million in 2009, and E!'s ratings have likewise increased over this period.[10] Comcast has launched several other national video services – Sprout in 2005, Exercise TV in 2006, and FEARnet in 2006. Sprout was launched as a video-on-demand ("VOD") service to feature PBS, Sesame Street, and other programming for children, and has become a linear network. Exercise TV and FEARnet launched as VOD-only services and currently remain VOD only. Comcast has also invested substantially in securing programming rights for the Golf Channel and Versus since their launches in the 1990s.[11] Golf Channel's programming budget increased from approximately {{ }} million in 2000 to {{ }} million in 2009. Versus' programming budget grew from {{ }} million to {{ }} million over the same period. Comcast's investment in these networks is reflected in their ratings performance during this period.[12] During this same period, Comcast also launched four new sports networks and purchased two others.[13] In addition, in 2004 Comcast partnered with Radio One to launch TV One, a channel targeted to African-Americans.[14] Comcast executives expect to have a similar approach to investment in the NBCU programming that will be part of the new entity.[15]

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[10] E!'s household total day ratings increased [[ ]] from 2004 to 2009, and the average number of households viewing the network increased more than [[ ]] in that period. The equivalent primetime figures grew even more. See [[ ]] (Comcast Attachment #2). E! recently experienced its best-rated telecast ever, attracting 4.8 million viewers. See Josef Adalian, "Kardashians Scores Monster Ratings for E!," TheWrap, Feb. 22, 2010, available at http://www.thewrap.com/ind-column/kardashians-scores-monster-ratings-e-14483, accessed on Apr. 30, 2010.

[11] See Comcast Corp., {{ }} (Comcast Attachment #1).

[12] Golf Channel's household total day ratings increased approximately [[ ]] from 2005 to 2009, and the average number of households viewing the network increased just under [[ ]] in that period. (2005 is the first full year in which ratings for the network were available.) Likewise, Versus' household total day ratings increased [[ ]] from 2004 to 2009, and the average number of households viewing the network increased [[ ]] in that period (with even faster growth in primetime ratings and viewing households). See [[ ]] (Comcast Attachment #2).

[13] Comcast launched CSN Chicago in 2004 (30% interest), CSN California in 2004 (100% interest), CSN Northwest in 2007 (100% interest), and The Mtn. in 2007 (50% interest), and in 2007 purchased from Rainbow Media the regional sports networks ("RSNs") now known as CSN Bay Area (67% interest) and CSN New England (100% interest). Comcast also owns a non-controlling interest in SportsNet New York (8.2 percent), launched in 2006.

[14] See "Comcast to Launch TV One," Multichannel News, Nov. 23, 2003, available at http://www.multichannel.com/article/51720-Comcast_to_Launch_TV_One.php ("'Comcast is pleased to debut TV One, one of the most anticipated, innovative and exciting new networks in a long time, to our subscribers in some of the country's top urban markets,' Comcast Cable president Steve Burke said in a statement. 'TV One is representative of our efforts to provide viewers with the widest possible array of programming choices.'"); see also R. Thomas Umstead, "Will Good Times Roll for TV One?" Multichannel News, Jan. 19, 2004, available at http://www.multichannel.com/article/74645-Will_Good_Times_Roll_for_TV_One_.php ("'I'm so happy that our friends at Comcast saw the real value in this channel and gave us the initial analog carriage,' TV One president

12. For example, the new entity could increase programming by competing more effectively in purchasing rights for additional sports programming. The new entity will have national sports networks, regional sports networks, and local over-the-air broadcast stations. The proposed transaction will enable the joint venture to make more attractive bids to distribute sports content on a multitude of platforms, including broadcast networks, national cable sports networks, regional sports networks, and digital and mobile platforms, thus expanding the availability of sports programming to consumers.[16] Having more cable and over-the-air networks available to carry sports programming will also enable the joint venture to make real-time programming changes more easily such as carrying sports content that has been bumped from one network on another network (e.g., a golf tournament that runs over into primetime). Similar real-time synergies likely could not easily be achieved between unaffiliated companies on a contractual basis.

13. Similarly, Comcast has expressed its intent to improve and expand the joint venture's women's/lifestyle programming.[17] The joint venture will combine NBCU's assets in Oxygen

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Johnathan Rodgers said. 'Rarely do you get big companies to understand how important [distribution] is and to understand how African-Americans deserve this channel.'").

[15] Per David L. Cohen, Executive Vice President, Comcast Corp., Nov. 19, 2009, Mar. 27, 2010, Apr. 09, 2010, Apr. 28, 2010. See also Tom Shales, "A Deal for NBC Could Be Comcastic," Washington Post, Oct. 16, 2009 available at http://www.washingtonpost.com/wp-dyn/content/article/2009/10/15/AR2009101502354.html ("Comcast is expected to put money into NBC to develop programming, not just ask for more cost-cutting as the current owner reportedly does. Comcast will likely explore innovations rather than just trying to survive, since Comcast has been in the television business since it began. Its executives know more about the changing terrain of American telecommunications."); see also Testimony of Brian L. Roberts, "Consumers, Competition, and Consolidation in the Video and Broadband Market," Subcommittee on Communications, Technology, and the Internet, Committee on Commerce, Science and Transportation, United States Senate, Mar. 11, 2010, pp. 93, 118 (Appendix #3) ("What is our motivation is to try to make these channels better, more relevant. Invest in them, be more focused on them than their current situation, and that we think they are good businesses, as you describe, as the next generation wants them on more platforms.").

[16] Comcast is hampered in its competition with Disney/ESPN for sports rights, which can make high bids because it can distribute sports programming on ABC and a variety of widely-carried cable sports networks (e.g., ESPN2, ESPNU). Moreover, many sports leagues consider it important to have the exposure that results from having their games carried on both national networks and local over-the-air broadcast networks. Comcast has no over-the-air broadcast stations. NBCU does not have a widely distributed cable sports network, such as ESPN, but its acquisition in 2008 of a minority interest in what is now known as Universal Sports demonstrates its interest in expanding its provision of sports programming. Comcast's sports channels include its multiple RSNs, Versus, and Golf Channel. NBCU provides sports programming on the NBC network and local broadcast stations as well as Universal Sports, a multicast channel carried by some MVPDs. See John Eggerton, "NBCU, WCSN Create Universal Sports," Broadcasting & Cable, Jun. 16, 2008, available at http://www.broadcastingcable.com/article/114179-NBCU_WCSN_Create_Universal_Sports.php.

[17] See Public Interest Statement, p. 52.

and Bravo with Comcast's assets in E! and Style. Comcast has invested in acquiring and expanding a variety of networks and making the content from those networks available for distribution.

14. With this transaction, Comcast will have more efficient access to NBCU's programming and will have the ability and incentive to invest in the NBCU programming and ensure that it is available on new distribution platforms. Increasing investment in programming makes economic sense for the more vertically integrated entity, as discussed more fully below. Because the new entity will enter into distribution contracts more efficiently, the returns to content will be higher and therefore Comcast will have a stronger incentive to invest in content.

IV. Challenges Facing Comcast Regarding the Development of New Products and Services

15. Another key public interest benefit of the proposed transaction is the acceleration of the anytime/anywhere future of video viewing by overcoming the transactional friction that has made it difficult for Comcast to reach agreements (or to reach them quickly) with content owners and programmers to create and deliver more content to consumers on new platforms. There are a number of reasons for such difficulties, including different expectations about costs, demand, and profits, different perceptions of and attitudes toward risk, different business models, and the complexity of the markets (e.g., multiple windows for content with multiple sources of revenue).[18] There are many issues to resolve and agree upon, including the ability of the content provider to determine the amount and type of content that will be made available under certain conditions, the level of restrictions on licensing content to other distributors and for other services, most favored nation ("MFN") clauses, required marketing efforts by the parties, rights over the sale of advertising, release timing for programming, quality of programming, and many other factors. The challenges stemming from different perspectives and interests on these issues between Comcast and content providers have been difficult to surmount and have delayed the expansion of Comcast video products, platforms, and services that would increase the amount, quality, and accessibility of content for consumers. Greater access to NBCU's content at arm's

[18] See Public Interest Statement, App. 7, ¶ 4 (Declaration of Robert Pick, Senior Vice President, Corporate Development, Comcast Corporation, Jan. 27, 2010) ("Pick Declaration").

length terms will help Comcast accelerate the transition to the anytime/anywhere world of video viewing its customers increasingly desire.[19]

16. This section describes the challenges facing Comcast and content owners in coming to agreements about the rights to distribute content. I use four examples to illustrate some of those tensions: VOD, DVD day-and-date release, Fancast Xfinity TV, and interactive advertising. Then, in Section V, I explain, from an economic perspective, why the transaction will help to alleviate some of the difficulties.

