

Patch.<sup>757</sup> According to Borrell, between 2009 and 2010, broadcast television stations increased their market share of local online advertising. Borrell estimates that television broadcasters accounted for 10.4 percent, or about \$1.4 billion of the \$13.5 billion spent on local online advertising in 2010, up from 9.3 percent, or \$1.2 billion in 2009.<sup>758</sup> It states that the average station's market share depended on market size, with the stations in the smallest markets averaging 2.2 percent of local online advertising and larger-market stations averaging 0.5 percent of local online advertising, due to heavy competition from stand-alone sites and other local media. Borrell posits that a performance gulf has emerged between stations that have invested heavily in their websites and those that have not.<sup>759</sup> One percent of television station websites surveyed made more than \$5 million in 2010, while 52 percent of station sites surveyed by Borrell made less than \$500,000.

229. *Other Revenues.* Advertising revenues from mobile services and applications are still nascent for most stations. NAB estimates that mobile revenues represented \$7,089, less than 0.05 percent of an average station's total \$16,175,476 in net revenues in 2010.<sup>760</sup> In Borrell's survey, few stations reported any advertising revenue from mobile applications in 2010, and of those that did, mobile advertising represented on average 2.5 percent of total revenues, with the typical station getting between \$20,000 and \$50,000.<sup>761</sup> NAB estimates that in 2010 advertising revenues from multicast channels represented about 0.4 percent of an average station's total net revenues.<sup>762</sup>

### c. Profitability

230. To assess profitability trends in the broadcast television station sector between 2006 and 2010, we consider data on a station-level basis, using benchmarks in NAB's Television Financial Reports and, on a company-level basis, examining companies that have been pure-play broadcast television companies throughout the relevant period. When entering the broadcast television station industry, companies often buy or sell individual stations or the portfolio of assets of a broadcast television station group owner based on a multiple of profitability.<sup>763</sup>

<sup>757</sup> Borrell Study at 14.

<sup>758</sup> *Id.* at 6, 8. For its calculations, Borrell relied on two databases: one that estimated online advertising spending by more than 15 million U.S. and Canadian companies, and one that estimates online advertising receipts by more than 4,400 U.S. and Canadian online media companies that participate in its surveys. *Id.* at 32.

<sup>759</sup> *Id.* at 6. For example, LIN has invested heavily in websites, mobile applications, and other digital technologies. It states that since the launch of its digital businesses in 2007, digital revenues, including retransmission consent revenues, have grown nearly 309 percent and as of 2010 comprised 15 percent of its total net revenues. LIN 2010 Form 10-K at 8. In addition to paying LIN retransmission consent revenues for carriage of its broadcast signals, MVPDs pay LIN for online and advertising media services through its subsidiary online Red McCombs Media, LP. *See id.*

<sup>760</sup> 2011 NAB Television Financial Report at 2. NAB defines mobile revenue as any revenue derived directly from streaming to mobile devices. *Id.* at 164.

<sup>761</sup> Borrell Study at 22. Borrell defines mobile advertising as advertising derived from mobile applications. *Id.* at 5-7. Borrell states that "[b]y 2015, most forecasters agree, the majority of all 'online' advertising will become untethered from desktops and delivered to mobile devices such as iPads, smart phones, and GPS-enabled laptops." *Id.* at 7.

<sup>762</sup> 2011 NAB Television Financial Report at 2. To calculate total net revenues, NAB subtracts agency and rep firm commission for gross advertising revenues, and adds all other forms of revenue.

<sup>763</sup> Vogel at 307-10. *See also* Price Colman, *For Sale: Young Broadcasting for Just \$350M*, TVNEWSCHECK, June 30, 2011, <http://www.tvnewscheck.com/article/2011/06/30/52237/for-sale-young-broadcasting-for-just-350m> (visited Mar. 25, 2012).

**Table 21: Broadcast Television Station Industry Profitability<sup>764</sup>**

<b>a. Net Operating Revenue (in thousands)</b>					
	<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>	<b>2010</b>
Nexstar	\$265,169	\$266,801	\$284,919	\$251,979	\$313,350
Gray	\$332,137	\$304,288	\$327,176	\$270,374	\$346,058
LIN	\$420,468	\$395,910	\$399,814	\$339,474	\$420,047
Sinclair	\$706,222	\$718,100	\$754,474	\$656,477	\$767,186

<b>Average NAB Station</b>	<b>\$16,850</b>	<b>\$16,147</b>	<b>\$15,837</b>	<b>\$13,454</b>	<b>\$16,175</b>
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<b>b. (Recurring) EBITDA (in thousands)</b>					
	<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>	<b>2010</b>
Nexstar	\$88,710	\$84,443	\$95,741	\$59,958	\$112,656
Gray	\$125,538	\$92,511	\$113,507	\$68,623	\$136,160
LIN	\$133,348	\$120,297	\$122,619	\$81,091	\$141,806
Sinclair	\$244,853	\$221,083	\$232,905	\$199,550	\$295,696

<b>Average NAB Station</b>	<b>\$6,290</b>	<b>\$5,258</b>	<b>\$4,704</b>	<b>\$3,072</b>	<b>\$5,498</b>
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<b>c. Net Income before Taxes (in thousands)<sup>765</sup></b>					
	<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>	<b>2010</b>
Nexstar	(\$5,173)	(\$13,966)	(\$83,375)	(\$12,414)	\$4,926
Gray	\$21,534	(\$35,694)	(\$313,027)	(\$34,307)	\$36,610
LIN	(\$300,748)	\$46,755	(\$1,052,552)	\$23,400	\$56,724
Sinclair	\$55,091	\$39,215	(\$369,884)	(\$170,460)	\$113,851

<b>Average NAB Station</b>	<b>\$4,210</b>	<b>\$3,321</b>	<b>\$2,686</b>	<b>\$1,126</b>	<b>\$3,863</b>
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231. We use NAB average station financial statistics as an indicator of profitability: station EBITDA (which NAB calls “cash flow”) and station pre-tax profits. NAB calculates an average broadcast television station’s cash flow by subtracting station operational expenses (expenses from all of the station’s departments: engineering, programming, production, news, sales, advertising and promotions, and general administrative expenses) from total net revenues, which are gross advertising revenues minus agency commissions and national and regional rep firm commissions. Similarly, we can examine the recurring EBITDA<sup>766</sup> of a select group of broadcast television station group owners (Nexstar,

<sup>764</sup> FCC staff estimates based on data from NAB Financial Reports and SNL Kagan.

<sup>765</sup> Each of the station groups incurred non-cash expenses by writing down the values of, among other assets, their broadcast licenses, including Nexstar in 2008 and 2009, Gray in 2008, LIN in 2008 and 2009, and Sinclair in 2008, 2009, and 2010.

<sup>766</sup> Recurring earnings before interest, taxes, depreciation and amortization. SNL Kagan, Nexstar EBITDA and FCF (Free Cash Flow) Analysis. Free cash flow is a measure of financial performance calculated as operating cash flow minus capital expenditures. It represents the cash that a company is able to generate after laying out the money required to maintain or expand its asset base. Investopedia, *Dictionary: Free Cash Flow*, <http://www.investopedia.com/terms/f/freecashflow.asp#axzz1qAPFGRjM> (visited Mar. 25, 2012).

Gray, LIN, and Sinclair) that have been pure-play broadcast television station companies between 2006 and 2010. Recurring EBITDA excludes earnings or losses from nonrecurring events, such as the gain or sale of assets, early retirement of debt, restructuring, or asset write-downs, and facilitates consideration prior to widely varying debt-financing arrangements.<sup>767</sup> For the purpose of this Report, we believe recurring EBITDA and EBIDTA are better indicators of profitability within the broadcast television industry than pre-tax income, which incorporates revenues and expenses from extraordinary events, as well as interest payments on debt.

232. To better compare trends among a single station and select station groups, we can calculate the profit margins, *i.e.*, EBITDA (or recurring EBITDA) divided by net operating revenues, (*i.e.*, revenues earned by the station or station group, minus commissions from advertising agencies and rep firms). Generally, the broadcast station groups performed in the range of the NAB figures. As measured by recurring EBITDA/net operating revenues, profit margins in 2007 ranged from 30.1 percent for Gray, to 31.7 percent for Nexstar, slightly lower than NAB's average of 32.6 percent. In 2008, the station groups' profit margins were higher than NAB's average of 29.7 percent, ranging from 30.7 percent for LIN, to 34.7 percent for Nexstar. In 2009, the NAB average station and the station groups all recorded a marked decline in profitability. The average NAB station was at the low end, with a 22.8 percent margin. For the station groups, profit margins ranged from 23.8 percent for Nexstar to 30.4 percent for Sinclair. Profitability bounced back in 2010, with the NAB average station's profitability in the middle. The NAB average station had a profit margin of 34.0 percent, while the margins for the station groups ranged from 33.8 percent (LIN) to 38.5 percent (Sinclair).

233. As noted above, broadcast station revenues tend to be higher in even-numbered years, primarily due to the influx of political advertising, but NBC affiliates also earn additional revenues during NBC's coverage of the Olympics. Additional reasons for the improvement in 2010 include an overall upswing in economic conditions, recovery in advertising spending by the top advertising categories, strong political spending, rapid growth and high incremental margins in both station website revenues, and retransmission consent revenues.<sup>768</sup> In addition, some stations have increased profit margins by decreasing expenses.<sup>769</sup> Several station groups incurred non-cash expenses by writing down the values of, among other assets their broadcast licenses, including Nexstar in 2008 and 2009, Gray in 2008, LIN in 2008 and 2009, and Sinclair in 2008, 2009, and 2010.<sup>770</sup>

#### **d. Investment and Innovation**

234. As in our analysis of profitability, we analyze broadcast station industry investment trends by examining (1) an average television station's average capital expenditures divided by net operating income and (2) a sample of pure-play television broadcasting companies' capital expenditures divided by net income.

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<sup>767</sup> Vogel at 308-09.

<sup>768</sup> Nexstar 2010 Form 10-K at 29.

<sup>769</sup> For example, in 2009, Nexstar began regionalizing certain accounting and traffic functions, resulting in layoff of 93 employees. Nexstar estimates that the restructuring saves the company about \$2.2 million per year. Nexstar 2010 Form 10-K at 34.

<sup>770</sup> Nexstar 2010 Form 10-K at 34; Gray 2010 Form 10-K at 39; LIN at 43; Sinclair 2010 Form 10-K at 38-39.

Table 22: Broadcast Television Station Industry Investment<sup>771</sup>

<b>a. Capital Expenditures (in thousands)</b>					
	<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>	<b>2010</b>
Nexstar	\$26,345	\$18,541	\$30,793	\$19,028	\$13,799
Gray	\$41,139	\$24,605	\$15,019	\$17,756	\$19,395
LIN TV	\$22,294	\$25,290	\$28,537	\$10,247	\$17,648
Sinclair	\$16,923	\$23,226	\$25,169	\$7,693	\$11,694
<b>Average NAB Station</b>	<b>\$785</b>	<b>\$826</b>	<b>\$970</b>	<b>\$495</b>	<b>\$541</b>
<b>b. Net Operating Revenue (in thousands)</b>					
	<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>	<b>2010</b>
Nexstar	\$265,169	\$266,801	\$284,919	\$251,979	\$313,350
Gray	\$332,137	\$304,288	\$327,176	\$270,374	\$346,058
LIN	\$420,468	\$395,910	\$399,814	\$339,474	\$420,047
Sinclair	\$706,222	\$718,100	\$754,474	\$656,477	\$767,186
<b>Average NAB Station</b>	<b>\$16,850</b>	<b>\$16,147</b>	<b>\$15,837</b>	<b>\$13,454</b>	<b>\$16,175</b>

235. The capital expenditure ratio for the NAB average station tended to fall in the mid-range of the ratios of the television station groups. Sinclair consistently spent the lowest proportion of net revenues on capital expenditures, in part because Sinclair's net revenues are nearly twice as large as the revenues of the other station groups we examined.<sup>772</sup> The average NAB station spent 5.1 percent of net revenues on capital expenditures in 2007. This compares with a range of 3.2 percent for Sinclair to 8.0 percent for Gray. In 2008, the average NAB station spent 6.1 percent of net revenues on capital expenditure, compared with a range of 3.3 percent for Sinclair Broadcasting to 10.8 percent for Nexstar. In 2009, these figures fell to 3.7 percent for the NAB average station, and a range of 1.2 percent for Sinclair Broadcasting to 7.6 percent for Nexstar. In 2010, these figures fell to 3.3 percent for the NAB average station, and a range of 1.5 percent for Sinclair to 5.6 percent for Gray Television.

