impossible to start a cable network" these

[52] "My Beef With Big Media," Ted Turner, *The Washington Monthly*, July/August 2004, Available: http://www.washingtonmonthly.com/features/2004/0407.turner.html [Accessed September 16, 2005.]
[53] "Ted Turner Laments Cable Mergers," supra.
[54] "My Beef With Big Media," supra.

days, Turner has concluded, because the big companies “don't want independent voices out there.”[55]

But what about the “level playing field” that the government promised to independents trying to enter the cable network business? Says Turner, “(T)oday the government has cast down its duty, and media competition is less like boxing and more like professional wrestling: The wrestler and the referee are both kicking the guy on the canvas.”[56]

The consolidation of the broadcast and cable businesses has gotten so bad that at NATPE 2005, when an aspiring young television producer asked Turner for career advice, Turner counseled him, “Go into the restaurant business!”[57]

Which is precisely what Turner himself has done, opening “Ted’s Montana Grill,” a chain of eateries featuring bison meat with less fat than beef and half the cholesterol.[58]

America’s arteries may be healthier thanks to Turner applying his entrepreneurial skills to purveying bison meat. But with Turner’s independent and iconoclastic voice forced out of programming by the absence of a “level playing field,” America’s media is far less lively. More important, absent Turner’s unique voice, America’s democracy is far less healthy.

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[55] “Ted Turner at NATPE,” supra.
[56] “My Beef With Big Media,” supra.
[57] “Ted Turner at NATPE,” supra.
[58] Id.

BARRY DILLER – Film, Broadcast and Cable Television, and Internet Pioneer

In 1991, Barry Diller embarked on a personal quest to discover the future of the media business. As the highly-regarded former Chairman of Paramount Pictures and, later, as the creator of the Fox Television Network, Diller had already succeeded at the highest levels of the film and broadcast television businesses. But, as chronicled by Ken Auletta in a widely-read *New Yorker* profile, Diller yearned to run his own company in the area of the media business best-positioned to take advantage of the technological changes overtaking the industry.[59]

By 1992, Diller had decided the future of the media business would be "led by the cable systems." According to Auletta, Diller was impressed that "(S)ixty-three per cent of all American homes were already wired for cable. Cable companies could charge for much of their programming, by pay per view, thereby perhaps alleviating government concerns about steep cable prices. In the words of TCI's chief operating officer, Brendan Clouston, 'Cable will go a la carte. You pay for what you watch. Like your phone bill.' And Diller agreed with Brian Roberts (then President of Comcast) that some of that eighty billion dollars in telephone bills could be siphoned off by cable. Finally, Diller came to believe that the cable people treated technology not as an adversary but as an ally. 'They're livelier than most of the competition in their thinking,' Diller says. 'Talk to the cable people, as opposed to senior people in the news-gathering business, or at the TV

[59] "Barry Diller's Search for the Future," *The New Yorker*, February 22, 1993. Available: http://www.kenauletta.com/barrydiller.html [Accessed September 20, 2005.]

networks, or in the studios. Just line them up, and you find that people in the leadership of cable are students of technology and spend vast amounts of time and capital thinking issues through.'"[60]

In partnership with TCI and Comcast, Diller took over QVC, the home-shopping network. Eventually, as the head of USA Interactive, he ran the USA and Sci-Fi cable networks. But today, he is almost entirely out of the cable programming business. As chairman of IAC/InterActive Corp., the successor to USA Interactive, he has turned his business attention and entrepreneurship to the Internet. Still, as a programming veteran, and one of the most respected businessmen in media today, Diller's views on the state of the cable industry are always well worth noting.

Diller strongly believes that large media conglomerates should not be allowed to own both content and distribution. In a later interview with Auletta in 2003, Diller noted that when he was the head of the USA cable network, "(W)e looked at programs that were owned by cable M.S.O.s [multiple-system operators] and programs that were not owned by M.S.O.s. And the differences of preferences were so categorical in every case -- the disadvantage of anybody who has an unaligned program service, as against an aligned program service, is so glaring.[61]

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[60] Id.
[61] "A Conversation with Barry Diller," May 10, 2002. Available: http://www.kenauletta.com/2002_05_10_conversationwithbarrydiller.html [Accessed September 20, 2005.]