17. In this paper, I use "VOD" to refer to all video-on-demand. I use "pay VOD" when there is an additional charge for subscribers and "free VOD" when there is not an additional charge for subscribers. DVD day-and-date release refers to the practice of releasing movies on pay VOD the same day they are released on DVD.

18. As a content distributor, Comcast has been a pioneer in developing new, innovative ways of delivering content and services to consumers at times and places of their choosing. For instance, Comcast invested significant resources in developing and promoting VOD starting in 2001.[20] Comcast continues to be a leader in developing new ways of delivering content to consumers. In December 2009, Comcast launched a new service, Fancast Xfinity TV, which allows Comcast subscribers to obtain, at no additional cost, online access to content from their cable subscription packages via the Internet, in addition to ad-supported content available via the

[19] See Public Interest Statement, p. 37 ("Similarly, the proposed transaction, by linking NBCU's content with Comcast's multiple distribution platforms, will give the combined entity greater incentive and ability to deliver more content choices to consumers sooner than either company could do alone. Moreover, Comcast's creative vision and willingness to invest in its vision will enable the new NBCU to more efficiently respond to consumers' desire for 'anytime, anywhere' access in the rapidly evolving 'new media' landscape."). See also "Multi-Platform TV Viewership," Converging Insights LLC. Mar. 2009, p. 3 (Third Party Attachment #1) ("In addition to watching TV programs as they are regularly scheduled, respondents have used their DVR's (36% overall and 64% among DVR owners) and online websites (20%) to watch as well . . . . TV network websites (31%) and VOD (23%) will become more important viewing platforms during the next six months. Making available more content to these platforms should be ramped up.").

[20] See "Concurrent's MediaHawk Powers VOD Deployments at Multiple Comcast Systems; Concurrent Now Delivering Video-On-Demand to Over 1.47 Million North American Customers," Business Wire, Nov. 20, 2001, available at http://www.allbusiness.com/company-activities-management/operations-customer/6148033-1.html ("Jack Bryant, president and chief executive officer, Concurrent, said, 'As the digital broadband market continues to excel, we are pleased to support Comcast's industry-leading rollout of Video-On-Demand in several Comcast systems in 2001 and 2002.'").

Internet to Comcast subscribers and non-subscribers alike.[21] In 2009, Comcast upgraded set-top boxes and launched Enhanced TV Binary Interchange Format ("EBIF") technology in select markets to allow for interactive TV advertising.[22] In April of this year, Comcast delivered the 2010 Masters Tournament in 3D across multiple platforms, the first live nationwide 3D telecast of a national sporting event.[23]

19. Developing such new platforms requires risky, business-specific investment. For example, as Exhibit 1 shows, Comcast has incurred significant upfront and ongoing expenditures for its new distribution platforms.[24]

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[21] See Comcast Corp., Press Release, Comcast Makes On Demand Online Video Entertainment Experience Available Nationally, Dec. 15, 2009, available at http://www.comcast.com/About/PressRelease/Press ReleaseDetail.ashx?prid=946 ("The innovative new service, now called Fancast XFINITY TV, gives customers an 'anytime anywhere' entertainment experience – at home and on-the-go – and expands the video content customers can watch online by giving them quick and easy access to thousands of hours of cable TV shows, movies and independently produced content . . . . Both Comcast customers and non-Comcast customers across the nation currently have access to over 12,000 hours of great online content through Fancast.com – the company's online TV site and a top TV destination on the web – for free. Now, as a benefit of their cable subscription, Comcast customers will enjoy even more access to thousands of titles from the cable channels in their subscription packages at no additional cost through Fancast XFINITY TV.").

[22] See Todd Spangler, "Comcast Hits 8 Million EBIF-Enabled Homes," Multichannel News, Dec. 2, 2009, available at http://www.multichannel.com/article/397739-Comcast_Hits_8_Million_EBIF_Enabled_Homes.php ("Comcast has upgraded set-tops for 8 million digital cable subscribers to support the cable industry's Enhanced TV Binary Interchange Format (EBIF) technology, which the operator has used to launch an interactive TV advertising service and HSN's Shop by Remote application.").

[23] See Comcast Corp., Press Release, Comcast Partners with the Masters Tournament to Deliver the First National Sporting Event in Next-Generation 3D, Apr. 5, 2010, available at http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=983.

[24] See Pick Declaration, ¶ 18.

Exhibit 1: Comcast Expenditures and Costs Regarding Select Products, Platforms, and Services

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20. However, expenditures such as these may be profitable only if sufficient content is available now and in the future at arm's length terms without protracted delays. While Comcast has made significant investments in developing new delivery platforms, it will have a greater incentive to make these investments (and make them sooner) when it expects to have more efficient access to sufficient quality and variety of content so that it can experiment and demonstrate the effectiveness of new platforms and thereby attract even more content.[25]

21. Although Comcast has invested directly in producing a limited amount of its own content, it must obtain rights to distribute programs from other networks and studios to have a sufficient quality and variety of content to launch new distribution platforms. Comcast has tried

[25] See Pick Declaration, ¶ 18.

to obtain rights to distribute the content that it needs to justify investments in innovative programming delivery platforms, but, as I describe below, it has in some cases been unsuccessful and in other cases experienced lengthy delays. Initially, customer usage of these platforms was limited because significant quality content was not available.[26] This transaction will ensure more certain, rapid, and efficient access to the quality and variety of NBCU programming on arm's length terms, which will facilitate investments by enabling experimentation to develop successful new programming delivery platforms.

22. Content providers such as NBCU recognize that consumers value content more highly when they can access it on more platforms and that increased consumer value creates incentives to generate more content.[27] Content providers, however, also need to ensure that new revenue streams will provide the financial support necessary to justify the large investments that are required to create high-quality, professionally produced programming before they risk undercutting established revenue streams by allowing their content to be delivered over new distribution platforms.[28]

23. These concerns have delayed the benefits consumers receive from new initiatives not only by delaying the availability of content directly, but also by reducing the incentive for rapid and extensive investment on the platform side. For example, as I discuss below, Comcast was not able to launch VOD, DVD day-and-date release, Fancast Xfinity TV, and interactive advertising services as quickly or extensively as Comcast wanted because it did not have sufficient content. NBCU's and Comcast' incentives will be better aligned after the transaction, which will make it easier to take risks and will encourage experimentation, innovation, and investment.

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[26] See Pick Declaration, ¶ 13.

[27] See "Internet Video: Field of Dreams or Nightmare on Elm Street," PiperJaffray, Nov. 2009, p. 12 (Third Party Attachment #2) ("Offering the ability to easily access an unlimited library of content online with limited restrictions would only serve to increase consumption of content. We believe users would be willing to pay as much, if not more, for content that is made available to watch on their schedule and through virtually any device.").

[28] See Public Interest Statement, p. 62 ("Technology, costs, and demand for video products and services change rapidly. As a result, there is a high degree of uncertainty about what content, which delivery platforms, and which revenue models (e.g., subscription and/or advertising) will work or work best."); see also Pick Declaration, ¶¶ 5, 8.

A. Video-on-Demand (VOD)

24. Comcast's experience in trying to create an innovative VOD service for its cable subscribers illustrates its difficulties in obtaining content from independent companies for new platforms. Comcast's vision in the early 2000s was to become a leader in providing popular content, including movies, to its subscribers "on demand" for viewing on their television sets. It invested considerable resources in the technology to provide VOD services. See Exhibit 1 above. While Comcast was able to obtain limited content for its VOD service, it was unsuccessful initially in convincing studios and other content owners to make available a sufficient amount of their popular content to make this new service as attractive as it could be. In its negotiations with content owners, Comcast sought the rights to provide movies and other content both on pay VOD and free VOD.[29] Content providers were uncertain regarding the degree to which offering content on demand to Comcast subscribers would cannibalize the content providers' existing revenue streams.[30]

25. While Comcast had developed VOD technology by 2001, it took several more years to begin to get sufficient quality and variety of content to achieve widespread adoption by consumers, notwithstanding the fact that it had the capacity to offer consumers much more.[31] See Exhibit 2.[32]