236. Between 2006 and 2008, the majority of Nexstar's capital expenditures went towards preparing for the transition from analog to digital television.<sup>773</sup> Nexstar attributes its decline in capital expenditures between 2008 and 2010 primarily to the completion of the digital conversions in 2009 and early 2010.<sup>774</sup> Station groups have also been upgrading their newscasts to HD format, purchasing new studio equipment, and adding programming to their digital multicast channels.<sup>775</sup> Stations also are investing in creating multimedia products to attract new audiences and increase loyalty to their stations.<sup>776</sup> For example, in 2009, LIN purchased an online advertising and media services company to expand its

<sup>771</sup> FCC staff estimates based on data from NAB Financial Reports and SNL Kagan.

<sup>772</sup> Sinclair also claims that duopolies and LMAs enable it to realize significant economies of scale in capital expenditures. Sinclair 2010 Form 10-K at 10.

<sup>773</sup> Nexstar 2010 Form 10-K at 36.

<sup>774</sup> *Id.*

<sup>775</sup> Gray 2010 Form 10-K at 22, 46.

<sup>776</sup> LIN 2010 Form 10-K at 7-8.

online and mobile offerings; it also has developed iPhone, BlackBerry, Droid, and iPad applications for each of its television stations. In addition, LIN has launched a website called onPolitix.com, that provides local, regional, and national political coverage.

### C. Online Video Distributors

#### 1. Introduction

237. For the purposes of assessing the OVD industry in this Report, we define OVDs as entities that distribute video content to consumers over the Internet.<sup>777</sup> This section of the Report examines the structure, conduct, and performance of OVDs. Internet-based distribution of video content has increased substantially since the last report, evolving from a niche service into a thriving industry.<sup>778</sup> Today, online video reaches consumers via multiple devices, including computers, smartphones, tablets, gaming consoles, television sets, and other equipment connected to the Internet. According to Nielsen, approximately 48 percent of Americans now watch video online, and 10 percent watch mobile video.<sup>779</sup> Consumers stream or download video content at home, as well as at libraries, work, airports, Wi-Fi hotspots, and other locations. The number and diversity of OVD industry participants also have grown, and now include stand-alone distributors, programmers, content producers/owners (including broadcasters), and subsidiaries of the largest hardware, software, and online delivery companies.

238. For the purposes of assessing the OVD industry in this Report, we examine entities that offer video content that is similar to the professional programming traditionally exhibited by broadcast stations, or broadcast and cable networks, and which is usually created or produced by media and entertainment companies using professional-grade equipment, talent, and production crews that hold or maintain the rights for distribution. We distinguish professionally-produced content from both (1) semi-professionally produced video, which refers to consumer or user-generated content that has professional or industrial qualities (*e.g.*, shot with professional-grade equipment, using professional talent), and which may be produced exclusively for online audiences; and (2) user-generated content that is publicly available, created or produced by end users, often with little to no brand equity or brand recognition.<sup>780</sup>

239. As discussed in more detail below, the OVD marketplace is continuing to grow and develop. Indeed, as the Commission noted in the recent *Comcast-NBCU Order*, “[b]y all accounts, OVD services have just begun” and “[n]ew OVD services and new deals are announced seemingly daily.”<sup>781</sup> Businesses continue to enter and exit the marketplace, as well as change their approaches to providing OVD service. As a result, while this section covers several of the major players in the OVD space, it does not attempt to address all, or even most, of the providers currently in the market.

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<sup>777</sup> See *supra*, n. 6; *Further Notice*, 26 FCC Rcd at 14112, ¶ 52. To the extent that MVPDs also provide video to their subscribers online, for example as part of triple-play or TV Everywhere service, those offerings are discussed *supra*, Sec. III.A. We note, however, that, in the future, some MVPDs may distribute video content online to non-subscribers as well. See, *e.g.*, *infra*, ¶ 281.

<sup>778</sup> See, *e.g.*, Comcast 6/8/11 Comments at 31-36; NCTA 6/8/11 Comments at 19-21; DIRECTV 6/8/11 Comments at 22-24; Google 6/8/11 Comments at 5-6.

<sup>779</sup> See Nielsen, *The Cross-Platform Report, Quarter 2, 2011*, at 1.

<sup>780</sup> See, *e.g.*, *Comcast-NBCU Order*, 26 FCC Rcd at 4298-99, ¶¶ 144-46 & n. 365; Letter from William T. Lake, Chief, Media Bureau, to Michael H. Hammer, Counsel, Comcast Corporation, *et al.*, MB Docket No. 10-56, Attach. at 3-6, 8-9, 14 (May 21, 2010).

<sup>781</sup> *Comcast-NBCU Order*, 26 FCC Rcd at 4268-69, ¶¶ 78-80.

240. In the *Comcast-NBCU Order*, the Commission found that, while the amount of online viewing is growing, cord-cutting of traditional video programming service is relatively infrequent, and most consumers consider OVD service to be a complement to, rather than a substitute for, their MVPD service.<sup>782</sup> While recognizing that the Internet has evolved into a powerful method of video content distribution, the Commission did not determine whether or not online video competes with MVPD services.<sup>783</sup> Instead, the order concluded that, regardless of whether online video currently is a complement to or a substitute for MVPD service, it is potentially a substitute product.<sup>784</sup> The state of the current market suggests no reason to revisit this conclusion for purposes of this Report.

## 2. OVD Structure

241. We begin our consideration of OVDs with an examination of the industry structure. This discussion will address some of the major players in today's OVD marketplace, including programmers and content producers/owners, affiliates of online services and affiliates of manufacturers, retailers and other businesses. We then explain horizontal concentration and vertical integration in the market. Next we describe conditions affecting market entry during the relevant period, including an overview of existing regulations and market conditions that might influence entry decisions. Finally, we describe recent entry into and exit from the OVD market.

242. Since the last report, the OVD marketplace has expanded tremendously, with the industry's structure and operations continuing to develop. Most notably, there has been an increase in the number and type of OVDs, the amount of online video content available, and the devices used for delivery of that programming.<sup>785</sup>

243. While the structure of the OVD industry is still evolving, a few trends have emerged. To begin with, unlike an MVPD, whose market typically is tied to the provider's own facilities-based infrastructure, or a broadcaster, whose market typically is defined by the station's signal coverage area and DMA, an OVD's market generally covers the entire national broadband footprint. Also, much of the OVD industry does not provide stand-alone, unaffiliated delivery of video content. Rather, as discussed below, many OVD providers are affiliated with other video content owners or programmers (including broadcasters); online services; or manufacturers, retailers, or other businesses.

244. *Programmers and Content Producers/Owners.* Individual content owners or programming networks make their programming available online on their websites, sometimes referred to as "verticals" or "portals."<sup>786</sup> The websites may be brand extensions of existing media properties and/or contain content unique to the Internet. Mobile applications, which often provide access to video content,

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<sup>782</sup> *Id.* at 4269, ¶ 79.

<sup>783</sup> *Id.* at 4256, ¶ 41.

<sup>784</sup> *Id.* Some commenters in this proceeding argue that OVDs already are becoming true substitutes for traditional MVPD service or that consumers may well see OVDs as substitutes for MVPD service in the future. *See, e.g.*, DIRECTV 6/8/11 Comments at 22-25; Digital Broadcasting 6/8/11 Comments at 32.

<sup>785</sup> *See* OVD viewership information, *infra*, Sec. III.C.4.a.

<sup>786</sup> *See, e.g.*, ABC, <http://abc.go.com/watch> (visited Feb. 13, 2012) ("ABC Network Portal"); NBC, <http://www.nbc.com/> (visited Feb. 13, 2012) ("NBC Network Portal"); CBS, <http://www.cbs.com/> (visited Feb. 13, 2012) ("CBS Network Portal"); FOX, <http://www.fox.com/> (visited Feb. 13, 2012) ("FOX Network Portal"). In addition, local television stations often act as OVDs by making video content, for example clips from their own newscasts, available online. *See, e.g.*, KLAS-TV, <http://www.8newsnow.com/category/28259/8-news-now-video> (visited Feb. 13, 2012); WFAA-TV, <http://www.wfaa.com/video/> (visited Feb. 13, 2012). *See also* NAB 6/8/2011 Comments at 27-29 (noting extensive efforts of local television stations to make news content available online).

also are an integral part of the user interface strategy for many content producers and programming networks.<sup>787</sup>

245. Portals take different approaches to making content available online, often reflecting concern that online strategies may undercut revenues for the portal's traditional mode of distribution or due to contract restrictions. For example, Comedy Central distributes the most recent episodes of *The Daily Show* and *The Colbert Report* online right after those programs initially air.<sup>788</sup> FOX, on the other hand, limits free next-day streaming of its shows to subscribers of approved cable and satellite distributors (currently, only DISH Network) and subscribers of the Hulu Plus OVD; all others must wait eight days.<sup>789</sup> Similarly, HBO Go – HBO's mechanism for making its content available online – is available only to those who already subscribe to HBO via an MVPD.<sup>790</sup>

246. Hulu, which is owned by News Corporation, NBCUniversal, The Walt Disney Company, and Providence Equity Partners, brings together content from over 260 content companies, including its joint venture participants.<sup>791</sup> Hulu began as a free service, with programming available only via computer and only in standard definition.<sup>792</sup> In June 2010, Hulu added a subscription service, Hulu Plus, which allows consumers to view programming in 720p high definition (where available) on Internet-connected televisions and other devices, and includes additional content with limited advertisements.<sup>793</sup>

247. Sports leagues participate in the OVD marketplace as well. The four largest U.S. professional sports leagues – Major League Baseball, the National Football League, the National Basketball Association, and the National Hockey League – make a large amount of their programming

<sup>787</sup> See, e.g., TBS, *TBS Mobile*, <http://www.tbs.com/mobileapp.jsp> (visited Feb. 13, 2012) (providing a TBS mobile app with access to some TBS shows, including *Conan*, *Meet the Browns*, and *The Office*); NBC, *Apps & Mobile*, <http://www.nbc.com/mobile/> (visited Feb. 13, 2012) (featuring link to NBC app, which allows mobile users to watch full episodes of NBC shows); Vlad Savov, *HBO Go App Set to Stream its Way to iPhones, iPads and Android Devices*, Engadget, Apr. 19, 2011, <http://www.engadget.com/2011/04/19/hbo-go-app-set-to-stream-its-way-to-iphones-ipads-and-android-d/> (visited Feb. 13, 2012) (discussing apps for viewing HBO content on mobile devices).

<sup>788</sup> See Comedy Central, *The Daily Show*, <http://www.thedailyshow.com/> (visited Feb. 13, 2012); Comedy Central, *Colbert Nation*, <http://www.colbertnation.com/> (visited Feb. 13, 2012).

<sup>789</sup> Brian Stetler, *FOX to Limit Next-Day Streaming on Hulu to Paying Cable Customers*, N.Y. TIMES, July 26, 2011, [http://www.nytimes.com/2011/07/27/business/media/fox-to-limit-next-day-streaming-on-hulu.html?\\_r=1](http://www.nytimes.com/2011/07/27/business/media/fox-to-limit-next-day-streaming-on-hulu.html?_r=1) (visited Feb. 13, 2012).

<sup>790</sup> John Paul Titlow, *HBO Go Expands, But Cord Cutters Are Still Out of Luck*, ReadWriteWeb, Dec. 19, 2011, [http://www.readwriteweb.com/archives/hbo\\_go\\_not\\_without\\_cable.php](http://www.readwriteweb.com/archives/hbo_go_not_without_cable.php) (visited Feb. 13, 2012); Jeff Roberts, *HBO To Cord Cutters: You'll Never See Our Shows*, PaidContent.org, Nov. 30, 2011, <http://paidcontent.org/article/419-hbo-to-cord-cutters-youll-never-see-our-shows/> (visited Feb. 13, 2012).

<sup>791</sup> Hulu, *About*, <http://www.hulu.com/about> (visited Feb. 13, 2012) (“About Hulu”). Hulu began in March 2007 as a joint venture between News Corp., NBC Universal and Providence Equity Partners, with Disney joining the fold in April 2009. See Hulu, *Company Timeline*, [http://www.hulu.com/about/company\\_timeline](http://www.hulu.com/about/company_timeline) (visited Feb. 13, 2012) (“Hulu Timeline”); Hulu, *Disney to Join NBC Universal, News Corporation and Providence Equity Partners as an Equity Owner of Hulu* (press release), Apr. 30, 2009.