“Time Warner moved us, moved USA, down the dial. It's not like this little thing. This was a nickel-and-dime little study we did., this was hardly some big deal. But it was so extraordinary, the difference, and when you think that there's going to be more concentration rather than less concentration, you say, well, what is good public policy? Well, good public policy is certainly having a situation where what is essentially a monopoly—this rigged game, so to speak—is going to have some bad effects over a very long period of time. I'm not talking about this in terms of diversity. I'm just talking about it in terms of a frightening kind of economic power.”[62]

Auletta then urged Diller to elaborate on the government’s responsibility to ensure a “level playing field.” Noted Auletta, “But the principle that government should follow, which you enunciated ten minutes ago, was that government should not allow a company to own both the pipe and the content that travels on that pipe?”

Replied Diller, “If, in fact, that pipe's concentration is at a level that precludes any player's being able to get a program service onto it with reasonable terms, conditions, and parity with owned systems. There are different ways of achieving that, but, yes, I think that's absolutely true.”[63]

Like Hindery, Malone and Turner, Diller has not been shy about letting his fellow media moguls and the rest of the world know that the cable pipe’s concentration is now so great that it is a threat to the public interest in “promoting diversity, localism, and

[62] Id.
[63] Id.

competition."[64] At the 2003 NAB Convention in Las Vegas, Diller in his Keynote Address told the assembled broadcasters that "with our nations communications infrastructure in the breech there must be fierce focus and vigor for the appropriate safeguards, and these new rules must extend to the remarkably concentrated cable distributors... There are real dangers in complete concentration. The conventional wisdom is wrong - we need more regulation - not less."

At that time, Diller called for "well-reasoned guidelines with practical and meaningful consequences." Specifically, Diller told the broadcasters:

- I believe that raising the 35% limit (nationwide audience cap for broadcast network-owned local stations) is not good for the industry or the public.
- I believe that having some form of financial interest rules for these vertically integrated businesses is good for the industry and the public.
- **And I believe that having tight program ownership and financial interest rules for the already completely concentrated cable and satellite business is mandatory.**[65]

Now that Diller has largely left the cable programming industry to become an Internet entrepreneur, he sees an additional danger posed by the concentration of cable: control over the Internet itself. In a 2004 interview with Newsweek, Diller correctly predicted[66] that "cable, DSL [digital subscriber lines provided by telecom companies] and direct-broadcast satellite in the end will emerge as the dominant broadband-distribution

[64] Barry Diller Keynote Speech to NAB Annual Convention, Las Vegas, April 7, 2003.
[65] Id. Emphasis added.
[66] 94 percent of Americans with broadband receive it from a cable or telephone company. *High-Speed Services for Internet Access: Status as of December 31, 2004*, FCC Wireline Bureau, July 2005.

pipeline. **Then the same thing is going to happen in the Internet that has happened essentially to our other mass-communications pipelines.**[67]

"You can already see at Comcast and others the beginnings of efforts to control the home pages that their consumers plug into. It's for one reason: to create a toll bridge or turnstile through which others must pay to go. The inevitable result of that, without any question, is that every domino will fall. **And there will be eventual control by media giants of the Internet in terms of independence and strangulation. This is a situation where history is absolutely destined to repeat itself.**[68]

Is the destruction of the "level playing field" in cable about to be repeated on the Internet, as Diller predicts?

Let's ask the "King of Cable and Broadband."[69]

[67] "Is Big Media Bad?" Newsweek Special Report: Issues 2004, Available: http://www.msnbc.msn.com/id/3606172/site/newsweek/ [Accessed September 20, 2005.] Emphasis added.
[68] Id. Emphasis added.
[69] "Comcast's New Era Begins," *USA Today*, November 17, 2002. Available: http://www.usatoday.com/money/media/columnist/lieberman/2002-11-17-comcast_x.htm [Accessed October 4, 2005.]