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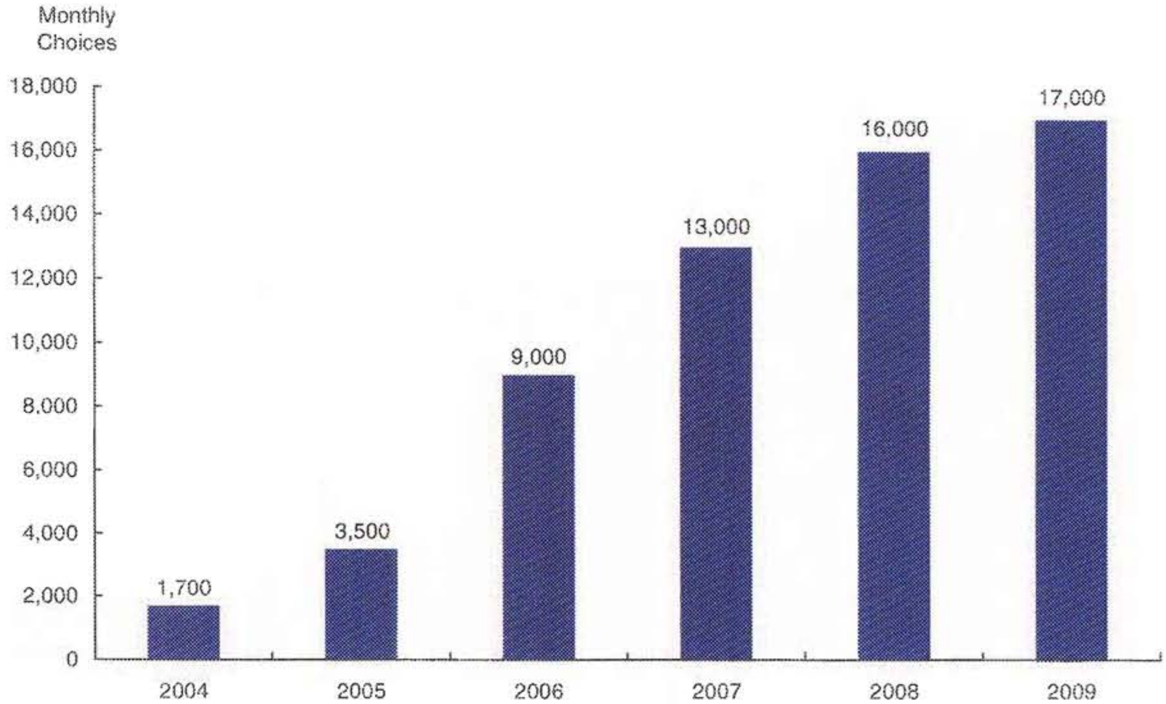
[29] See Mike Farrell, "Banking on a VOD Future," Multichannel News, Dec. 19, 2004, available at http://www.multichannel.com/article/82260-Banking_on_a_VOD_Future.php; see also "Comcast's VOD Guru; His Vision Broadened On-Demand Offerings," Television Week, Jul. 19, 2004 ("Comcast took a brave position nearly two years ago when it began to transition VOD away from just movies-on-demand, an expected moneymaker, to a broader service under the banner On Demand, starting with the Phillyvision concept in its flagship Philadelphia market. That's where Comcast incubated and successfully baked the idea of loads of free on-demand content to complement the movies that have price tags attached.").

[30] See Brooks Barnes, "Studios and Cable Unite in Support of Video on Demand," The New York Times, Mar. 18, 2010 ("[Movie studios] worried that creating too much noise would anger powerful retail partners like Wal-Mart and Best Buy, which had a stranglehold on DVD sales. Movie rental companies like Blockbuster had just enough life left in them to cause their own brand of trouble over video-on-demand cheerleading.").

[31] See Linda Moss, "Raging Debate on VOD Still Hasn't Delivered Hits," Multichannel News, Apr. 10, 2005, available at http://www.multichannel.com/article/118430-Raging_Debate_on_VOD_Still_Hasn_t_Delivered_the_Hits.php ("While major programmers continue to experiment with video on demand, they continue to hold back their most-prized content — marquee primetime programming — from the new platform . . . . Thus, programmers and cable operators (notably Comcast Corp.) are trying to figure out a business model for VOD that satisfies everyone: networks, distributors and advertisers.").

[32] Comcast personnel have provided estimates of VOD choices at different times using different assumptions and for different purposes. Based on interviews with Comcast personnel, the estimated figures for VOD choices and DVD day-and-date releases presented below are the most accurate for the purposes of my analysis.

Exhibit 2: Video On Demand Content Choices



Source: Comcast Corp., "All VOD - Views and Choices" (Appendix #2)

26. During this period, Comcast was negotiating with networks and studios for rights to distribute content on VOD. In late 2004, Comcast participated, along with Sony and others, in an acquisition of Metro-Goldwyn-Mayer ("MGM").[33] As part of the arrangement under which Comcast agreed to invest $250 million in MGM, Comcast was able to obtain expanded rights from Sony and MGM for 100 movies from Sony and an additional 100 movies from MGM for free VOD.[34] Comcast also gained access to more than 35,000 television episodes from Sony and

[33] See Comcast Corp., Press Release, "Consortium Led by Sony Corporation of America, Providence Equity Partners, Texas Pacific Group, Comcast Corporation and DLJ Merchant Banking Partners Enters Into Definitive Agreement to Acquire Metro-Goldwyn-Mayer," Sept. 23, 2004, available at http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=193.

[34] See Martin Peers and Peter Grant, "Limited Viewing: Comcast, TV Program Owners Clash Over Video-on-Demand," The Wall Street Journal, Jan. 27, 2005 ("As a result of the deal, Sony Pictures agreed to license 100 of its older movies for use on the 'free' section of Comcast's on-demand service. Once the MGM purchase is completed, another 100 MGM films will be added, Mr. Burke says."); see also "About Comcast Cable," available at http://comcastcalifornia.mediaroom.com/index.php?s=18, accessed on Apr. 30, 2010 (noting Comcast's $250 million investment in MGM).

10,000 television episodes from MGM.[35] These deals allowed Comcast to create a "Free Movies" category on VOD; Comcast sought to expand that category over time.

27. As the quantity and quality of VOD content grew, many content owners began to recognize that the VOD model and its promotional aspects were beneficial. In several cases, audience ratings for the standard linear broadcasts of television shows were higher in the Comcast footprint when these shows' content was featured on free VOD.[36] As certain content providers observed that the VOD model could be a benefit, they gradually made more content available for VOD.[37] In 2004, Comcast offered about 1,700 VOD choices in a given month. By 2009, VOD choices increased tenfold to 17,000 choices in a month, including both free and paid selections. See Exhibit 2.

28. As additional content became available on demand, VOD consumption grew rapidly. In 2009, Comcast's digital customers averaged over 300 million VOD views per month. See Exhibit 3. There were about 17 VOD views per home per month.[38] Of the 17,000 available

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[35] See Mike Farrell, "Banking on a VOD Future," Multiehannel News, Dec. 19, 2004, available at http://www.multichannel.com/article/82260-Banking_on_a_VOD_Future.php.