<sup>792</sup> See Hulu Timeline; Hulu, *Hulu Blog, Introducing Hulu Plus: More Wherever. More Whenever. Than Ever.*, June 29, 2010, <http://blog.hulu.com/2010/06/29/introducing-hulu-plus-more-wherever-more-when-ever-than-ever/> (visited Feb. 24, 2012) (“Introducing Hulu Plus”).

<sup>793</sup> See *id.*; Hulu Timeline; Introducing Hulu Plus; Robert Briel, *Hulu Launches Premium Service Hulu Plus*, Broadband TV News, June 29, 2010, <http://www.broadbandtvnews.com/2010/06/29/hulu-launches-subscription-service-hulu-plus/> (visited Feb. 13, 2012); David Einstein, *Going Mobile With Internet, TV*, S.F. CHRONICLE, May 23, 2011, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2011/05/22/BU221JHC9S.DTL> (visited Feb. 13, 2012).

available online through paid subscription services.<sup>794</sup> Collegiate sports leagues are following a similar path. For example, the Atlantic Coast Conference recently announced the launch of the ACC Digital Network, a fully programmed video network designed, produced, and distributed exclusively for audiences watching on connected devices such as laptops and smartphones.<sup>795</sup> The ACC Digital Network is a joint venture between Raycom Sports, the conference's long-standing broadcast and marketing partner, and Silver Chalice Ventures, a digital media company.<sup>796</sup> The content is available without charge, supported by sponsorship and advertising.<sup>797</sup> Similarly, the Big Ten recently unveiled a new Internet offering, BTN2Go, which provides streams of Big Ten games, as well as original and studio programming, to consumers who subscribe to the Big Ten Network on Time Warner Cable, Charter Communications, DIRECTV or DISH Network.<sup>798</sup> The league makes the content available via the web, smartphones, and tablets.<sup>799</sup> Content is available for free to consumers who already subscribe separately to the Big Ten Network.<sup>800</sup>

248. Sony is, among other things, a producer and owner of video content. Sony's Crackle OVD service, which launched in Summer 2007, offers a wide variety of free, streaming online content, including movies, television shows, and original programming, much of which comes from Sony's own content library.<sup>801</sup>

<sup>794</sup> See Major League Baseball, *MLB.tv*, <http://mlb.mlb.com/mlb/subscriptions/index.jsp?product=mlbtv&affiliateId=MLBTVREDIRECT> (visited Feb. 13, 2012); National Basketball Association, *NBA League Pass*, <http://www.nba.com/leaguepass/index.html> (visited Feb. 13, 2012); DIRECTV, *NFL Sunday Ticket*, <http://www.directv.com/DTVAPP/content/sports/nfl> (visited Feb. 13, 2012) ("NFL Sunday Ticket"); National Hockey League, *NHL Gamecenter Live*, <https://gamecenter.nhl.com/nhlgc/secure/gclsignup> (visited Feb. 13, 2012). NFL Sunday Ticket is available through DIRECTV, which makes games available via multiple platforms, including smartphones, tablets, and the Sony Playstation 3. See NFL Sunday Ticket; Playstation, *NFL Sunday Ticket*, <http://us.playstation.com/psn/nfl/> (visited Feb. 13, 2012). A customer who subscribes to NFL Sunday Ticket via the PlayStation Network need not be a DIRECTV subscriber. See Scott Stein, *NFL Sunday Ticket Comes to the PlayStation 3*, CNET, Aug. 17, 2011, [http://news.cnet.com/8301-17938\\_105-20093727-1/nfl-sunday-ticket-comes-to-the-playstation-3/](http://news.cnet.com/8301-17938_105-20093727-1/nfl-sunday-ticket-comes-to-the-playstation-3/) (visited Feb. 29, 2012) ("NFL To PlayStation"). NBA, MLB, and NHL games are also available via Apple's digital media receiver, Apple TV. See Dan Frommer, *Apple TV Now Has MLB.TV And NBA Live Game Streaming*, Business Insider, Mar. 9, 2011, [http://articles.businessinsider.com/2011-03-09/tech/30032181\\_1\\_boxee-roku-mlb-tv](http://articles.businessinsider.com/2011-03-09/tech/30032181_1_boxee-roku-mlb-tv) (visited Feb. 13, 2012); Jonathan Seff, *Apple TV 4.4 Update Adds Photo Stream, NHL, and More*, MACWORLD, Oct. 12, 2011, [http://www.macworld.com/article/162974/2011/10/apple\\_tv\\_4\\_4\\_update\\_adds\\_photo\\_stream\\_nhl\\_and\\_more.html](http://www.macworld.com/article/162974/2011/10/apple_tv_4_4_update_adds_photo_stream_nhl_and_more.html) (visited Feb. 13, 2012).

<sup>795</sup> See Atlantic Coast Conference, *ACC Launches Digital Network* (press release), Oct. 17, 2011 ("ACC Launches").

<sup>796</sup> See *id.*

<sup>797</sup> See *id.*

<sup>798</sup> Mike Reynolds, *BTN2GO Kicks Off With Four Distributors*, MULTICHANNEL NEWS, Sept. 1, 2011, [http://www.multichannel.com/article/473187-BTN2GO\\_Kicks\\_Off\\_With\\_Four\\_Distributors.php](http://www.multichannel.com/article/473187-BTN2GO_Kicks_Off_With_Four_Distributors.php) (visited Feb. 13, 2012) ("BTN2GO Kicks Off").

<sup>799</sup> See *id.*; BTN2GO, *What is BTN2GO?*, <http://www.btn2go.com/btn2go/FAQ.jsp> (visited Feb. 13, 2012) ("BTN2Go FAQ").

<sup>800</sup> See *id.*

<sup>801</sup> See Crackle, *About Crackle*, <http://www.crackle.com/about/> (visited Feb. 13, 2012) ("About Crackle"); Crackle, *Crackle FAQ: General Questions*, [http://www.crackle.com/outreach/faq#general\\_questions](http://www.crackle.com/outreach/faq#general_questions) (visited Feb. 14, 2012) ("Crackle FAQ"); Daniel Frankel, *Sony's Crackle Launches On Xbox Live*, PaidContent.org, Jan. 31, 2012, (continued....)

249. *Affiliates of Online Services.* YouTube launched in February 2005, primarily as a portal for niche, user-generated-content.<sup>802</sup> In its early years, much of the professional content on YouTube was posted by individual users without the permission of the relevant rights holders.<sup>803</sup> Since Google purchased YouTube for \$1.65 billion in 2006,<sup>804</sup> however, the service has evolved into a destination for a wide variety of free content, produced by both amateur and professional content creators.<sup>805</sup> YouTube began renting movies to users in January 2012,<sup>806</sup> and currently boasts an extensive catalog of online movie rental content.<sup>807</sup>

250. In 2011, Facebook entered the OVD market and began offering online movie rentals for a fee. In March 2011, Warner Brothers announced that “The Dark Knight” would be the first Warner Brothers movie to be made available for purchase or rental on Facebook.<sup>808</sup> Since then, Warner Brothers has made several additional movies, as well as an original series, available via Facebook.<sup>809</sup> In July 2011, Facebook began to offer a limited selection of movies from Paramount,<sup>810</sup> and in August 2011 the service

(Continued from previous page)

<http://paidcontent.org/article/419-sonys-crackle-launches-on-xbox-live/> (visited Feb. 14, 2012) (“Crackle on Xbox”).

<sup>802</sup> See, e.g., Tony Long, *Feb. 15, 2005: YouTube and Your 15 Minutes of Fame*, WIRED, Feb. 15, 2012, <http://www.wired.com/thisdayintech/2011/02/0215youtube-launched/> (visited Feb. 14, 2012) (“YouTube 15 Mins.”).

<sup>803</sup> See, e.g., *id.*; Kenneth Li & Richard Waters, *YouTube “Knew of Copyright Violations,”* FINANCIAL TIMES, Mar. 19, 2010, <http://www.ft.com/cms/s/2/56cacfc0-32c2-11df-a767-00144feabdc0.html#axzz1j5CtASMq> (visited Feb. 14, 2012).

<sup>804</sup> See, e.g., YouTube 15 Mins.

<sup>805</sup> See, e.g., YouTube, *Partner Showcase*, [http://www.youtube.com/t/partnerships\\_showcase](http://www.youtube.com/t/partnerships_showcase) (visited Feb. 14, 2012); NPR, *A War To Watch: YouTube Takes On Television*, Jan. 12, 2012, <http://www.npr.org/2012/01/12/145099987/a-war-to-watch-youtube-takes-on-television> (visited Feb. 14, 2012); Graeme McMillan, *YouTube Confirms New Professionally-Created Channels*, TIME, Oct. 29, 2011, <http://techland.time.com/2011/10/29/youtube-confirms-new-professionally-created-channels/> (visited Feb. 14, 2012).

<sup>806</sup> Adam Ostrow, *YouTube Debuts Movie Rentals*, Mashable, Jan. 20, 2010, <http://mashable.com/2010/01/20/youtube-movie-rentals-2/> (visited Feb. 27, 2012).

<sup>807</sup> YouTube, *Movies*, <http://www.youtube.com/movies> (visited Feb. 27, 2012) (“YouTube Movies”).

<sup>808</sup> Time Warner, *Warner Bros. Entertainment Becomes First Hollywood Studio To Offer Movies Directly On Facebook* (press release), Mar. 8, 2011.

<sup>809</sup> Emil Protalinski, *Warner Bros. Offers Five More Movies on Facebook*, ZDNet, Mar. 28, 2011, <http://www.zdnet.com/blog/facebook/warner-bros-offers-five-more-movies-on-facebook/1003?tag=content;siu-container> (visited Feb. 14, 2012); Emil Protalinski, *Warner Bros. Announces the First Facebook Show*, ZDNet, Sept. 29, 2011, <http://www.zdnet.com/blog/facebook/warner-bros-announces-the-first-facebook-show/4254> (visited Feb. 14, 2012); Facebook, *Aim High*, <http://www.facebook.com/AimHighSeries> (visited Feb. 14, 2012).

<sup>810</sup> Erik Gruenwedel, *Paramount Posts Entire “Jackass” Catalog on Facebook*, HOME MEDIA MAGAZINE, July 28, 2011, <http://www.homemediamagazine.com/paramount/paramount-posts-entire-jackass-catalog-facebook-24627> (visited Feb. 14, 2012); Kurt Orzeck, *Paramount Places “Mission: Impossible” for Rent on Facebook*, TheWrap.com, Nov. 22, 2011, <http://www.thewrap.com/movies/article/mission-impossible-flicks-coming-facebook-32993> (visited Feb. 14, 2012).

added movie content from Universal Studios<sup>811</sup> and Miramax.<sup>812</sup>

251. In October 2011, Yahoo launched Yahoo Screen, a revamped portal for its television shows and premium video content.<sup>813</sup> Yahoo Screen content includes original shows as well as content secured through licensing deals with entities, such as Hulu, CBS, ABC News, Ultimate Fighting Championship, and special interest video network Revision3.<sup>814</sup> Yahoo Screen provides “multiple channels filled with thousands of videos and television shows” and boasts an interface that looks “very similar to Hulu.”<sup>815</sup>

252. *Affiliates of Manufacturers, Retailers, and Other Businesses.* A variety of other businesses also operate OVDs as well. Netflix launched in 1999 as an Internet-based DVD rental service.<sup>816</sup> In 2007, Netflix added its Watch Instantly service (originally called “Watch Now”).<sup>817</sup> Watch Instantly, a subscription service, allows consumers to stream video content to computers, mobile devices, and televisions connected to a Netflix-enabled device.<sup>818</sup> By the end of 2010, a majority of Netflix subscribers viewed more of Netflix’s television shows and movies via streaming than from its DVD rental service.<sup>819</sup>

253. Similarly, Apple is a designer, manufacturer, and marketer of electronic hardware and software, with online video representing only a small portion of its revenues.<sup>820</sup> In 2005, Apple

<sup>811</sup> Cooper Smith, *Facebook: “The Big Lebowski” Now Available To Watch Via Social Theater App*, HUFFINGTON POST, Aug. 19, 2011, [http://www.huffingtonpost.com/2011/08/19/facebook-the-big-lebowski-watch\\_n\\_931350.html](http://www.huffingtonpost.com/2011/08/19/facebook-the-big-lebowski-watch_n_931350.html) (visited Feb. 14, 2012).