BRIAN ROBERTS – Chairman and CEO, Comcast Corporation

Following the 2002 merger with AT&T Broadband that made his company the nation's largest cable provider, Comcast Chairman and CEO Brian Roberts was anointed by the press as the "king of cable and broadband."[70] As David Lieberman wrote in *USA Today*, "It's hard to think of any executive since CBS' William Paley who has wielded as much power over the media as Brian Roberts."[71]

With its control of 28.3 million cable homes, representing 42.5 percent of all U.S. cable homes and 29 percent of U.S. video homes,[72] industry analysts also are quick to acknowledge Comcast's and Roberts's status as cable's "800 pound gorilla." Says Richard Bilotti, a cable analyst for Morgan Stanley, "Without distribution from Comcast, it would be virtually impossible for any network to be profitable."[73]

Cable pioneers also recognize the commercial realities of today's cable business. Said John Malone in his *Broadcasting & Cable* interview excerpted above, "there's no way on earth that you can be successful in the U.S. distributing a channel that Brian Roberts doesn't carry, particularly if he has one that competes with it."[74]

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[70] Id.
[71] Id.
[72] Source: FCC, from "Is Comcast Too Big?" *Broadcasting & Cable*, July 25, 2005. Available: http://www.broadcastingcable.com/article/CA628786.html?display=Search+Results&text=comcast [Accessed October 4, 2005.]
[73] "Cable's New Giant Flexes His Muscles," *The New York Times*, October 20, 2003. Available: http://www.bmedia.org/archives/00000412.php [Accessed October 4, 2005.]
[74] "From Darth Vadar to Yoda," *Broadcasting & Cable*, April 4, 2005. Available: http://www.broadcastingcable.com/article/CA514729.html?display=Search+Results&text=john+malone [Accessed September 19, 2005.]

Increasingly, Comcast and Roberts do have one or more channels that compete with not only new cable networks but older, established cable networks as well.[75] And Comcast has not hesitated to bestow upon cable networks affiliated with it, such as TV One and G4 Video Game Network, highly favorable carriage arrangements that it withholds from non-affiliated channels. For example, Comcast's G4 Video Game Network is available in over 50 million homes – the "critical mass" threshold that makes a cable network generally successful and profitable.[76] Yet even though nearly half of all television households have access to G4, the network's audience is so small that it won't release ratings data.[77]

Clearly, Comcast's experience as an owner of both content and distribution does not appear to give it a leg up in terms of creating a successful cable network. As Joe Flint observed in *The Wall Street Journal*, "Comcast has the clout and finances to push G4 in any direction it desires, and G4 certainly could benefit from a makeover. But instead of attempting a half-hearted, and sometimes crass attempt to move G4 toward the mainstream, it might make a lot more sense to stick to videogames."[78]

Today, even conglomerates that own broadcast networks are apparently skittish about launching new cable networks without bringing Comcast in as a partner. In a

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[75] "Comcast Aiming to Control the Content it Delivers," *Philadelphia Inquirer*, July 10, 2005. Available: http://www.philly.com/mld/philly/business/12095299.htm
[Accessed October 4, 2005.]
[76] Comments of multiple cable network owners filed in MB Docket 04-207 compiled in Exhibit 2, *In the Matter of Applications for the Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corp.,* MB Docket No. 05-192, Comments of The America Channel, filed July 21, 2005.
[77] "Niche Videogame Network Takes Aim at Broader Market," *The Wall Street Journal*, August 31, 2005.
[78] Id.

telling example of how far the balance of power in the television industry has tilted toward Comcast, *Broadcasting & Cable* reported in August 2005:

> *You'd think that MTV Networks is rich and powerful enough to launch cable networks without anyone's help. But a startup that has been gestating at Viacom's star unit may have a surprise partner: Comcast.*
>
> *MTVN has been talking to the No. 1 cable operator not only about carriage for a planned lifestyle network but also about becoming a partner.*[79]

MTV, of course, is owned by Viacom, which also owns the CBS and UPN broadcast networks. As the owner of two broadcast networks, blessed with leverage of its own over cable operators in the form of retransmission consent and "must have" cable networks, Viacom had always been considered "rich and powerful enough to launch cable networks without anyone's help." Not anymore, apparently.