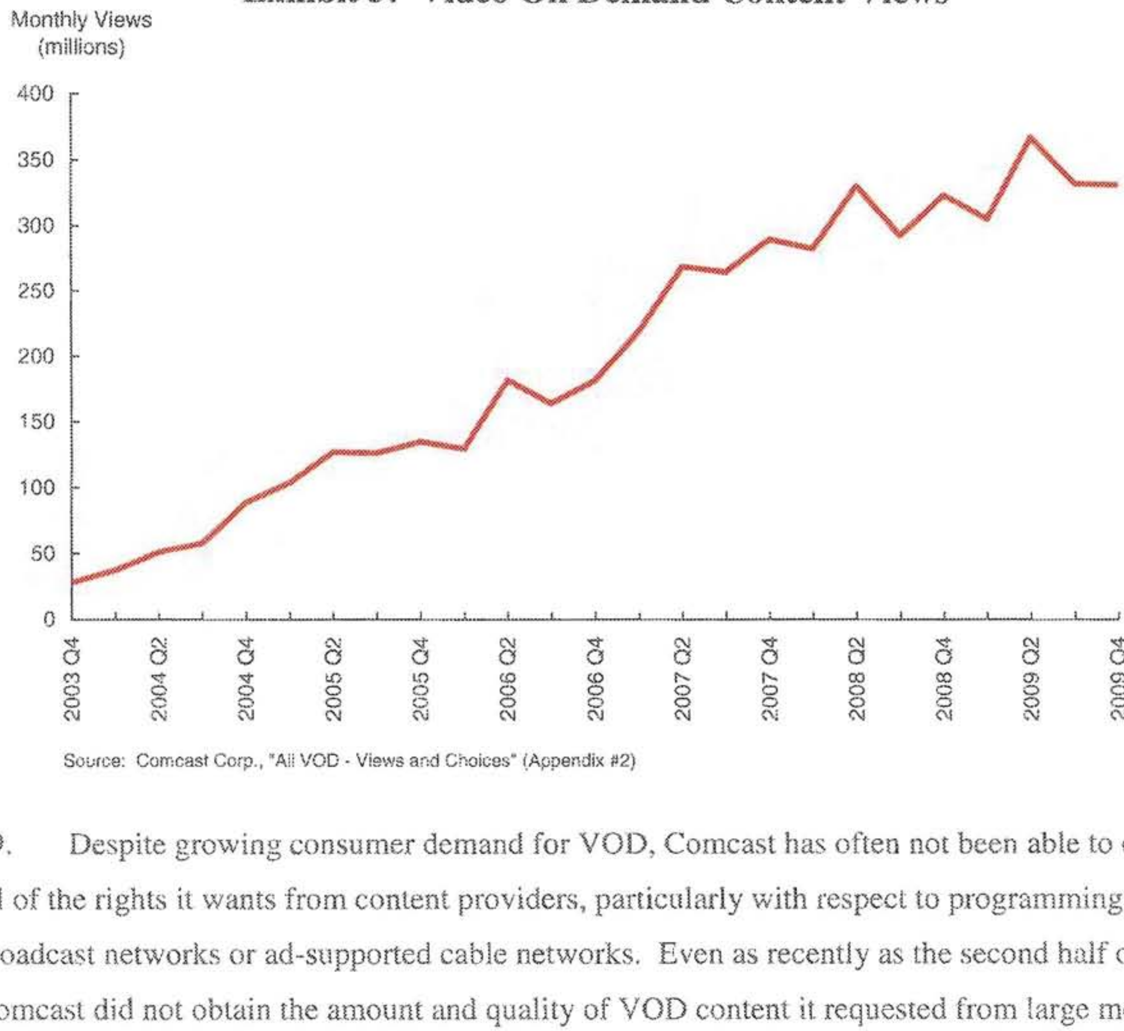
[36] See George Winslow, "Converging On The Future: Providers Try To Leave 2009 Woes Behind," Multichannel News, Jan. 4, 2010, available at http://www.multichannel.com/article/442198-Converging_On_The_Future.php ("'One of the big surprises has been how these new digital platforms have helped grow TV viewing,' said Nic Covey, Director of Cross-Platform Insight at The Nielsen Co."). AMC's Mad Men is one recent example of this. See Comcast Corp., {{ }} (Comcast Attachment #7); see also Comcast Corp., {{ }} (Comcast Attachment #8).

[37] See "Comcast's VOD Guru; His Vision Broadened On-Demand Offerings," Television Week, Jul. 19, 2004 ("'The Phillyvision model transformed the concept of what VOD could be for the whole industry from movies to everything on-demand,' said James Kelso, VP and general manager for broadband systems at SeaChange, a VOD services and equipment supplier that works with Comcast . . . . In fact, Comcast's VOD shift had a ripple effect with programming suppliers. '[Mr. Thompson] has worked across the industry and really stimulated the programming community to more carefully consider VOD,' said Clint Stinchcomb, senior VP and general manager for Discovery HD Theater and VOD. Discovery programming is slated to be added to Comcast's on-demand lineup this summer."). Recently, more content has been made available to consumers through the VOD services of other MVPDs. See Brooks Barnes, "Studios and Cable Unite in Support of Video on Demand," The New York Times, Mar. 18, 2010 ("'The Video Store Just Moved In,' a $30 million advertising campaign backed by eight motion picture companies and eight cable providers, began Tuesday night during 'American Idol' and will continue on television, print and online outlets for three months. The effort is the first time rival studios have come together to push consumers to rent more movies through their cable boxes.").

[38] Based on 18 million digital subscribers in 2009. Comcast's VOD-enabled footprint covers nearly all of its digital subscribers. Per Derek Harrar, Senior Vice President and General Manager of Video and Entertainment Services, Comcast Cable, Apr. 29, 2010. See also Public Interest Statement, p. 18.

titles, the vast majority of entertainment titles were viewed in a given month.[39] Overall, Comcast customers viewed more than 14 billion VOD videos from 2003 to 2009.[40]

Exhibit 3: Video On Demand Content Views



Source: Comcast Corp., "All VOD - Views and Choices" (Appendix #2)

29. Despite growing consumer demand for VOD, Comcast has often not been able to obtain all of the rights it wants from content providers, particularly with respect to programming from broadcast networks or ad-supported cable networks. Even as recently as the second half of 2009, Comcast did not obtain the amount and quality of VOD content it requested from large media companies with which it was negotiating. For example, Comcast has limited amounts of current season primetime broadcast series from ABC and NBC and nothing from Fox and CW.[41] Even

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[39] Per Derek Harrar, Senior Vice President and General Manager of Video and Entertainment Services, Comcast Cable, Apr. 29, 2010.

[40] See Comcast Corp., "All VOD - Views and Choices" (Appendix 2); see also David Watson, "Comcast Launches XFINITY," Feb. 3, 2010, available at http://blog.comcast.com/2010/02/comcast-launches-xfinity.html, accessed on Apr. 30, 2010.

[41] Per Matthew Strauss, Senior Vice President, New Media, Content Acquisition, Comcast Cable, Mar. 24, 2010, Apr. 27, 2010.

for available series, only a limited number of episodes, typically four, are available at a time.[42] Similarly, top series and programming from many cable networks still are not available on Comcast VOD. In addition, Comcast has experienced significant delays in obtaining rights regarding the distribution of high-definition content on Comcast's VOD platform from many programmers, including premium programmers.[43] For example, {{ }}, NBCU and Comcast had different positions on a variety of issues, including the amount and type of content that should be released on Comcast's on demand platforms.[44]

30. There are several lessons from Comcast's experience with VOD. First, widespread consumer viewing of Comcast's VOD service would have occurred sooner had Comcast been able to reach agreements for distribution rights to more content during VOD's initial years. Second, absent having sufficient VOD content, it was difficult for Comcast to demonstrate that free and/or pay VOD could benefit content owners by direct payments, increasing audience, and providing promotion, ultimately increasing the content owners' revenues and profits. Thus, content owners were unwilling to make more content available for VOD until carriage agreements were negotiated and renewed, at which point Comcast was able to secure rights for some VOD content.[45] Third, once Comcast acquired VOD rights to greater content, it was able to demonstrate that VOD was a viable business and promotional model for both content providers and multichannel video programming distributors ("MVPDs"). The viability of VOD increased the willingness of content owners to make their content available for VOD services and increased the willingness of other MVPDs to also make the investments necessary to provide VOD services to their subscribers. Many MVPDs now offer VOD services based on content from numerous sources. Fourth, while VOD has become more widespread, it took substantial risky upfront investment and was much slower to develop than it could have been given the capacity of Comcast's distribution technology and consumer demand. As discussed below, these lessons apply directly to the current transaction; with a more certain supply of content, Comcast

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[42] Id.

[43] Id.

[44] Id.

[45] See Comcast Corp., Press Release, Comcast and Home Box Office Extend HBO and Cinemax Distribution Agreement, Aug. 19, 2003, available at http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=293.

will be more willing to invest more aggressively in new delivery platforms and in turn content providers will be more willing to invest in content and to make that content available to the new platforms.

B. DVD Day-and-Date Releases

31. Under DVD day-and-date release, movies become available to cable subscribers for pay VOD on the same day they become available on DVD. Comcast has been technically capable of providing DVD day-and-date release of movies since it first implemented VOD in the early 2000s, and Comcast has been trying for several years to convince content owners – with limited success – to provide movies for DVD day-and-date release. Warner Brothers, at a time when it was part of the same company as Time Warner Cable, was the first major studio to test DVD day-and-date releases.[46] These releases, in 2007, were initially on Time Warner Cable followed a few months later on Comcast.[47] In describing these DVD day-and-date tests, Andrew Mellett, SVP of VOD, Warner Brothers Digital Distribution said, "We are very excited about working with our sister company on this next-generation business model."[48]

32. Comcast has not been able to provide as many DVD day-and-date release movies as it would like because of the concerns of studios and other movie rights holders that such release to cable subscribers on pay VOD would reduce revenues from existing distribution channels, primarily DVD and Blu-ray disc sales.[49] In 2006, Comcast convinced all the major motion

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[46] See Nat Worden, "Films Studios And Cable Providers Tout Video-On-Demand," Dow Jones Newswires, Mar. 17, 2010, available at http://online.wsj.com/article/BT-CO-20100317-709489.html; see also "WB Sets Day-and-Date," Multichannel News, Mar. 15, 2010, available at http://www.multichannel.com/article/450246-WB_Sets_Day_and_Date.php; Mike Farrell, "Time Warner Split 'Legal,'" Multichannel News, Mar. 12, 2009, available at http://www.multichannel.com/article/189874-Time_Warner_Split_Legal_.php.