<sup>812</sup> Bianca Bosker, *Miramax Brings More Movies To Facebook: A Look At The Movie Rental App*, HUFFINGTON POST, Aug. 22, 2011, [http://www.huffingtonpost.com/2011/08/22/watch-movies-on-facebook-miramax-movie-rental-app\\_n\\_933058.html#s335352](http://www.huffingtonpost.com/2011/08/22/watch-movies-on-facebook-miramax-movie-rental-app_n_933058.html#s335352) (visited Feb. 14, 2012).

<sup>813</sup> Ben Parr, *Yahoo Launches Revamped Premium Video Portal*, Mashable, Oct. 4, 2011, <http://mashable.com/2011/10/04/yahoo-screen/> (visited Feb. 14, 2012).

<sup>814</sup> *See id.*; Revision 3, *Inside Revision3: About Us*, <http://revision3.com/about> (visited Feb. 14, 2012). Revision3 is an Internet television network that produces original content, including lifestyle and technology video shows geared to 13-34 year old males. *See* Andy Plesser, *Revision3 Is “Biggest” Internet TV Network With 70 Million Monthly Video Views*, Business Insider, May 19, 2011, [http://articles.businessinsider.com/2011-05-19/tech/30038978\\_1\\_revision3-video-views-network](http://articles.businessinsider.com/2011-05-19/tech/30038978_1_revision3-video-views-network) (visited Feb. 27, 2012). According to figures provided by Revision3’s CEO in May 2011, the network had 17 million monthly unique viewers who watched 70 million video views. *See id.*

<sup>815</sup> Graeme McMillan, *Yahoo! Screen: Your New TV on the Internet*, TIME, Oct. 4, 2011, <http://techland.time.com/2011/10/04/yahoo-screen-your-new-tv-on-the-Internet/> (visited Feb. 14, 2012).

<sup>816</sup> Netflix, *Company Timeline*, <https://signup.netflix.com/MediaCenter/Timeline> (visited Feb. 14, 2012).

<sup>817</sup> *See id.*; Bumpershine, *Netflix “Watch Instantly” Goes Unlimited*, Dec. 17, 2007, <http://www.bumpershine.com/2007/12/17/netflix-watch-instantly-goes-unlimited.html> (visited Feb. 14, 2012).

<sup>818</sup> Netflix, *Signup*, <https://signup.netflix.com/home?country=1&rdirdc=true> (visited Feb. 14, 2012) (“Netflix Signup”); Netflix, *How It Works*, <https://signup.netflix.com/HowItWorks> (visited Feb. 14, 2012) (“Netflix How It Works”).

<sup>819</sup> *See* Netflix Inc., *SEC Form 10-K for the Fiscal Year Ended December 31, 2010*, at 22 (“Netflix 2010 Form 10-K”).

<sup>820</sup> For example, Apple’s revenue from “net sales of other music related products and services” – which includes, among other things, online video and music sales – accounted for just nine percent of the company’s 2009 net sales, eight percent of the company’s 2010 net sales, and six percent of the company’s 2011 net sales. *See* Apple Inc., *SEC Form 10-K for the Period Ended September 24, 2011*, at 30-32 (“Apple 2011 Form 10-K”).

announced that it would begin offering certain movies and television episodes for download on a per movie or per program fee basis.<sup>821</sup> In January 2008, Apple announced the introduction of its iTunes Movie Rentals service, which allows users to rent movies from all the major studios and watch them on their computers, Apple mobile devices, or Apple TV.<sup>822</sup> Consumers also can now buy television shows and movies via iTunes.<sup>823</sup> Some analysts have noted that for Apple, providing worthwhile online video content is not merely an end in itself, but is also a tool to promote the company's digital devices.<sup>824</sup>

254. In 2006, online retailer Amazon.com launched its Unbox service, which allowed consumers to download television and movie content for rental or purchase, on a pay-per-download basis.<sup>825</sup> Two years later, Amazon announced that consumers could stream movies and television programs on their computers, without advertisements, through its Amazon Video on Demand streaming service.<sup>826</sup> In 2011, Amazon announced that customers who pay an annual fee for the company's Amazon Prime service will receive commercial-free, instant streaming of thousands of movies and television shows at no extra charge.<sup>827</sup> OVD content provided by Amazon can be viewed on multiple devices.<sup>828</sup>

255. In addition to being a producer of content, Sony also manufactures consumer electronics equipment. As discussed in more detail below, Sony's Crackle OVD service is available on numerous devices, many of which are manufactured by Sony. Indeed, the ability to use Crackle to access Sony's library of movies, television shows, and original programming<sup>829</sup> is a potential selling point for these electronics products.

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<sup>821</sup> Apple Inc., *Apple Announces iTunes 6 With 2,000 Music Videos, Pixar Short Films & Hit TV Shows* (press release), Oct. 12, 2005.

<sup>822</sup> Apple Inc., *Apple Premieres iTunes Movie Rentals With All Major Film Studios* (press release), Jan. 15, 2008.

<sup>823</sup> Apple, *iTunes, What's On iTunes*, <http://www.apple.com/itunes/whats-on/> (visited Feb. 14, 2012) ("What's On iTunes").

<sup>824</sup> See, e.g., Geoffrey A. Fowler & Sam Schechner, *A New Digital Battlefield*, WALL ST. J., Sept. 2, 2010, <http://online.wsj.com/article/SB10001424052748703431604575468051468814036.html#articleTabs%3Darticle> (visited Feb. 14, 2012) ("Fowler & Schechner").

<sup>825</sup> Marshall Kirkpatrick, *Amazon Unbox Goes Live*, Tech Crunch, Sept. 7, 2006, <http://techcrunch.com/2006/09/07/amazon-unbox-goes-live/> (visited Feb. 14, 2012).

<sup>826</sup> See Amazon.com, *Amazon Instant Video Compatible Devices*, <http://www.amazon.com/gp/video/ontv/devices> (visited Feb. 29, 2012) ("Amazon Devices").

<sup>827</sup> Amazon Devices: Amazon.com, Inc., *Amazon Prime Members Now Get Unlimited, Commercial-free, Instant Streaming of More Than 5,000 Movies and TV Shows at No Additional Cost* (press release), Feb. 22, 2011. The company's Amazon Prime service provides other, non-video benefits, including for instance two-day shipping on some purchases. See Amazon.com, *Amazon Prime*, <http://www.amazon.com/gp/help/customer/display.html?nodeId=13819211> (visited Feb. 14, 2012) ("Amazon Prime").

<sup>828</sup> See Amazon.com, *Watch Anywhere*, <http://www.amazon.com/gp/feature.html?ie=UTF8&docId=1000663511> (visited Feb. 14, 2012); Amazon.com, *Help, Watching Amazon Instant Videos*, [http://www.amazon.com/gp/help/customer/display.html/ref=hp\\_3757\\_watchfaq?nodeId=200238920](http://www.amazon.com/gp/help/customer/display.html/ref=hp_3757_watchfaq?nodeId=200238920) (visited Feb. 14, 2012); Amazon.com, *Help, Amazon Instant Video Support*, [http://www.amazon.com/gp/help/customer/display.html/ref=hp\\_13819211\\_aiv?nodeId=3757](http://www.amazon.com/gp/help/customer/display.html/ref=hp_13819211_aiv?nodeId=3757) (visited Feb. 14, 2012).

<sup>829</sup> See About Crackle; Crackle FAQ; Crackle on Xbox.

256. In 2007, Vudu launched a service that provided consumers with a television set-top box that enabled instant viewing of movies via rent or purchase.<sup>830</sup> Wal-Mart purchased the company in February 2010.<sup>831</sup> Today, Vudu offers its movie store and interactive services as a feature that consumer electronics manufacturers can build into their devices,<sup>832</sup> many of which are available for sale at Wal-Mart.

257. Consumer electronics retailer Best Buy's CinemaNow service allows users to rent or purchase movie and television show content.<sup>833</sup> CinemaNow, a non-subscription service, provides customers with same-day instant access to new release movies and television shows.<sup>834</sup> Users can access CinemaNow content via a variety of devices, some of which can be purchased at Best Buy, including computers and certain Internet-connectable televisions and Blu-ray players.<sup>835</sup>

**a. Horizontal Concentration and Vertical Integration**

258. *Horizontal Concentration.* It is difficult to measure horizontal concentration in the OVD marketplace. To begin with, it is hard to get a handle on the number and identity of players in the market. As described in the examples above, all of the major providers in this industry segment have either entered the market, or dramatically retooled their approach to the distribution of video content, during the last few years. Players continue to enter and exit the OVD marketplace, and business models appear to be evolving.

259. Even if it were possible to get a firm handle on the players in the OVD marketplace, it is difficult to obtain the revenue or ratings/viewing information required for a horizontal concentration analysis. As discussed above, many OVDs are parts of companies with multiple non-OVD business lines. This often makes it difficult or impossible to obtain useful OVD revenue figures. As noted above, for example, Apple reports revenue from a category called "net sales of other music related products and services," which includes, among other things, online video and music sales, but does not break out what portion of that revenue comes from OVD services.<sup>836</sup> Similarly, while revenues for Netflix are available, the company's most recent SEC Form 10-K filing notes that because Netflix subscribers were able to receive both streaming and DVDs-by-mail under a single hybrid plan prior to the fourth quarter of 2011,

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<sup>830</sup> See Brad Stone, *Wal-Mart Adds Its Clout to Movie Streaming*, N.Y. TIMES, Feb. 23, 2010, <http://www.nytimes.com/2010/02/23/technology/23video.html?partner=rss&emc=rss> (visited Feb. 15, 2012) ("Wal-Mart Clout"); Azadeh Ensha, *Vudu, Roku, Boxee: What's the Difference?*, N.Y. TIMES, Mar. 24, 2009, <http://gadgetwise.blogs.nytimes.com/2009/03/24/vudu-roku-boxee-whats-the-difference/> (visited Feb. 15, 2012); Brad Stone, *Vudu Casts Its Spell on Hollywood*, N.Y. TIMES, Apr. 29, 2007, <http://www.nytimes.com/2007/04/29/business/yourmoney/29vudu.html> (visited Feb. 15, 2012).

<sup>831</sup> See Wal-Mart Clout.

<sup>832</sup> See Vudu, *VUDU is Available on Virtually Every Internet-Connected Blu-ray Player and HDTV on the Market*, <http://www.vudu.com/devices.html> (visited Feb. 15, 2012) ("Vudu Devices"); Vudu, *VUDU Expands Distribution to HDTVs and Blu-ray Players from LG, Mitsubishi, Samsung, SANYO, Sharp, Toshiba and VIZIO* (press release), Jan. 8, 2010.

<sup>833</sup> CinemaNow, *About Us*, <http://www.cinemanow.com/AboutUs-BBYCinemaNow.aspx> (visited Feb. 15, 2012) ("About CinemaNow").

<sup>834</sup> See *id.*; Best Buy Co. Inc., *Best Buy Provides Customers Same-Day Instant Access to New Release Movies and TV Shows with Launch of CinemaNow* (press release), May 18, 2010.

<sup>835</sup> See *id.*; About CinemaNow.

<sup>836</sup> See *supra*, ¶ 253 & n. 820; Apple 2011 Form 10-K at 30-32.

it is not possible to allocate domestic revenues from prior to that time between the company's streaming and DVD rental segments.<sup>837</sup>

260. Moreover, while metrics exist to assess MVPD subscribership or broadcast viewership, measuring online video viewership raises unique challenges. Entities like Nielsen and comScore measure hits/views for online video websites, but they use different methodologies and, therefore, achieve different results. Importantly, services that measure online video viewership generally do not separate professional and non-professional video content. For example, entities such as Google/YouTube and Facebook rank high in analyses by comScore and Nielsen,<sup>838</sup> but this is almost certainly due in large part to the non-professional video content hosted on both sites.<sup>839</sup> Hence, these viewership figures cannot be used to measure horizontal concentration in the market for online delivery of professional video content.

261. *Vertical Integration.* As discussed above, many OVDs are vertically integrated. For example, some OVDs are integrated with content producers and owners, which view online video as another distribution outlet for their programming. In other cases, OVDs are affiliated with online services for which video content is an additional product to offer consumers or with retailers of consumer electronics equipment used to access OVD-delivered content.