A possible partnership in new networks with Viacom would be just one more way Comcast is moving ever more aggressively into the content business. Its failed takeover of Disney and its successful purchase of MGM in partnership with Sony, noted above, are further evidence of this strategy. Writes Tim Arango in *The New York Post:*

> *"It appears that what Comcast failed to do in one fell swoop it is now trying to accomplish with a series of smaller moves. Last year, the Philadelphia-based cable operator made a bold bid to take over Disney — a move that, had it succeeded, would have instantly transformed the company into one of the world's largest media companies, powerful both in content and distribution.*
>
> *But since the failed takeover bid, Comcast chief Brian Roberts has hardly abandoned his content ambitions."*[80]

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[79] "MTV Courts Comcast," *Broadcasting & Cable,* August 21, 2005. Available: http://www.broadcastingcable.com/article/CA6249937.html?display=Breaking+News&referral=supp [Accessed October 4, 2005.]

[80] "Power Combo," *The New York Post,* September 13, 2005, p. 39. Subsequent press reports stated that while Viacom and Comcast had discussed such joint ventures, no deal had yet been reached. "Freston

Comcast's ambition to control the content that it distributes through its cable does not end with cable television – it also extends to the Internet. As noted above, in addition to being the nation's largest cable company, Comcast is also the nation's largest broadband service provider. In recent days, Comcast has been reported to be discussing a deal to jointly own AOL's web portal, in partnership with Google and Time Warner, the super-majority owner of Time Warner Cable.[81] Should this deal come to fruition, would Comcast then impose AOL as the web portal for its broadband customers? Under the *Brand X* decision, it would have the power to do so. To further execute this strategy of controlling Internet content, Comcast and the rest of the cable industry strongly oppose "Net Neutrality" policies that would ensure customers could select their own home page, surf to websites they wish, or access the entire Internet.[82]

Fears of discrimination by broadband gatekeepers against competing Internet websites, services, and applications are not hypothetical. Several cable and telephone companies today discriminate against their broadband customers accessing competing technologies, such as VoIP for telephone service or BitTorrent for video, by either slowing down this traffic over their network or denying service entirely.[83]

Pumps Par, Dismisses Comcast Talk," *The Hollywood Reporter,* September 14, 2005. Available: http://www.hollywoodreporter.com/thr/television/article_display.jsp?vnu_content_id=1001097368 [Accessed October 4, 2005.]

81 "Comcast, Google May Acquire Part of AOL," *Yahoo News*, October 13, 2005. Available: http://news.yahoo.com/s/ap/20051013/ap_on_hi_te/aol_comcast_google [Accessed October 17, 2005.]

82 "Cable Provides Open Connectivity for the Internet," *NCTA Issue Brief*, June 2004. Available: http://www.ncta.com/pdf_files/IssueBriefs/OpenInternet.pdf [Accessed October 5, 2005.]

83 "Phone, Cable Firms Rein in Consumers' Internet Use," *Wall Street Journal*, October 21, 2005 Available: http://online.wsj.com/article/SB112985651806475197.html?mod=todays_us_page_one [Accessed October 21, 2005.]

Many claim that the Internet will "change everything" and end concerns over the lack of a "level playing field" in the broadcast and MVPD markets. But given cable and telco broadband providers' hostility to Net Neutrality and Comcast's desire to control the content that it distributes, whether via cable TV or broadband Internet, there is a substantial danger that the future Internet will not really change anything at all. Rather, if history is any guide, the Net may ultimately also be "consolidated" by a few conglomerates, as were both broadcast and cable television. Without Net Neutrality and a host of competitive ways other than cable and telecom DSL for Americans to access the broadband Internet, the future Net may ironically bring an even greater concentration of gatekeepers, toll collectors, choke points, and "walled gardeners."