[47] Warner Brothers began testing day-and-date releases on Time Warner Cable in March 2007. See Time Warner Cable, Press Release, Time Warner Cable Tests Day-and-Date Movies On Demand with Warner Bros. Home Entertainment Group, Mar. 28, 2007, available at http://www.timewarnercable.com/MidOhio/about/inthenewsdetails.ashx?PRID=1643&MarketID=124. The Comcast day-and-date trial began with the release of "The Astronaut Farmer" in July 2007; see Stuart Miller, "Forward Fast: Studios Speed Up Launch Dates for VOD," Multichannel News, May 18, 2009, available at http://www.multichannel.com/article/232702-Forward_Fast.php. "The Astronaut Farmer" was released in July 2007. See Video ETA, The Astronaut Farmer, available at http://videoeta.com/movie/86567, accessed on Apr. 30, 2010.

[48] See Alex Woodson, "TWC Pushes VOD Envelope," The Hollywood Reporter, Mar. 28, 2007, available at http://www.allbusiness.com/services/motion-pictures/4780925-1.html.

[49] See "Comcast Craves Content; Access to MGM's Film Library Would Bolster Video-On-Demand," Broadcasting & Cable, Sept. 20, 2004 ("For years, cable operators had sought to sell a movie on pay-per-view on the same 'day-

picture studios except Sony to participate in a limited test of DVD day-and-date release. The studios permitted Comcast to offer movies on pay VOD at the same time they were released on DVD for six months in two markets – Denver and Pittsburgh – to assess the extent to which these offerings would affect DVD sales.[50] A study conducted for the two test markets provided evidence that [[

]][51] However, except for Warner Brothers, movie studios did not agree to offer Comcast more day-and-date movie releases for pay VOD at that time. According to one analyst:

> While studio executives from several studios have indicated to us that DVD sales (in day and date VOD trial markets) have not been negatively impacted, we believe consumer behavior is far too hard to analyze until day and date VOD is being done nationwide.[52]

33. In 2007, due to a lack of rights, Comcast distributed only thirteen movies on a nationwide DVD day-and-date basis, a number that was insufficient to determine whether this innovation would have a negative impact on revenues generated by existing distribution channels. In 2008,

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and-date' that the title hits the shelves of Blockbuster Video or Wal-Mart. But studios are too skittish about cannibalizing the home-video gold mine and delayed the PPV and VOD window by 45-60 days."); see also Mike Farrell, "Cleaning Up on Closing DVD Window," Multichannel News, Jan. 28, 2007, available at http://www.multichannel.com/article/127642-Cleaning_Up_on_Closing_DVD_Window.php ("Studios have resisted day-and-date releases via on-demand because of fears of cutting into lucrative retail DVD sales.").

[50] See "Six Studios in Comcast VOD Trial," Multichannel News, Dec. 18, 2006, available at http://www.multichannel.com/article/127188-Six_Studios_in_Comcast_VOD_Trial.php ("Comcast's day-and-date video-on-demand market test in Denver and Pittsburgh includes six studios . . . . The test is expected to run about six months, and then parties will evaluate the results. Actually, it could take longer to evaluate the impact on DVD sales or video-store rentals because the studios will want to see how much better sales were in Denver and Pittsburgh than in markets where the titles hit VOD with the usual 30- to 45-day lag."). The trials were eventually extended to two years and included Atlanta, GA as the third test market. See Stuart Miller, "Forward Fast: Studios Speed Up Launch Dates for VOD," Multichannel News, May 18, 2009, available at http://www.multichannel.com/article/232702-Forward_Fast.php ("In 2006, Comcast developed a two-year trial, working with eight movie studios. Denver, Atlanta and Pittsburgh were used as test markets (against three control markets) to measure VOD use, DVD sales and DVD rentals (which are more difficult to measure.)").

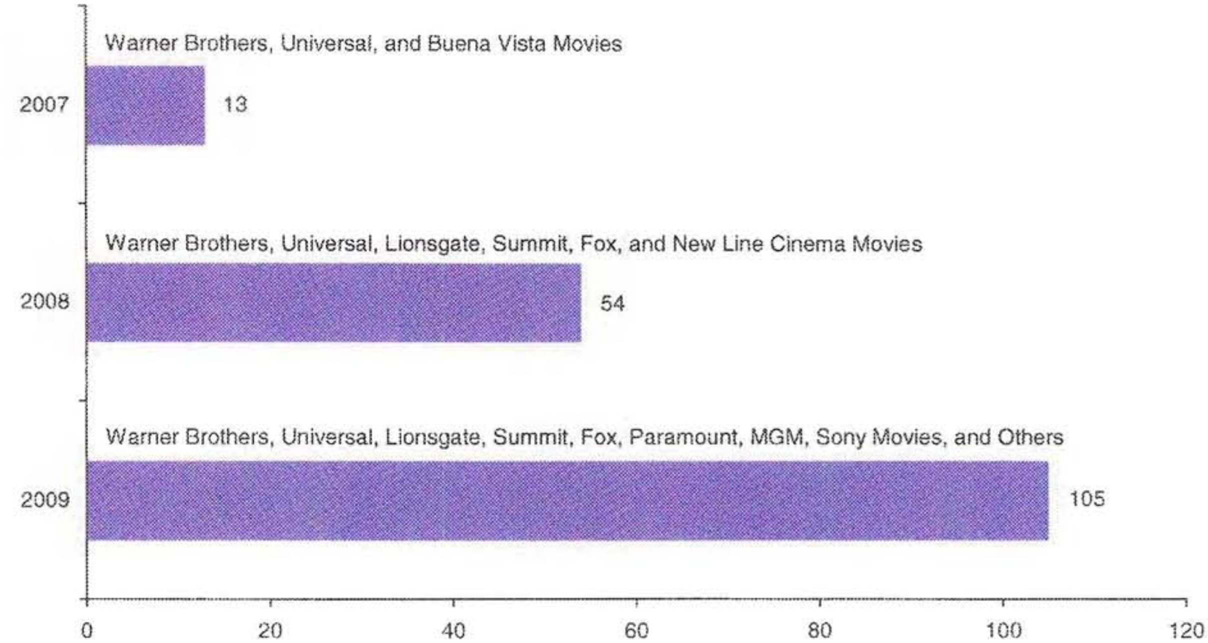
[51] {{

}} (Comcast Attachment #9).

[52] Richard Greenfield and Mark Smaldon, "Media & Cable Industry: Why We Believe Enabling VOD Day & Date with DVD is a Major Mistake for Movie Studios," Pali Research, Apr. 23, 2007, p. 3 (Third Party Attachment #3).

Comcast was able to distribute 54 DVD day-and-date movies, and increased that to 105 in 2009.[53] See Exhibit 4.

Exhibit 4: Number of Comcast Day-and-Date Movie Releases by Year 2007 – 2009



Source: Comcast Corp., [[ ]] (Comcast Attachment #10)

Note: Includes pre-DVD releases.

34. In Exhibit 5 below, the pie chart shows that the 105 DVD day-and-date releases Comcast obtained in 2009 were only about 19% of the 558 theatrically-released movies in 2009.[54] Comcast still faces difficulties obtaining day-and-date release commitments from major studios.[55] For example, in 2010, only 50% of VOD titles are expected to be released at the same time as the DVDs.[56] Furthermore, even successful negotiations have taken a long time.[57]

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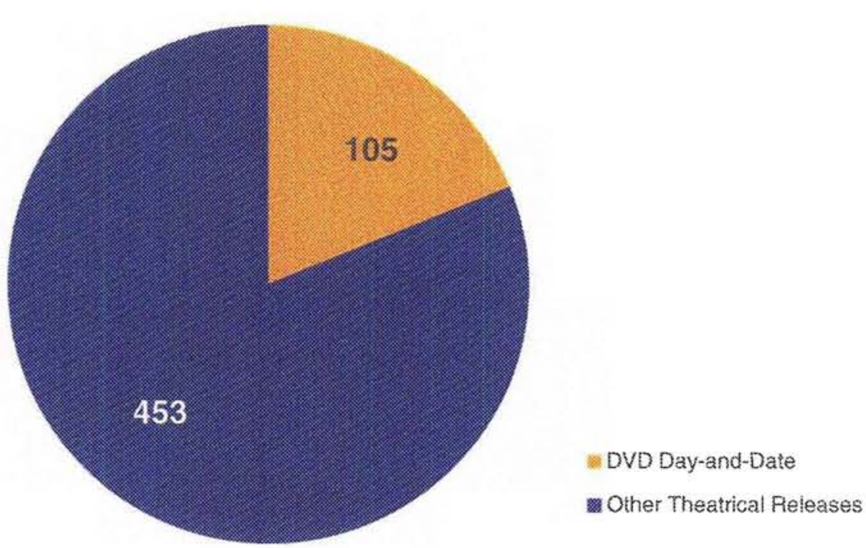
[53] These figures correspond to DVD day-and-date movies that were previously released in the theaters. They do not include "direct to video" movies that were not released in theaters.