262. In addition, OVDs, including those not affiliated with traditional programmers or content owners, are becoming increasingly involved in the creation of original content. For example, Netflix launched an original show, *Lilyhammer*, in February 2012.<sup>840</sup> In addition, it is developing three additional original series (*House of Cards*, *Orange is the New Black*, and *Hemlock Grove*), and plans to air exclusive new episodes of *Arrested Development* in 2013.<sup>841</sup> Hulu launched its first original series, *Battleground*, in

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<sup>837</sup> See Netflix Inc., *SEC Form 10-K for the Fiscal Year Ended December 31, 2011*, at 26. On September 1, 2011, Netflix ended its hybrid plan, which, for \$9.99, provided unlimited access to the Netflix streaming video library and allowed customers to rent one DVD at a time. See Greg Sandoval, *Netflix Users, Time to Pick a Plan*, CNET, Aug. 29, 2011, [http://news.cnet.com/8301-31001\\_3-20098921-261/netflix-users-time-to-pick-a-plan/](http://news.cnet.com/8301-31001_3-20098921-261/netflix-users-time-to-pick-a-plan/) (visited Mar. 5, 2012); Eric Savitz, *Netflix Jacking Up Prices On Hybrid DVD/Streaming Plans*, FORBES, July 13, 2011, <http://sg.news.yahoo.com/netflix-jacking-prices-hybrid-dvd-streaming-plans-172634671.html> (visited Mar. 5, 2012). As of March 2012, Netflix customers pay \$7.99 per month for unlimited streaming and must pay an additional \$7.99 per month for the DVD rental service (\$9.99 for access to Blu-ray discs). See *id.*; Netflix Signup; Netflix How It Works. Netflix announced plans to split its DVD-rental business from its streaming business in September 2011, but reversed that decision the next month. Bianca Bosker, *Qwikster Is Dead: Netflix Kills DVD-Only Service Weeks After Unveiling It*, HUFFINGTON POST, Oct. 10, 2011, [http://www.huffingtonpost.com/2011/10/10/qwikster-dead-netflix-kills\\_n\\_1003098.html](http://www.huffingtonpost.com/2011/10/10/qwikster-dead-netflix-kills_n_1003098.html) (visited Mar. 5, 2012).

<sup>838</sup> See *infra*, ¶¶ 320-21.

<sup>839</sup> See *supra*, ¶ 249; Facebook, *Help Center, Video: Uploading and Viewing Videos*, <http://www.facebook.com/help/?page=157734877627482> (visited Feb. 16, 2012).

<sup>840</sup> See Lesley Goldberg, *Netflix to Bow Original Series "Lilyhammer" on Feb. 6*, THE HOLLYWOOD REPORTER, Jan. 3, 2012, <http://www.hollywoodreporter.com/live-feed/netflix-bow-original-series-lilyhammer-277530> (visited Feb. 28, 2012).

<sup>841</sup> See *id.*; Chloe Albanesius, *Netflix Original Series, Lilyhammer, to Debut Feb. 6*, PC MAGAZINE, Jan. 3, 2012, <http://www.pcmag.com/article2/0,2817,2398304,00.asp> (visited Feb. 15, 2012); Janko Roettgers, *Netflix, Hulu and the Golden Age of Content*, GAGAOM, Jan. 16, 2012, <http://gigaom.com/video/netflix-hulu-exclusive-content/> (visited Feb. 15, 2012) ("Golden Age"). Netflix paid \$100 million, outbidding cable networks, for rights to air 26 episodes of original series *House of Cards*. Paul Bond, *Hollywood's Feelings About Netflix's \$100 Million "House of Cards" Deal*, THE HOLLYWOOD REPORTER, Mar. 23, 2011, <http://www.hollywoodreporter.com/news/hollywoods-feelings-netflixs-100-million-170651> (visited Feb. 28, 2012). According to recent industry reports, CBS has held discussions with Netflix about producing original programming for airing on Netflix as well. See COMM. DAILY (Feb. 17, 2012) at 16-17.

February 2012.<sup>842</sup> Similarly, in late 2011, Yahoo announced eight original shows targeted at women and featuring Hollywood talent.<sup>843</sup> YouTube continues to invest in original content, offering multiple channels from Hollywood celebrities and other content partners.<sup>844</sup>

#### b. Entry and Exit Conditions

263. Some commenters state that the online video marketplace is relatively open with low barriers to entry.<sup>845</sup> OVDs generally rely on third-party owned infrastructure for data transport, instead of needing to build their own.<sup>846</sup> On the other hand, one industry analyst states, “there are huge and very real infrastructure costs associated with massive server farms, transport costs, and hosting fees associated with a large-scale video-over-the Internet model. . . . For a large scale start-up, the cost could run into the billions.”<sup>847</sup> Moreover, while niche material often can find an audience, in order to compete, an OVD must secure rights to a wide range of compelling content, which can be difficult and quite expensive.<sup>848</sup> While the extent of these costs will vary depending on an OVD’s business model, it is clear that there are real costs and hurdles involved in entering into, and competing in, the OVD market.

264. Below, we discuss the regulatory conditions potentially affecting entry in this market. Thereafter, we describe the market, or non-regulatory, conditions that may influence entry decisions, including the need for OVDs to acquire rights to content and to secure sufficient, reasonably priced Internet access for transmission of OVD content. We then describe recent entry and exit from the market.

#### (i) Regulatory Conditions

265. *Open Internet.* OVDs need broadband Internet speeds and capacity in order to transmit video content to their customers. In 2010, the Commission adopted an order seeking to protect the openness of the Internet.<sup>849</sup> The Commission’s open Internet rules require transparency from fixed and

<sup>842</sup> See Golden Age; Meg James, *Hulu Introduces “Battleground,” its First Original Scripted Show*, L.A. TIMES, Jan. 15, 2012, <http://latimesblogs.latimes.com/entertainmentnewsbuzz/2012/01/hulu-introduces-battleground-first-original-scripted-show.html> (visited Feb. 15, 2012).

<sup>843</sup> Georg Szalai; *Yahoo Launches Original Web Shows Targeting Women With Judy Greer, Morgan Spurlock, Niecy Nash*, THE HOLLYWOOD REPORTER, Oct. 4, 2011, <http://www.hollywoodreporter.com/news/yahoo-launches-original-web-shows-243610> (visited Feb. 15, 2012).

<sup>844</sup> See Golden Age; Ben Sisario, *New Layer of Content Amid Chaos on YouTube*, N. Y. TIMES, Mar. 11, 2012, <http://www.nytimes.com/2012/03/12/technology/youtube-channels-seek-advertisers-and-audiences.html?pagewanted=all> (visited Mar. 12, 2012); Janko Roettgers, *It’s True: YouTube to Take on Cable With A-list Celebs*, Gigaom, Oct. 28, 2011, <http://gigaom.com/video/youtube-premium-content/> (visited Feb. 15, 2012); See also *infra*, ¶¶ 304-05.

<sup>845</sup> See, e.g., Google 6/8/11 Comments at 1-4.

<sup>846</sup> See *infra*, ¶¶ 271-75.

<sup>847</sup> See Craig Moffett, *Weekend Media Blast: Why Haven’t We Seen a Virtual MSO Yet?*, Bernstein Research, Jan. 27, 2012, at 3 (“Virtual MSO”).

<sup>848</sup> See *Comcast-NBCU Order*, 26 FCC Rcd at 4273, ¶ 86; *infra*, ¶¶ 268-70, ¶¶ 287-89.

<sup>849</sup> See *Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905, 17906, ¶ 1 (2010) (“*Open Internet Order*”). This order is currently on appeal in the D.C. Circuit. See, e.g., Notice of Appeal, *Verizon v. FCC*, No. 11-1355 (filed Sept. 30, 2011, D.C. Cir.). In addition, Southern Company Services recently filed a petition for clarification or reconsideration with the Commission concerning one aspect of the *Open Internet Order*. See Southern Company Services, Petition for Clarification or Reconsideration, GN Docket No. 09-191, WC Docket No. 07-52 (filed Oct. 24, 2011).

mobile broadband providers.<sup>850</sup> In addition, fixed broadband providers cannot block access to lawful content, applications, and services; mobile broadband providers cannot block access to lawful websites and applications competing with their voice or video telephony services.<sup>851</sup> Fixed broadband providers must also allow access to non-harmful devices and cannot unreasonably discriminate in transmitting lawful network traffic.<sup>852</sup>

266. *Closed Captioning.* In January 2012, the Commission adopted rules placing closed captioning obligations on the owners, providers, and distributors of video programming delivered using Internet protocol (IP).<sup>853</sup> The rules were adopted pursuant to the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA), which directed the Commission to revise its regulations to require closed captioning of IP-delivered video programming that is published or exhibited on television with captions after the effective date of the new regulations.<sup>854</sup> An entity intending to enter the OVD marketplace will need to take steps to comply with these requirements.

### (ii) Non-regulatory Conditions

267. An OVD entrant faces several non-regulatory costs and challenges to introducing its video content services that influence its decision to enter the market, including program acquisition and the need for sufficient Internet capacity at a reasonable cost.

268. *Program Acquisition.* Just as OVD subscriber growth creates the ability to obtain more content, which in turn drives usage and subscriber growth, lack of compelling content to offer potential customers is a significant deterrent to entry. An entity attempting to enter the OVD marketplace must obtain a robust, if not comprehensive, programming library to offer consumers.<sup>855</sup>

269. One potential barrier to such content acquisition is cost. For example, Netflix recently signed a deal with The CW network, which gives Netflix the streaming rights to repeats of current and future The CW network series. While the cost is undisclosed, and reportedly depends on the performance of certain shows, analysts estimate that it is close to \$1 billion, including approximately \$600,000 an episode for established shows like *Gossip Girl*.<sup>856</sup> This is a significant cost for what will amount to a

<sup>850</sup> See *Open Internet Order*, 25 FCC Rcd at 17906, ¶ 1.

<sup>851</sup> See *id.*

<sup>852</sup> See *id.*

<sup>853</sup> See *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket No. 11-154, Report and Order, 27 FCC Rcd 787 (2012). Petitions for reconsideration are currently pending before the Commission.

<sup>854</sup> 47 U.S.C. § 613(c)(2).

<sup>855</sup> See *Comcast-NBCU Order*, 26 FCC Rcd at 4273, ¶ 86 (“If an OVD is to fully compete against a traditional MVPD, it must have a similar array of programming.”); Will Richmond, *This Holiday Season, Video Apps’ Purpose is to Sell Devices*, VideoNuze, Nov. 10, 2011, <http://www.videonuze.com/article/this-holiday-season-video-apps-purpose-is-to-sell-devices> (visited Feb. 15, 2012) (“In short, premium video is more valuable than ever, with new players in the ecosystem recognizing that they can’t accomplish their goals without it. Another reminder that content is king.”); Dan Rayburn, *Veoh Should Be A Reminder That Execution & Focus Are More Important Than Vision*, StreamingMediaBlog.com, Feb. 12, 2010, [http://blog.streamingmedia.com/the\\_business\\_of\\_online\\_vi/2010/02/veoh-should-be-a-reminder-that-execution-and-focus-are-more-important-than-vision.html](http://blog.streamingmedia.com/the_business_of_online_vi/2010/02/veoh-should-be-a-reminder-that-execution-and-focus-are-more-important-than-vision.html) (visited Feb. 15, 2012) (discussing demise of OVD Veoh and noting that it is difficult for an ad-supported OVD to survive without a broad content library).

<sup>856</sup> Joe Flint & Ben Fritz, *Netflix Deal Makes CW Pay Off for CBS and Warner Bros.*, L.A. TIMES, Oct. 13, 2011, <http://latimesblogs.latimes.com/entertainmentnewsbuzz/2011/10/netflix-cw-deal-cbs-warner-bros.html> (visited Feb. 15, 2012) (“Netflix CW Deal”).

small part of Netflix's overall content library. Alternatively, Microsoft put its plans to start an online subscription service for television shows and movies on hold after determining that constant licensing costs would be too high for the company's envisioned business model.<sup>857</sup> Given the costs faced by established companies, it is even more difficult for new entrants with less capital to enter into the many high-priced content deals required to build an adequate content library.

270. Content acquisition difficulties for OVDs can be exacerbated by vertical integration and pre-existing business relationships in the marketplace. For example, vertical integration or exclusivity arrangements between content producers/owners and cable networks, broadcast networks, or MVPDs can make it difficult for unaffiliated OVDs to obtain content rights.<sup>858</sup> OVD content acquisition also can be difficult when content owners are vertically integrated with, or enjoy exclusive relationships with, other OVDs.<sup>859</sup>

271. *Internet Capacity and Cost.* Unlike MVPDs such as cable and DBS, which generally own and/or control the infrastructure they use to distribute video content to their customers, as stated above, OVDs rely on high-capacity and high-speed broadband Internet services that are often owned and controlled by unaffiliated MVPDs.<sup>860</sup> According to one analyst, services and applications such as OVD services represented 60 percent of peak downstream traffic in 2011, with Netflix alone accounting for 32.7 percent of such traffic.<sup>861</sup> OVDs therefore must have access to sufficient, reliable, and reasonably priced broadband capacity in order to operate in the video marketplace. Prospective OVD entrants face several challenges in this regard.