Are concerns about Comcast trying to control the content it distributes overblown? Roberts is now publicly candid about Comcast's strategy of controlling as much content as it possibly can. In a speech in Boston on October 6, 2005, Roberts laid out a vision for Comcast in which it would lock up as much content as it could so that it did not have to compete on price with DBS providers and new telecom video offerings.[84]

However, it was in an earlier private session with venture capitalists that Roberts most explicitly expressed the Comcast strategy for eliminating the last vestiges of the "level playing field" and controlling the content it distributes, at the expense of independent entrepreneurs. In June 2005, Roberts "ventured" to Sand Hill Road in the Silicon Valley, home to many of America's most prominent venture capitalists, seeking

[84] "Comcast Chief Hints at Plan to Compete," *Boston Globe*, October 7, 2005. Available: http://www.boston.com/business/technology/articles/2005/10/07/comcast_chief_hints_at_plan_to_compete/ [Accessed October 7, 2005.]

partnerships with the VC community. Duncan Davidson, Managing Director of Vantage Point Venture Partners, participated in a meeting with Roberts and then blogged about it.[85] According to Davidson, Roberts "wistfully noted that when Eric Schmidt (C.E.O. of Google) said Google wouldn't have happened without broadband, he wondered why they (Comcast and Roberts) failed to get stock options." According to Davidson's account, Roberts's pointed reference to Comcast's dominance in providing broadband Internet access, "Got a chuckle but sent a chill."[86]

Davidson's account continues, ***"He (Roberts) was then challenged on any room for new services. He started with a story that CNN and other new channels were pushed by entrepreneurs not the cable companies, and then went on to essentially say Comcast was going to learn how to be an innovator of services and not let that happen again."***[87]

Given Roberts's vow to the VCs that Comcast "will not let that happen again" – "that" being maintaining a level playing field where independent entrepreneurs have an equal opportunity along with Comcast to create new services, networks, innovations -- we think concerns about Comcast's and other cable companies' power over MVPD or cable programming, as well as the future Internet, are not in the least overblown.

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[85] "Brian Roberts Comes to Sand Hill Road," *Technik: Thoughts on the new New New Thing, Duncan Davidson Blog*, June 17, 2005. Available: http://yelnick.typepad.com/technik/2005/06/brian_roberts_c.html [Accessed October 5, 2005.]
[86] Id.
[87] Id.

Today, Comcast's corporate strategy is quite clear – control the content it distributes in <u>whatever form</u> and eliminate any possibility of "level playing fields."

CONCLUSION

Based on the experience of real-life players, including some of cable's savviest and most prominent entrepreneurs, in today's real-life cable business the "level playing field" that Congress intended in 1992 does not exist. It's not just that the "playing field" is tilted. The problem today is that there is no "playing field" whatsoever. The corporate strategy of Comcast, the nation's largest cable MSO, as stated publicly and privately by its Chairman and CEO, is to control as much content as possible, thus eliminating the "level playing field."

It is the duty of the Federal Communications Commission to establish and protect "level playing fields" in cable and on the Internet, via a combination of ownership limits and enforceable rules. In terms of cable, ownership limits must ensure that no one or two companies hold life or death power over the fate of cable networks and that independent networks have an equal opportunity for carriage. Enforceable rules must provide for non-discrimination in the way programming services are treated by cable MSOs.

In terms of the Internet, Net Neutrality must become more than a policy goal – it must become an enforceable right.

Ultimately, the power to determine what content consumers receive, whether it is delivered via cable TV or over the broadband Internet, must be much more in the hands of consumers themselves. They must have the freedom to access without regard to its ownership what content they wish to receive.

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