[54] See Comcast Corp., [[ ]] (Comcast Attachment #10); see also "Theatrical Market Statistics," Motion Picture Association of America, 2009, p. 11, available at http://www.mpaa.org/Resources/091af5d6-faf7-4f58-9a8e-405466c1c5e5.pdf. Theatrical releases include all major and minor studio releases in theaters but are a small fraction of the thousands of movies released on DVD each year.

[55] Per Matthew Strauss, Senior Vice President, New Media, Content Acquisition, Comcast Cable, Mar. 24, 2010, Apr. 27, 2010.

[56] See R. Thomas Umstead, "Big Month for VOD Pix," Multichannel News, Nov. 7, 2009, available at http://www.multichannel.com/article/383336-Big_Month_for_VOD_Pix.php ("In Demand interim CEO Bob Benya

Exhibit 5: Comcast DVD Day-and-Date vs. Other Theatrical Releases 2009



Total 2009 New Theatrical Releases = 558

Source: Comcast Corp., [[ ]] (Comcast Attachment #10); "2009 Theatrical Market Statistics," Motion Picture Association of America.

Note: Includes pre-DVD releases.

35. In 2009, 8 of the top 10 most popular movies on Comcast's VOD platform were DVD day-and-date movies even though they accounted for a small minority of all VOD movies.[58] The popularity of DVD day-and-date demonstrates that consumers value this new distribution method.[59]

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said that he expects nearly half of all VOD titles offered in 2010 to be released on par with DVD — a major accomplishment, considering most titles carried a 45-to-90-day DVD window just five years ago. Still, the industry needs to figure out how to convert the remaining 50% of non-day-and-date titles, because many of them are among the biggest movies in Hollywood. While studios will continue to experiment with day-and-date titles on some big hit films, they understandably remain squeamish about potentially reducing huge DVD sell-through and rental revenue for top box-office titles. Operators will have to prove to them, without a shadow of a doubt, that premiering such titles on VOD is a revenue no-brainer and that the industry will aggressively promote and market day-and-date titles so that cable subscribers instinctively turn to VOD first to gain access to their favorite movies.").

[57] Per Matthew Strauss, Senior Vice President, New Media, Content Acquisition, Comcast Cable, Mar. 24, 2010, Apr. 27, 2010.

[58] See Public Interest Statement, p. 58.

[59] See Comcast Corp., Press Release, Comcast Announces 100th Movie Available On Demand Same Day as DVD Release, Dec. 17, 2009, available at http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=948 ("Movies available same day as DVD releases continue to rise in popularity and are consistently among the top-performing content On Demand.").

36. Comcast's experience with DVD day-and-date releases illustrates that, although there has been some progress, the available content is still limited despite the fact that Comcast has had the capacity to deliver more DVD day-and-date movies and consumers want this service. For example, even in negotiations with a major studio in the second half of 2009, Comcast was not able to get access to all of its recent theatrical releases within 30 days of their DVD release dates.[60] In addition to the limitations on the number of DVD day-and-date movies that Comcast has been able to offer its subscribers, the delays in the negotiating process have deprived subscribers of the benefits they would have enjoyed had the deals been reached more expeditiously. With common ownership of Universal Studios, Comcast may be able to encourage Universal to offer more DVD day-and-date titles or potentially even test offering titles before day-and-date for a premium, which in turn might encourage other major studios to follow suit.[61]

37. Other new and innovative delivery platforms and services will also require access to quality content. For example, theatrical day-and-date releases where subscribers could watch movies from major studios at home the same day they are released to theaters could be a very attractive option for consumers.[62] However, the studios' sensitivity to their relationships with theater owners and other third parties, as well as their concerns regarding piracy, are delaying the introduction of this new service for consumers.[63] Comcast's efforts to get DVD day-and-date

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[60] Per Matthew Strauss, Senior Vice President, New Media, Content Acquisition, Comcast Cable, Mar. 24, 2010, Apr. 27, 2010.

[61] Per Matthew Strauss, Senior Vice President, New Media, Content Acquisition, Comcast Cable, Mar. 24, 2010, Apr. 27, 2010. NBCU personnel agree the new entity, for instance, may be more likely to push forward with putting additional film content on VOD. Per Jean-Briac Perrette, President of Digital & Affiliate Distribution/Content Distribution Strategy, NBCU, Apr. 29, 2010.

[62] Comcast has been able to obtain a limited amount of theatrical day-and-date releases from smaller studios and other rights holders. See Comcast Corp., Press Release, Comcast and IFC to Offer On-Demand Day and Date Premieres of Independent Theatrical Films, Feb. 28, 2006, available at http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=89.

[63] Part of the reason that studios are reluctant to try theatrical day-and-date releases is that the current business model values movies according to their box office results. "In Hollywood, there's an obsession with a film's theatrical release and its opening weekend box-office performance. This box-office period is critical because the numbers from that three-day period establish most subsequent deals for DVD, international distribution, cable and satellite television, and free television." Mark Young, James Gong, Wim Van der Stede, Tatiana Sandino, and Fei Du, "The Business of Selling Movies," Strategic Finance, Mar. 2008, pp. 35-41 at p. 39.

movie releases illustrates that getting access to content is a critical factor in the speed at which new platforms can be rolled out.

C. Fancast Xfinity TV

38. Fancast Xfinity TV is a recent initiative by Comcast that lets consumers browse, manage, and watch video content on multiple platforms, such as TV, online, and mobile devices.[64] Fancast Xfinity TV's online video service is multilevel. Anyone (including consumers who are not Comcast cable subscribers) can access on an ad-supported basis at no additional charge approximately [[ ]] of all movies and [[ ]] of all television show episodes available on Fancast.com.[65] In addition, Comcast video customers (once authenticated) are entitled to online access at no additional charge to content associated with their individual Comcast Cable subscription level. For example, an eligible Comcast Cable customer who subscribes to HBO has online access to the HBO programming that HBO has made available for the platform. Of course, Comcast must obtain the appropriate licenses from content owners to distribute their content online.

39. Comcast would make much more content available online if it could obtain the rights at arm's length terms that would allow it to do so profitably over the long term. As Comcast set about obtaining rights to distribute authenticated content for Fancast Xfinity TV, it ran into and continues to experience contracting difficulties similar to those it faced with VOD and day-and-date releases. Most cable network owners have been reluctant to make all of their content available to Fancast Xfinity TV, and they generally have refrained from making long-term commitments. As of late 2009, 30 cable networks (out of the hundreds of networks from which Comcast has obtained cable distribution rights) provided some authenticated content to Fancast

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[64] Comcast and Time Warner, Inc. developed the TV Everywhere principles. The TV Everywhere model was "designed to be simple and attractive for any programmer and any video distributor to elect to adopt." See Comcast Corp., Press Release, Time Warner Inc. Announces Widespread Distribution of Cable TV Content Online, Jun. 24, 2009, available at http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=883. TV Everywhere is open and non-exclusive; cable, satellite or telco video distributors can enter into similar agreements with other programmers.

[65] These percentages exclude the Fancast Store which operates similar to iTunes in enabling customers to purchase video content. Including the Fancast Store, approximately [[ ]] of episodes and [[ ]] of movies are available on an ad-supported basis. See Comcast Corp., [[ ]] Apr. 1, 2010 (Comcast Attachment #11).

Xfinity TV and many of the most popular networks had not agreed to provide any content for Xfinity TV.[66]

40. There are three main reasons for the challenges that Comcast has faced in getting more content for Fancast Xfinity TV: content providers' fear of the risks to their content's value if the programming were made available online; uncertainty about future online business models; and cable network owners' lack of certain online rights in some programs.

41. Content owners are uncertain about the impact of online distribution on their traditional revenue streams and cautious about agreeing to permit online distribution of their programming.[67] For example, online advertising models are still evolving, and existing affiliate fees from traditional MVPDs are currently the largest source of revenue for most cable networks.