272. First, consumers may lack the broadband capability that is a necessary prerequisite for OVD providers to reach their intended market. Broadband deployment has increased in recent years, but, as the Commission has repeatedly recognized, it is far from ubiquitous. The Commission recently estimated that 26.2 million Americans living in more than 9.2 million households do not have access to

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<sup>857</sup> Yinka Adegoke, *Exclusive: Microsoft Web TV Subscription Plan on Hold*, Reuters, Jan. 11, 2012, <http://www.reuters.com/article/2012/01/11/us-microsoft-video-idUSTRE80A1KL20120111> (visited Feb. 15, 2012).

<sup>858</sup> See, e.g., Netflix 2010 Form 10-K, at 7 (noting that HBO's license with Warner Brothers provides HBO with the exclusive right to such content against other subscription services, including OVDs like Netflix); *Comcast-NBCU Order* 26 FCC Rcd at 4273, ¶ 86 & 4359-62, Online Conditions IV.A-IV.C (listing Commission-imposed conditions designed to prevent Comcast/NBCU from withholding online rights to programming from unaffiliated OVDs); Rural Associations 6/8/11 Comments at 9; Netflix 6/8/11 Comments at 6-7.

<sup>859</sup> See, e.g., *The Economics of Online Video* (White Paper), ADVERTISING AGE, June 19, 2010, at 10 ("AD AGE White Paper"); Emma Barnett, *Joost ex-CEO Holds Broadcasters Responsible for Demise of Company*, THE TELEGRAPH, July 7, 2009, <http://www.telegraph.co.uk/finance/newsbysector/mediatechnologyandtelecoms/digital-media/5771174/Joost-ex-CEO-blames-broadcasters-for-demise-of-company.html> (visited Feb. 15, 2012) (discussing belief of former CEO of OVD Joost that broadcasters' decision to create their own online video services hindered Joost's ability to acquire the content rights necessary to be competitive).

<sup>860</sup> See Rovi 6/8/11 Comments at 2. The record indicates that cable operators continue to invest billions of dollars in infrastructure and facility rebuilds and upgrades to improve their video service offerings, as well as to offer more robust Internet and digital telephone services. Since 1996, cable companies have invested over \$170 billion in infrastructure, including \$12 billion in 2010 alone. See NCTA 6/8/11 Comments at 9-10. Telephone companies, including those that are not MVPDs, also provide the broadband Internet services that OVDs require.

<sup>861</sup> Sandvine, *Global Internet Phenomena Report*, Fall 2011 at 2, 5-8. The analyst defined peak period as the time during which aggregate network traffic is within 95 percent of its highest value. *Id.* at 5.

broadband service at or above the Commission's 4 Mbps downstream/1 Mbps upstream broadband speed benchmark.<sup>862</sup>

273. Second, even where the physical capacity exists to provide broadband service, some of the leading Internet Service Providers ("ISPs") have begun to impose data caps or shift to usage-based billing. Specifically, in 2008 Comcast imposed a data cap of 250 gigabytes per month, disconnecting users who exceeded the cap twice in a six-month period.<sup>863</sup> In May 2011, AT&T imposed a cap of 150 GB per month for its DSL service and 250 GB for its U-verse service; if a user exceeds the data limit AT&T will send certain notifications, and then charge an additional \$10 per month for each 50 GB beyond the limit.<sup>864</sup> Cox imposes monthly usage limits from 30 GB up to 400 GB, depending on the package.<sup>865</sup> Major wireless providers also have begun to impose data caps.<sup>866</sup> Broadband providers assert that data caps and usage based billing are mechanisms to manage ISP traffic, address excessive use, alleviate network congestion, ensure that users can access their networks, and provide adequate data speeds to all of their customers.<sup>867</sup> Some commenters identify moves by broadband ISPs to usage-based billing as being potentially discriminatory against OVDs,<sup>868</sup> and some claim that this behavior is intended to retard OVD growth to sustain the traditional MVPD subscription model.<sup>869</sup> In contrast, ISPs indicate

<sup>862</sup> See *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 10-159, Seventh Broadband Progress Report and Order on Reconsideration, 26 FCC Rcd 8008, 8018, 8022, ¶¶ 14, 23 (2011). The Commission is in the process of reforming and modernizing its Form 477 data collection in order to obtain more accurate information about broadband deployment. See *id.* at 8016, ¶ 11; see generally *Modernizing the FCC Form 477 Data Program; Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscriber Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscriber Data; Service Quality, Customer Satisfaction, Infrastructure and Operating Data Gathering; Review of Wireline Competition Bureau Data Practices*, WC Docket Nos. 07-38, 08-190, 01-132, and 11-10, Notice of Proposed Rulemaking, 26 FCC Rcd 1508 (2011).

<sup>863</sup> Editorial, *To Cap, or Not*, N.Y. TIMES, July 21, 2011, <http://www.nytimes.com/2011/07/22/opinion/22fri2.html> (visited Feb. 17, 2012) ("To Cap or Not"); Chloe Albanesius, *Comcast to Cap Data Transfers at 250 GB in Oct.*, PC MAGAZINE, July 22, 2011, <http://www.pcmag.com/article2/0,2817,2329170,00.asp> (visited Feb. 17, 2012) ("Comcast to Cap").

<sup>864</sup> See AT&T, *High Speed Internet Support: Broadband Usage FAQs*, <http://www.att.com/esupport/article.jsp?sid=KB409045&cv=801&ct=9000106&pv=3&title=Broadband+Usage+FAQs#fbid=xw2lZFJ5WmM> (visited Feb. 17, 2012) ("AT&T Broadband Usage").

<sup>865</sup> See Cox, e.g., *Speeds and Allowances Information for High Speed Internet Service in Rhode Island*, <http://ww2.cox.com/aboutus/rhodeisland/policies/speedsusage.cox> (visited Feb. 17, 2012).

<sup>866</sup> See, e.g., AT&T, *An Update for Our Smartphone Customers With Unlimited Data Plans* (press release), July 29, 2011 (announcing reduction in speeds for smartphone customers with unlimited data plans who exceed certain bandwidth thresholds) ("Smartphone Update"); Julianne Pepitone, *AT&T Raises Limit for Smartphone Data Slowdown*, CNNMoney, Mar. 1, 2012, [http://money.cnn.com/2012/03/01/technology/att\\_data\\_slowdown/index.htm?hpt=hp\\_t2](http://money.cnn.com/2012/03/01/technology/att_data_slowdown/index.htm?hpt=hp_t2) (visited Mar. 2, 2012) ("Smartphone Data Slowdown"); Trefis Team, *Crowded Pipes Prompt Verizon To Nix Unlimited Data Plans*, FORBES, May 31, 2011, <http://www.forbes.com/sites/greatspeculations/2011/05/31/crowded-pipes-prompt-verizon-to-nix-unlimited-data-plans/> (visited Feb. 17, 2012).

<sup>867</sup> See, e.g., *To Cap, or Not; Comcast to Cap; AT&T Broadband Usage; Smartphone Update; Smartphone Data Slowdown*; Chloe Albanesius, *Comcast Weighs 250 GB/Month Download Limit*, PC MAGAZINE, May 8, 2008, <http://www.pcmag.com/article2/0,2817,2301203,00.asp> (visited July 16, 2012).

<sup>868</sup> See, e.g., Netflix 6/8/11 Comments at 8; Public Knowledge 6/8/11 Comments at 4-5, 9-10.

<sup>869</sup> See e.g., WGAW 6/8/11 Comments at 19.

they have not impeded the growth of OVDs. By continually upgrading their broadband facilities, ISPs argue that they have helped facilitate the growth of high-quality Internet video and its distribution by entities like Netflix.<sup>870</sup> Comcast also notes that it offers a variety of speed tiers at different price points to accommodate the varying needs of its subscribers.<sup>871</sup>

274. Third, MVPDs have the ability and incentive to degrade the broadband service available to unaffiliated OVDs. For example, one party states that a cable provider can constrain broadband capacity available to OVDs in order to prevent them from offering full competitive substitutes for the cable company's MVPD offerings.<sup>872</sup> Although the Commission's *Open Internet Order* prohibits broadband ISPs from blocking OVD traffic, some worry that exceptions for "reasonable network management" and "specialized services" may still allow MVPDs to have an undue negative impact on online video.<sup>873</sup> Several MVPDs counter, however, that cable operators and other MVPDs have continually enabled the development of online video by providing faster broadband speeds and higher-bandwidth services.<sup>874</sup>

275. Finally, costs charged by ISPs to deliver online video traffic could have a negative impact on the ability of OVDs to enter the market and compete. Netflix, for example, asserts that some fees charged by MVPD/broadband network operators to terminate unaffiliated traffic on their networks can increase OVD operating costs.<sup>875</sup> Netflix also points to a recent dispute between Comcast and Level 3 in support of its allegations that providers of MVPD service have the incentive to use traffic charges to hinder or disrupt the flow of unaffiliated broadband video services over their networks.<sup>876</sup> MVPDs that are also ISPs dispute such assertions, arguing that while Internet backbone providers that have entered into peering arrangements typically do not charge fees when the traffic they carry for each other is roughly equal, charges are justified when the relative traffic flows are significantly out of proportion.<sup>877</sup>

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<sup>870</sup> See e.g., NCTA 7/8/11 Reply at 2-3.

<sup>871</sup> See Comcast 6/8/11 Comments at 15. Comcast highlights the need for providing a range of speed tiers by stating that 23 percent of its residential high-speed Internet customers subscribe to higher-speed tiers (i.e., speeds above 16 Mbps). See *id.* at 16.

<sup>872</sup> See Earthlink Reply, MB 10-56, at 9 (filed Aug. 19, 2010).

<sup>873</sup> See Public Knowledge 6/8/11 Comments at 4; Rovi 6/8/11 Comments at 3. When approving the Comcast/NBCU transaction, the merged entity agreed to some voluntary commitments, and the Commission imposed conditions, designed to limit the ability of the joint venture to hinder OVD competition by restricting access to or raising the price of unaffiliated OVD content, or blocking, degrading, or otherwise violating Open Internet principles with respect to the delivery of unaffiliated online content. See, e.g., *Comcast-NBCU Order*, 26 FCC Rcd at 4263, 4274-76, 4355-64, ¶ 61, ¶¶ 91-95, App. A, §§ I-IV.

<sup>874</sup> See, e.g., Comcast 6/8/11 Comments at 5; NCTA 6/8/11 Comments at 5.

<sup>875</sup> Netflix 6/8/11 Comments at 7. See also Netflix 2010 Form 10-K at 12 (noting that changes in how ISPs charge for access to data on their networks might adversely affect Netflix's business). Netflix states that the ISPs' customers already pay the ISPs to deliver the bits on their network, and requiring Netflix to pay as well, even though Netflix delivers the bits in question at the request of the ISPs' customers, is an inappropriate reflection of their last mile exclusive control of their residential customers. See Letter from Reed Hastings, CEO of Netflix, to Chairman Fred Upton and Ranking Member Henry A. Waxman, Committee on Energy and Commerce, Apr. 6, 2011, at 1 (attached to Letter from Devendra T. Kumar, Attorney for Netflix, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 09-191, WC Docket No. 07-52 (filed May 10, 2011)).

<sup>876</sup> See Netflix 6/8/11 Comments at 1-2, 7.

<sup>877</sup> See, e.g., Virtual MSO at 3; Spencer E. Ante & Amy Schatz, *Web-Traffic Spat Over Netflix Highlights New Tensions*, WALL ST. J., Nov. 30, 2010, <http://online.wsj.com/article/SB10001424052748704679204575646840288688392.html> (visited Feb. 17, 2012); (continued....)

### c. Recent Entry and Exit

276. The OVD market has undergone dramatic transformation since the last report, as all of the major providers have either entered the market in the last few years or dramatically retooled their approach to the online distribution of video content in that time. On the other hand, since the OVD marketplace is still evolving, it is not surprising that several entities have exited the marketplace recently as well.