42. Moreover, a cable network generally buys rights for linear exhibition of the programming on its network and for certain related uses such as rights for limited free VOD viewing. Obtaining rights to content for a particular platform does not necessarily allow distribution of the content on other platforms, such as the Internet, or for all business models (such as free VOD). In addition, content providers may have entered into agreements for their owned/controlled product that contain exclusivity or other restrictions on certain types of VOD or online use.[68] This complex rights structure makes it more difficult for Comcast to obtain sufficient content as quickly as it would like for new platforms. Ultimately, it is the content owner's decision to make content available in a limited fashion (e.g., on the content owner's proprietary website), or to

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[66] See Public Interest Statement, p. 60.

[67] See "Internet Video: Field of Dreams or Nightmare on Elm Street," PiperJaffray, Nov. 2009, p. 10 (Third Party Attachment #2) ("When looking at studio revenue sources it is perfectly clear why content owners are nervous about abandoning existing business models in favor of unknown future revenue streams. From an advertising revenue standpoint, ad revenue from online video is still a drop in the bucket vs. overall TV broadcast ad revenue. In the 1H09, online video ad revenue was $477 million, according to IAB (Internet Advertising Bureau), so it is safe to assume 2009 internet video advertising revenue will be approximately $1 billion. This compares to TV broadcast advertising, which totaled $20.1 billion in 1H09 (source: TVB – Television Bureau of Advertising) and will, therefore, likely be greater than $40 billion in 2009. With regards to the movie rental market, according to Adams Media Research, Internet delivery will account for less than 1% of 2009 U.S. movie rental revenue.").

[68] Most third-party studios retain digital rights to their content and therefore limit the ability of NBCU's broadcast and cable networks to distribute such content on certain other platforms. Per Ron Lamprecht, Senior Vice President, Business Development & Sales, NBCU, and Jean-Briac Perrette, President, Digital & Affiliate Distribution/Content Distribution Strategy, NBCU, Mar. 23, 2010, Apr. 27, 2010.

make content widely available online (on Fancast Xfinity TV and/or through various third-party websites and aggregators).[69] As discussed below, the transaction will provide greater incentive for the new entity to align all of the rights to minimize this problem and increase consumer choice; it will do so because it will be able to come to an efficient agreement with Comcast for distribution that will increase the returns to the new entity for acquiring upstream rights.

43. Fancast Xfinity TV has launched, but its future is unclear: Comcast needs to negotiate with many different rights holders on a variety of complex issues about the ultimate product, and the new service is likely to evolve substantially over time, which will require additional negotiations and experimentations. Ultimately, viewer acceptance and the success of Fancast Xfinity TV will depend on having attractive content. Comcast's challenges in obtaining content for Fancast Xfinity TV have limited the scope of the service and slowed its rollout. Once again, Comcast has the capacity to deliver an innovative new service that consumers want but it cannot do so, or cannot do so as fully and quickly as it would like, because of negotiating friction with content owners. As I discuss in Section V, this transaction should help ensure that Comcast can break through that friction and obtain more efficient access to distribute more of NBCU's content through contracts on arm's length terms, and provide greater incentive for NBCU to secure rights for content owned by third parties.[70]

D. Advanced Advertising Services

44. Because of improved targeting and interactivity, advanced advertising has the potential to provide greater value – to consumers and advertisers – than traditional cable and broadcast advertising.[71] Implementing advanced advertising requires investment by MVPDs, by networks,

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[69] See "Internet Video: Field of Dreams or Nightmare on Elm Street," PiperJaffray, Nov. 2009, p. 10 (Third Party Attachment #2) ("In other words, while each individual internet video service will customize its offering to maximize consumer satisfaction, the content owners hold the key to making it easier for consumers to use and enjoy a service, through broader access to content and usage of that content. Content owners are conflicted about what strategy will optimize profitability today while positioning them well for tomorrow.").

[70] While NBCU does not have the complete set of rights for all of the television programs and movies on its broadcast and cable networks, NBCU has the complete set of rights for about {{ }} of the shows, although it can vary from season to season. The remaining shows are controlled by third parties. Per Ron Lamprecht, Senior Vice President, Business Development & Sales, NBCU, and Jean-Briac Perrette, President, Digital & Affiliate Distribution/Content Distribution Strategy, NBCU, Mar. 23, 2010, Apr. 27, 2010.

[71] See Adam Swanson and Derek Baine, "Interactive Advertising: Appearing Soon on a Screen Near You," SNL Kagan, Nov. 18, 2008 (Third Party Attachment #4) ("The potential for advertisers is that they can purchase a single

and by advertisers. Comcast has invested significant resources to develop advanced advertising services[72] and has been an active participant in Project Canoe, a cable industry advanced advertising effort.[73] One aspect of Comcast's investment has been to configure appropriate technology, for example, set-top boxes that can be used for advanced advertising and to develop the "front end" technology using the remote control as the device to offer coupons and "Requests for Information" or "RFI."[74]

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ad spot and store variations of ads on a database, and based on information from the set-top box, a specific ad will be addressed to a specific viewer. Therefore, advertisers can get the right message to the right consumer at the right time. With the present state of the economy, this could also reduce the amount of 'wasted' ad dollars spent on reaching uninterested audiences."); see also Todd Spangler, "Chasing the Interactive Ad(vantage)," Multichannel News, May 26, 2008, available at http://www.multichannel.com/article/133381-Chasing_the_Interactive_Ad_vantage_.php (noting that advanced advertising "serv[es] up more relevant, interactive and measurable ads" and that "[m]ajor advertisers and agencies are hungry for marketing techniques that reach would-be customers as precisely as the Internet, coupled with the power of the highly engaging and visual TV medium").

[72] For example, between 2007 and March 2010, Comcast spent approximately {{ }} million on advanced advertising. See Exhibit 1; see also "Comcast-NBCU: Madison Ave.'s Wish List – Speed Up Addressable Advertising, Fix the Network," Broadcasting & Cable, available at http://www.broadcastingcable.com/article/423422-Comcast_NBCU_Madison_Ave_s_Wish_List.php ("Starcom MediaVest Group has been intimately involved in addressable advertising trials with Comcast in Huntsville, Ala. and in Baltimore, Md. 'We have seen very positive business results from that,' said Desmond. Addressable advertising is the ability to tailor more suitable ad messaging to the consumer. 'The idea of taking some of Comcast's trials in the area of interactivity and bringing that expertise to broadcast television is a very powerful thing.' Desmond said addressable advertising had been held back by cable operators' inability to deliver scale. The addition of mass via the broadcast network, 'is the very intriguing development.' Comcast is also developing interactive applications such as requests for information services. 'The ability to have those interactive applications and gain more content and more channels could be great for advertisers,' said Comcast COO Steve Burke on a call with press today . . . '").

[73] See Tim Arango, "Cable Firms Join Forces to Attract Focused Ads," The New York Times, Mar. 10, 2008 ("In an effort to slow Google's siphoning of advertising dollars away from television, the nation's six largest cable companies are making plans for a jointly owned company that would allow national advertisers to buy customized ads and interactive ads across the companies' systems. . . . Getting the right advertisement to the right person, based on that individual's own tastes and lifestyle, has been the promise of cable television for years and the reality of the Internet. . . . Collectively, the cable companies will initially put about $150 million behind the effort in order to build a national service that can sell targeted advertising across all six cable systems. . . . Another component of Project Canoe is interactive advertising, which allows television viewers to use remote controls to, say, request a brochure or call up more information about a product.").

[74] See, e.g., Todd Spangler, "Canoe In Discussions on Providing Set-Top Data," Multichannel News, Jun. 2, 2009, available at http://www.multichannel.com/article/277916-Canoe_In_Discussions_On_Providing_Set_Top_Data.php ("Comcast, for its part, is reportedly working on a database project dubbed 'TV Warehouse' that would allow the MSO to store a full year of statistics gathered from digital set-tops in more than 16 million households nationwide. . . . For 2009, Canoe's focus with regard to set-top data will be collecting and harmonizing the information, as well as supporting the RFI application."); Todd Spangler, "Comcast 'TV Warehouse' To Track Clicks," Multichannel News, Jan. 1, 2009, available at http://www.multichannel.com/article/161894-Comcast_TV_Warehouse_To_Collect_STB_Clicks.php.