277. *Entry.* While YouTube has been a leading distributor of user-generated video content since it began in 2005, it has taken several steps in the last few years to evolve into an entity that offers both professional and non-professional content. YouTube implemented its “Content ID” – an advanced set of copyright policies and content management tools – in 2009, addressing in large part issues of copyright infringement that previously arose from user-uploads of third-party content and allowing media companies to monetize and manage user-uploaded videos.<sup>878</sup> YouTube also has entered into partnerships with numerous content providers to create ad-supported channels of short- and long-form programming,<sup>879</sup> and developed mechanisms to allow its partners to sell advertisements on YouTube more directly.<sup>880</sup>

278. Sony’s Crackle service is another example of recent entry and retooling by an OVD. In 2006, Sony bought Grouper, a website that hosted user-generated videos.<sup>881</sup> Sony shut down Grouper and relaunched it as Crackle the next year.<sup>882</sup> At that time, Crackle was “something of a filmmaking incubator.”<sup>883</sup> User-uploaded videos were entered into contests and judged by editors.<sup>884</sup> Crackle’s focus has since changed, however. Today, Crackle is an outlet for the distribution of professionally produced

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Nancy Gohring, *FCC Looks Into Level 3, Comcast Content Dispute*, PC WORLD, Nov. 30, 2010, [http://www.peworld.com/businesscenter/article/212078/fcc\\_looks\\_into\\_level\\_3\\_comcast\\_content\\_dispute.html](http://www.peworld.com/businesscenter/article/212078/fcc_looks_into_level_3_comcast_content_dispute.html) (visited Feb. 17, 2012); Joe Mullin, *Verizon Chooses Sides, While Level 3 Keeps Fighting With Comcast*, PaidContent.org, Jan. 14, 2011, <http://paidcontent.org/article/419-verizon-chooses-sides-while-level-3-keeps-fighting-with-comcast/> (visited Feb. 29, 2012).

<sup>878</sup> See YouTube, *Content ID*, <http://www.youtube.com/t/contentid> (visited Feb. 16, 2012); Will Richmond, *Why Did Online Video Consumption Spike in 2009?*, Video Nuze, Feb. 24, 2010, <http://videonuze.com/blogs/?2010-02-24/Why-Did-Online-Video-Consumption-Spike-in-2009-/&id=2446> (visited Feb. 16, 2012).

<sup>879</sup> Ryan Nakashima, *YouTube Launching 100 New Channels*, USA TODAY, Oct. 29, 2011, <http://www.usatoday.com/tech/news/story/2011-10-29/youtube-original-programming/50997002/1> (visited Feb. 16, 2012); Laura Lee, *Welcome to YouTube, Univision!*, YouTube Biz Blog, Nov. 16, 2009, <http://ytbizblog.blogspot.com/2009/11/welcome-to-youtube-univision.html> (visited Feb. 16, 2012); Diane Pucin, *ESPN and YouTube, Together*, L.A. TIMES, July 13, 2009, [http://latimesblogs.latimes.com/sports\\_blog/2009/07/espn-and-youtube-together.html](http://latimesblogs.latimes.com/sports_blog/2009/07/espn-and-youtube-together.html) (visited Feb. 16, 2012).

<sup>880</sup> Phil Farhi, *Helping Partners Help Themselves*, YouTube Biz Blog, July 27, 2009, <http://ytbizblog.blogspot.com/2009/07/helping-partners-help-themselves.html> (visited Feb. 16, 2012).

<sup>881</sup> Greg Sandoval, *Sony Gets Into Video Sharing with Grouper Hug*, CNET, Aug. 23, 2006, [http://news.cnet.com/Sony-gets-into-video-sharing-with-Grouper-hug/2100-1026\\_3-6108508.html](http://news.cnet.com/Sony-gets-into-video-sharing-with-Grouper-hug/2100-1026_3-6108508.html) (visited Feb. 16, 2012).

<sup>882</sup> See Nilay Patel, *Sony Kills Grouper: Say Hello to Crackle*, Engadget, July 16, 2007, <http://www.engadget.com/2007/07/16/sony-kills-grouper-say-hello-to-crackle/> (visited Feb. 16, 2012).

<sup>883</sup> See *id.*

<sup>884</sup> See *id.*

content, such as Sony's television shows and movies, and generally does not accept user video submissions.<sup>885</sup>

279. As noted above, Hulu initiated service in 2007. Its entry into the subscription video service business was more recent however. Specifically, Hulu launched Hulu Plus in June 2010, altering its approach to delivery of online video content to consumers. The service launched as a means for Hulu's media owners to generate new sources of revenue from Hulu without undercutting the cable contracts that have traditionally supported content creation.<sup>886</sup>

280. Providers of niche content have entered the marketplace as well. For example, Mubi, a subscription OVD founded in 2007 and devoted to international, independent, and classic films, now has 1.2 million members worldwide.<sup>887</sup> Similarly, Fandor, which focuses on independent films, launched on March 8, 2011, charging \$10 per month for access to its large library of films.<sup>888</sup> Fandor claims that it intends to make the service accessible via multiple devices, such as smartphones, tablets, and televisions.<sup>889</sup>

281. Other competitors are entering the OVD industry as well. In February 2012, for example, Verizon announced a joint venture with Redbox operator Coinstar to launch an online streaming video service in the second half of 2012.<sup>890</sup> Verizon operates an MVPD service (FiOS TV).<sup>891</sup> RedBox is a video rental kiosk company.<sup>892</sup> According to reports, the joint venture's service, called "Project Zoetrope," will allow users to subscribe to, download and stream movies and television shows across various devices, including televisions, web browsers, tablets, smartphones, Roku, Xbox and Google TV.<sup>893</sup>

282. In addition, the continued development of online video distribution is encouraging some established content owners to enter the video content market for the first time. For example, news entities

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<sup>885</sup> Crackle, *Crackle FAQ: The Leftovers*, <http://www.crackle.com/outreach/faq#leftovers> (visited Feb. 14, 2012).

<sup>886</sup> Dawn C. Chmielewski, *Hulu Launches a Preview of its Subscription Service*, L.A. TIMES, June 29, 2010, <http://latimesblogs.latimes.com/entertainmentnewsbuzz/2010/06/hulu-announces-the-launch-of-its-paid-subscription-service.html> (visited Feb. 16, 2012).

<sup>887</sup> Mubi, <http://mubi.com/> (visited Feb. 16, 2012); Mubi, *Mubi Press*, <http://mubi.com/about/press> (visited Feb. 16, 2012); Paul Bond & Tim Appelo, *How the Assault on Netflix Will Shake Out*, THE HOLLYWOOD REPORTER, Mar. 17, 2011, <http://www.hollywoodreporter.com/news/how-assault-netflix-will-shake-168562> (visited Feb. 16, 2012).

<sup>888</sup> Fandor, <http://www.fandor.com/> (visited Feb. 16, 2012); Fandor, *About*, <http://www.fandor.com/company/about> (visited Feb. 16, 2012) ("About Fandor"); Mark Hachman, *Fandor Launches As "Netflix for Indie Films"*, PC MAGAZINE, Mar. 9, 2011, <http://www.pcmag.com/article2/0,2817,2381725,00.asp> (visited Feb. 16, 2012).

<sup>889</sup> About Fandor.

<sup>890</sup> David Goldman, *Verizon and Redbox Team Up to Battle Netflix*, CNN Money, Feb. 6, 2012, [http://money.cnn.com/2012/02/06/technology/verizon\\_redbox/index.htm](http://money.cnn.com/2012/02/06/technology/verizon_redbox/index.htm) (visited Feb. 28, 2012) ("Verizon and Redbox Team Up"); Verizon, *Verizon and Coinstar's Redbox Form Joint Venture to Create New Consumer Choice for Video Entertainment* (news release), Feb. 6, 2012, <http://newscenter.verizon.com/press-releases/verizon/2012/verizon-and-coinstars-redbox.html> (visited Feb. 28, 2012). Verizon and Redbox hold, respectively, 65 and 35 percent ownership shares of the joint venture. *Id.*

<sup>891</sup> *See supra*, ¶ 32.

<sup>892</sup> *See infra*, ¶ 288.

<sup>893</sup> Todd Haselton, *Verizon and Redbox May be Plotting Movie Streaming Partnership for Early 2012*, BGR.com, Dec. 9, 2011, <http://www.bgr.com/2011/12/09/verizon-and-redbox-plotting-streaming-partnership-early-2012-launch-expected/> (visited Feb. 28, 2012); Verizon and Redbox Team Up.

and organizations like *Politico*, *The Wall Street Journal*, *The Washington Post*, *The Los Angeles Times*, *The Huffington Post*, and Reuters have either entered the OVD marketplace recently or intend to do so in the near future.<sup>894</sup> For example, *Politico* recently added to its newsroom “a stage set with lights, microphones, an anchor desk and five high-definition cameras so that reporters and editors can produce hours of live programming for Internet viewers.”<sup>895</sup> *The New York Times* produces a daily taped news show for Internet distribution, *TimesCast*, and in early 2012 added a morning business newscast.<sup>896</sup> *The Wall Street Journal* produces five hours of live Internet video content per day, and news organizations like *The Washington Post*, *The Los Angeles Times*, and *The Huffington Post* are preparing to provide Internet video content in the near future.<sup>897</sup> News organizations continue to struggle to adopt new digital business models, and the potential to generate significant advertising revenue is encouraging them to develop and expand online video offerings.<sup>898</sup>

283. *Exit*. Because the OVD marketplace is still developing, it is likely that several entities will exit the marketplace in the upcoming years. MeeVee is one example of a company that entered the OVD marketplace, found it difficult to compete, and, ultimately ceased service. When MeeVee launched in 2005, it claimed to be “the first online destination to bring together traditional television listings and online video from hundreds of sources.”<sup>899</sup> MeeVee functioned like a highly interactive program guide. A user could enter information concerning the cable and other video services to which he or she subscribed, and MeeVee would sort the user’s various viewing options.<sup>900</sup> MeeVee also provided users with personalized viewing recommendations based on their selected shows and allowed users to create channels based on their own interests.<sup>901</sup> Through deals with content companies, MeeVee allowed users to watch previews and clips from shows.<sup>902</sup> The service attracted a large amount of venture capital.<sup>903</sup> As of July 2007, MeeVee’s website attracted 3.4 million unique visitors per month, although it had begun losing customers by that time.<sup>904</sup> By the end of Summer 2007, MeeVee’s traffic had experienced a steep

<sup>894</sup> Brian Stelter, *Print News Media Go Live With Video Programming*, N.Y. TIMES, February 5, 2012, [http://www.nytimes.com/2012/02/06/business/media/news-organizations-plunge-into-video-production.html?\\_r=1](http://www.nytimes.com/2012/02/06/business/media/news-organizations-plunge-into-video-production.html?_r=1) (visited Feb. 14, 2012) (“Print Media Go Live”).

<sup>895</sup> *See id.*

<sup>896</sup> *See id.*; New York Times, *TimesCast*, <http://video.nytimes.com/video/playlist/timescast/1247467375115/index.html> (visited Mar. 5, 2012).

<sup>897</sup> *See* Wall Street Journal, *Video Center*, <http://online.wsj.com/video-center> (visited Mar. 5, 2012); Print Media Go Live.

<sup>898</sup> *See id.*

<sup>899</sup> Clayton Moulunox, *Meevee Internet TV Guide: Striving to Connect Broadcast & Web TV*, Web TV Wire, July 31, 2007, <http://www.webtvwire.com/meevee-to-become-tv-guide-for-the-Internet/> (visited Feb. 16, 2012).

<sup>900</sup> Matt Marshall, *MeeVee Wants to be Your TV Guide: Raises \$8 Million More*, SiliconBeat, Aug. 14, 2006, [http://www.siliconbeat.com/entries/2006/08/14/meevee\\_wants\\_to\\_be\\_your\\_tv\\_guide\\_raises\\_8\\_million\\_more.html](http://www.siliconbeat.com/entries/2006/08/14/meevee_wants_to_be_your_tv_guide_raises_8_million_more.html) (visited Feb. 16, 2012) (“MeeVee 8 Million”).

<sup>901</sup> Whitney Reynolds, *2007 Top 100 Undiscovered Web Sites, Number 22*, PC MAGAZINE, [http://www.pcmag.com/slideshow\\_viewer/0,3253,1%253D213934%2526a%253D213919%2526po%253D22,00.asp?p=n](http://www.pcmag.com/slideshow_viewer/0,3253,1%253D213934%2526a%253D213919%2526po%253D22,00.asp?p=n) (visited Feb. 16, 2012).