45. However, successful implementation requires that networks and advertisers also make investment in technology and programming for interactive and targeted advertising. For example, networks would have to embed RFI enabled spots in their network programming, adding costs that are not incurred for traditional, linear spots. For targeted advertising, advertisers would have to provide multiple commercials for different audience segments and invest in technology to make use of the information from interactive advertising. Because networks and advertisers have not made the necessary investments, the pace of development and adoption of advanced advertising capabilities has been slow. In turn, Comcast and other MVPDs have not invested as rapidly as they could in part due to their realization that they would lack suitable programming that could support interactivity and targeted advertising. In part, the slower pace of investment can be attributed to complexity and uncertainty surrounding the feasibility of advanced advertising on multiple platforms, including how advanced advertising will impact profits.[75]

46. Comcast Spotlight, the local advertising sales division of Comcast Cable, would like to move forward to experiment with advanced advertising.[76] However, Comcast has been unable to get a sufficient number of programming networks to move forward with these advanced advertising endeavors as rapidly as it would like. {{

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47. As I discuss below, this transaction will bring NBCU's networks under Comcast's control and likely increase their participation with Comcast directly and in Project Canoe, leading to more experimentation and deployment of advanced advertising services. Increased

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[75] See David Tanklefsky, "Advanced Advertising: Ready to Turn the Corner," Multichannel News, Feb. 23, 2010, available at http://www.multichannel.com/article/449280-Advanced_Advertising_Ready_to_Turn_the_Corner.php ("Addressable advertising has picked up steam recently thanks to test results, like the recently concluding findings from a Comcast trial in Baltimore, that showed targeted ads improve viewer tune-in and buyer efficiency. But [Leap Media Group Principal, Courtenay] Harry said [advertisers] still express a lot of confusion about addressable advertising and need to be convinced of its efficacy before moving money from one part of their ad budget to the addressable space. 'It's as if we're re-teaching them how to buy television,' she said.").

[76] Per Robert Klippel, Vice President, New Products and Operations, Comcast Spotlight, Apr. 27, 2010.

[77] Id.

deployment, in turn, should bring more networks on board and also create incentives for other MVPDs to implement advanced advertising services.

V. How the Transaction Can Help Accelerate the Development of New Ways of Delivering Content

48. In Comcast's experience, content owners have been cautious, relying more heavily on traditional distribution channels for revenue, and reluctant to license content for new and/or uncertain ventures. Comcast and most content owners have different expectations about the profitability of new content distribution platforms, the impact of new distribution platforms on revenue from existing platforms, how profits should be divided, and how risks should be shared. As a result, agreements between distributors and owners of content for distribution on emerging platforms have been delayed or have not been reached.

49. There are two main economic reasons why the proposed transaction can change the outcome of negotiations over rights to distribute content on emerging platforms: vertical integration and a change in corporate control. Vertical integration can remove some of the barriers to efficient contracts when there is uncertainty, relationship-specific investment, and/or moral hazard.[78] A change in corporate control can lead to a different strategy toward how to maximize profits from content. This section will provide the economic underpinnings for those two reasons, discuss how they interact, and explain why they apply here.

50. Comcast wants to move quickly toward making content more widely available on multiple platforms. This strategy differs from that of most traditional content owners and emanates from Comcast's considerable experience as a distributor. Comcast's distribution strategy has been frustrated by not being able to get rights to distribute as much content as it wants on terms it regards as efficient, not having the flexibility to experiment with a variety of business models, and not having the ability to make adjustments when necessary. From an

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[78] Moral hazard can arise when upstream and downstream firms face conflicting incentives and fail to internalize incremental profits. See Jean Tirole (1988), "The Theory of Industrial Organization," The MIT Press, Ch. 4, pp. 177-179. Specifically, moral hazard arises when it is difficult to contract for the appropriate level of effort and one of the firms does not have sufficient incentives to exert the appropriate level of effort, which prevents firms from producing the optimal quantity of output. The moral hazard framework is relevant to the current transaction because it is very difficult to contract in advance on the right mix and quality of content necessary for new platforms in an evolving marketplace.

economic perspective, because the NBCU transaction gives Comcast assured access to content on arm's length terms but with less contractual friction, it can increase Comcast's multiplatform distribution while assuring that producers/content owners receive appropriate compensation. While NBCU content is only a small fraction of overall or even professionally produced content, the transaction will increase the amount of programming that would be controlled by Comcast. The certainty of future access to NBCU content at arm's length terms will provide a baseline level for Comcast that will allow for experimentation and justify long-lived distribution investments.

A. Vertical Integration and Corporate Control Theory

51. Theoretical analysis and empirical economic research underscore the challenges that companies at different levels in a distribution chain face in using contracts with affiliated parties to develop and expand products, platforms, and services and thereby allocate resources efficiently.[79] The economic literature identifies conditions under which vertical integration can overcome some of these challenges and yield significant efficiency and consumer benefits that are not readily realized by unaffiliated parties. According to this literature, vertical integration generally leads to more efficient production and pricing:

> Because many vertical mergers create vertical integration efficiencies between purchasers and sellers, many if not most vertical mergers are either procompetitive or competitively neutral. Potential efficiency benefits involve coordination in pricing, production, and design that can reduce costs and improve product quality. They also involve more efficient input usage and promotion.[80]

52. Economic literature shows that as complexity and uncertainty increase, the advantages of vertical integration over reliance on contracts between independent parties also increase.[81]

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[79] See Oliver Williamson (1979), "Transaction-Cost Economics: The Governance of Contractual Relations," Journal of Law and Economics, Vol. 22, No. 2, pp. 233-261; see also Oliver Williamson (1971) "The Vertical Integration of Production: Market Failure Considerations," The American Economic Review, Vol. 61, No. 2, pp. 112-123; Francine Lafontaine and Margaret Slade (2007), "Vertical Integration and Firm Boundaries: The Evidence," Journal of Economic Literature, Vol. 45, No. 3, pp. 629-685.

[80] See Michael Riordan and Steven Salop (1995), "Evaluating Vertical Mergers: A Post-Chicago Approach," Antitrust Law Journal, Vol. 63, pp. 513-568 at p. 519; see also Dennis Carlton and Jeffrey Perloff (2005), Modern Industrial Organization, Addison Wesley, 4th ed., Ch. 12.

[81] See Lafontaine and Slade (2007), Tables 13, 14.

Transaction cost economics and moral hazard frameworks demonstrate that the benefits of vertical integration increase when there is a greater potential for hold-up due to *ex post* opportunism, when parties differ more widely in their assessments of the value of trade and when it is more difficult to achieve breakthrough solutions with unaffiliated parties.[82] *Ex post* opportunism arises when one party makes a sunk investment and then its trading partner demands better terms than the first party would have agreed to prior to making the investment. For example, suppose that a railroad built a spur to a coal mine without an enforceable contract that required the mine to use the spur. If the mine had an alternative mode of transport available, the railroad could be exposed to *ex post* opportunism.

53. The potential for opportunistic behavior can also be greater when the parties have divergent incentives. Long-term contracts might help alleviate the potential for opportunistic behavior, but such contracts can lead to other issues such as changed incentives to put forth effort and maintain quality.

54. Vertical integration in such settings reduces or eliminates the transactional frictions that can hinder efficient contracts between unaffiliated parties. Vertical integration can help the two sides in a negotiation have assurances they will be able to make adjustments necessary to come to an agreement. Professor Oliver Williamson discusses the relative merits of organizing activities within a firm versus trading in a market:

> The properties of the firm that commend internal organization as a market substitute would appear to fall into three categories: incentives, controls, and what may be referred to broadly as "inherent structural advantages." In an incentive sense, internal organization attenuates the aggressive advocacy that epitomizes arms-length bargaining... In circumstances, therefore, where

[82] One aspect of transaction cost economics states that vertical integration is better than contracts with unaffiliated parties when there is a potential for hold-up due to ex post opportunism and contractual incompleteness due to complexity and uncertainty in the marketplace. Specifically, transaction cost economics focuses on the hold-up issues in contractual relationships posed by "quasi-rents" and incomplete contracts. Quasi-rent is the additional value generated by relationship-specific assets when they are deployed within a relationship as compared to other outside uses. Quasi-rents can create lock-in since the assets are less valuable outside the relationship. If, in addition, contracts are incomplete, any party to the contract can engage in hold up through ex post haggling, renegotiation, and opportunistic behavior to expropriate a larger share of the quasi-rent. If these types of hold-up issues cannot be fully anticipated or detected and accounted for in the contract, it creates ex post inefficiency and becomes a motivation for vertical integration (especially when the ex post inefficiencies are large). See Lafontaine and Slade (2007); see also Benjamin Klein, Robert Crawford, and Armen Alchian (1978), "Vertical Integration, Appropriable Rents, and the Competitive Contracting Process," Journal of Law and Economics, Vol. 21, No. 2, pp. 297-326.