<sup>902</sup> Mark Hopkins, *MeeVee Lays Off 3/4 of Staff: CEO and CTO Step Down*, Mashable, Feb. 29, 2008, <http://mashable.com/2008/02/29/meevee-layoff/> (visited Feb. 16, 2012) (“MeeVee Layoff”).

<sup>903</sup> *Id.*; MeeVee 8 Million.

<sup>904</sup> *Id.*; MeeVee Layoff; Liz Gannes, *MeeVee in Tatters, Drops Staff and CEO*, New Tee Vee, Mar. 3, 2008, <http://gigaom.com/video/meevee-in-tatters-drops-staff-and-ceo/> (visited Feb. 16, 2012) (“MeeVee in Tatters”).

decline, and those numbers remained low.<sup>905</sup> In February 2008, the company's CEO and CTO resigned, and a large portion of MeeVee's staff was laid off.<sup>906</sup> MeeVee was purchased by Live Universe in May 2008<sup>907</sup> but ultimately ceased operations in December 2011.<sup>908</sup>

284. Sezmi – which provided a hybrid of over-the-air, cable, and online video services<sup>909</sup> – also exited the market recently. The service used a consumer-purchased set-top box with an Internet connection and DVR functionality and a modular DTV antenna to provide access to broadcast stations, cable networks, and Internet content.<sup>910</sup> Sezmi's antenna picked up local digital television broadcast stations off the air, and the service used digital television spectrum leased from local broadcasters, as well as the Internet, to transmit cable networks to subscribers.<sup>911</sup> Sezmi's broadband connection also allowed the service to provide on-demand services (e.g., rentals and sales from an extensive library of movies and television shows), as well as access to archived video and Internet content from providers like YouTube and Comedy Central.<sup>912</sup> Sezmi offered very effective content selection. Its set-top box learned customers' content preferences and downloaded programming automatically.<sup>913</sup> The service provided individualized recommendations,<sup>914</sup> and customers could set up different accounts for different individuals, so that one member of the household did not have to wade through content chosen for someone else.<sup>915</sup> Sezmi never really caught on, however, for many reasons, including a lack of compelling content compared to its rivals.<sup>916</sup> For example, Sezmi offered limited sports content (ESPN

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<sup>905</sup> See MeeVee Layoff.

<sup>906</sup> See MeeVee in Tatters; MeeVee Layoff.

<sup>907</sup> Michael Arrington, *MeeVee Finds A Home, Acquired By Live Universe*, Tech Crunch, May 7, 2008, <http://techcrunch.com/2008/05/07/meevee-acquired-by-live-universe/> (visited Feb. 16, 2012).

<sup>908</sup> Wendy Boswell, *Use MeeVee to Find Local TV Listings*, About.com, <http://websearch.about.com/od/dailywebsearchtips/qt/dnt0812.htm> (visited Feb. 16, 2012).

<sup>909</sup> See Eric R. Taub, *Sezmi Looks to Bring Broadcast TV to Broadband*, N.Y. TIMES, June 24, 2009 <http://gadgetwise.blogs.nytimes.com/2009/06/24/will-sezmi-say-it-to-you/> (visited Mar. 5, 2012) (“Sezmi Broadband”); Jon Healy, *How Sezmi Stacks Up*, L.A. TIMES, May 28, 2010 <http://latimesblogs.latimes.com/technology/2010/05/how-sezmi-stacks-up.html> (visited Mar. 5, 2012) (“How Sezmi Stacks Up”).

<sup>910</sup> See *id.*; Harry McCracken, *Is Sezmi a Cable TV Killer?*, Technologizer, Nov. 16, 2009, <http://technologizer.com/2009/11/16/sezmi/> (visited Mar. 5, 2012) (“Sezmi Cable Killer”).

<sup>911</sup> See *id.*; Sezmi Broadband.

<sup>912</sup> See Sezmi Cable Killer; Mark Hachman, *New Sezmi Set-top Blows Away the TV*, PC MAGAZINE, May 1, 2008, <http://www.pcmag.com/article2/0,2817,2289653,00.asp> (visited Mar. 5, 2012) (“Sezmi Blows Away”).

<sup>913</sup> See Sezmi Broadband.

<sup>914</sup> See Sezmi Blows Away.

<sup>915</sup> See Sezmi Broadband.

<sup>916</sup> See Richard Lawler, *Sezmi's Cable/Satellite Alternative TV Service to Shut Down Monday, Won't Be Missed*, Engadget, Sept. 24, 2011, <http://www.engadget.com/2011/09/24/sezmi-s-cable-satellite-alternative-tv-service-to-shut-down-mo/> (visited Mar. 5, 2012) (“Sezmi to Shut Down”); Ryan Lawler, *Sezmi Says Goodbye. Here's Why.*, Gigaom, Sept. 26, 2011, <http://gigaom.com/video/sezmi-says-goodbye-heres-why/> (visited Mar. 5, 2012) (“Sezmi Says Goodbye”).

and regional sports networks were unavailable),<sup>917</sup> and did not provide access to OVD content from Hulu or Netflix.<sup>918</sup> Ultimately, Sezmi abandoned its consumer OVD service in September 2011.<sup>919</sup>

### 3. OVD Conduct

285. In addition to industry structure, a second key element of our analysis of OVD competition is an examination of the conduct of industry participants – in particular, the business models and competitive strategies of these entities. In this section of the Report, we discuss OVD competition in terms of both price and non-price rivalry.

286. As the delivery of online video is in its infancy, no single business strategy has emerged as the industry standard. As several commenters recognize, technology, delivery mechanisms, content acquisition, licensing strategies, and consumer demand patterns all remain in flux.<sup>920</sup>

287. An OVD's business model must account for the existence of broadcasters and MVPDs. MVPDs in particular have taken steps in recent years to expand the libraries of on-demand content they can provide to their customers.<sup>921</sup> This strategy puts pressure on OVDs to continue to expand their content libraries and/or to offer unique content. Moreover, so-called TV Everywhere services allow MVPDs to compete with unaffiliated OVDs by providing free on-demand Internet video to authenticated MVPD customers.<sup>922</sup>

288. An OVD also must contend with competition from DVDs, such as the DVD rental side of Netflix's business,<sup>923</sup> Redbox, which allows customers to rent DVDs and Blu-ray discs from more than 28,000 kiosks nationwide,<sup>924</sup> and Blockbuster, which provides DVD rentals by mail.<sup>925</sup> In addition, while

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<sup>917</sup> See Sezmi to Shut Down; Sezmi Cable Killer; How Sezmi Stacks Up.

<sup>918</sup> See *id.*

<sup>919</sup> See Sezmi Says Goodbye; Sezmi to Shut Down.

<sup>920</sup> See, e.g., Google 6/8/11 Comments at 4; NAB 6/8/11 Comments at 31 (noting variety of programming, revenue models, and distribution options in the OVD marketplace).

<sup>921</sup> See, e.g., Heather Wilner, *The Best Gets Better, and a Whole Lot Bigger: FiOS TV VOD Library Reaches 24,000*, Verizon at Home, Apr. 25, 2011, <http://forums.verizon.com/t5/Verizon-at-Home/The-Best-Gets-Better-and-a-Whole-Lot-Bigger-FiOS-TV-VOD-Library/ba-p/305255> (visited Feb. 16, 2012) (noting that Verizon FiOS offers more than 24,000 monthly VOD titles (movies and television shows), including 3,800 HD VOD titles per month); Todd Spangler, *Comcast: VOD Movie Views In Our Markets Well Ahead Of Netflix's*, MULTICHANNEL NEWS, Apr. 14, 2011, <http://www.multichannel.com/article/466818-Comcast-VOD-Movie-Views-In-Our-Markets-Well-Ahead-Of-Netflix-s.php> (visited Feb. 16, 2012) (noting Comcast's statements that the company offers more than 11,000 VOD movies in many markets and an average of more than 350 million VOD views per month overall, of which tens of millions are movies).

<sup>922</sup> See *supra*, ¶¶ 21, 96; Netflix 6/8/11 Comments at 6 (“By bundling traditional MVPD services with Internet delivery of content, vertically integrated MVPDs leverage their dominant market position at the expense of competitive online offerings.”).

<sup>923</sup> Netflix, *Netflix Plans*, <http://www.netflix-dvd.com/netflix-plans.html> (visited Feb. 16, 2012).

<sup>924</sup> Redbox, *Redbox Info*, <http://www.redbox.com/facts> (visited Feb. 16, 2012).

<sup>925</sup> Blockbuster, *Blockbuster Total Access*, <https://www.blockbuster.com/signup/m/plan> (visited Mar. 5, 2012). In addition to DVD rentals, the company's “Blockbuster Total Access” service includes video games by mail, the ability to exchange discs in Blockbuster stores, and streaming of video content to the TV and PC. See *id.*; Wade Holden, *DISH's Timing Perfect for Blockbuster Streaming Reveal*, SNL Kagan, Sept. 29, 2011.

DVD sales have been declining in recent years, in part due to competition from OVDs,<sup>926</sup> DVDs still constitute a competitor to the online delivery of video content. DVDs often offer extras that appeal to consumers, such a director's cuts, deleted scenes, commentary, and additional content,<sup>927</sup> which often are not available via OVDs.<sup>928</sup>

289. In addition, an OVD's business model needs to account for competition from other OVDs, bearing in mind that, while most consumers subscribe to only one MVPD, it is easy for consumers to access video content via multiple OVDs.

**a. Price Rivalry**

290. Unlike the broadcasting or MVPD industries, the OVD industry does not have a single revenue model. Depending on the OVD, consumers can gain access to programming in several ways, including: (1) for free, usually with advertising; (2) through a subscription service, with or without advertising; (3) on a per program basis for a fee; or (4) via "electronic sell-through" ("EST"), where a consumer pays a one-time fee to download a television show, movie, or other media to be stored locally on a hard drive.<sup>929</sup> Any OVD may implement any one or a combination of these business models.

291. Some OVDs provide video content for free. As a general rule, free OVD content is usually supported by advertisements delivered to viewers. Network portals, for example, generally provide their streams to users free of charge.<sup>930</sup> Yahoo Screen and Sony's Crackle service provide free content, and most of the content available on YouTube is free as well.<sup>931</sup>

292. Other OVDs use subscription-based models. For example, while Hulu's basic service is free, Hulu Plus charges subscribers \$7.99 a month for access to premium content, HD video (when available), and the ability to watch video on non-PC devices such as smartphones, tablets, gaming consoles, smart televisions, or Blu-ray players, or through set-top boxes.<sup>932</sup> Content delivered to Hulu Plus subscribers also contains advertisements.<sup>933</sup> For a flat monthly fee (as of February 2012, \$7.99),

<sup>926</sup> See, e.g., David Lieberman, *DVD Disaster? Study Says Sales Plummeted In 2010, Contrary To Industry Report*, Deadline, May 12, 2011, <http://www.deadline.com/2011/05/dvd-disaster-study-says-sales-plummeted-in-2010-contrary-to-industry-report/> (visited Feb. 16, 2012); Shane Smith, *Dreamworks Exec on DVD Sales Decline: "Greed Killed the Goose,"* Inside Redbox, May 12, 2010, <http://www.insideredbox.com/dreamworks-exec-on-dvd-sales-decline-greed-killed-the-geese/> (visited Feb. 16, 2012).

<sup>927</sup> See, e.g., DVD Special Features & Extras, <http://dvdspecialfeatures.net/> (Internet website providing "An Online Database of DVD Extras and Bonus Features" including director's cuts, behind the scenes footage, deleted scenes, bloopers, and other content).

<sup>928</sup> See, e.g., Liz Gannes, *DVD Extras Are the Future of the Internet*, Gigaom, Aug. 5, 2008, <http://gigaom.com/video/dvd-extras-are-the-future-of-the-internet/> (visited Mar. 6, 2012).

<sup>929</sup> Home Media Magazine, *Digital Glossary*, <http://www.homemediamagazine.com/electronic-delivery/digital-glossary> (visited Feb. 27, 2012) ("Digital Glossary"). When discussing EST, this particular report focuses on situations where video content "is made available to consumers on a download-to-own basis, as opposed to . . . where content is rented for a specific period of time." Anytime On Demand, *Media Centre: Glossary of Terms*, [http://www.anytimeondemand.com/glossary\\_of\\_terms.html#electronic](http://www.anytimeondemand.com/glossary_of_terms.html#electronic) (visited Feb. 27, 2012).

<sup>930</sup> See, e.g., ABC Network Portal, NBC Network Portal, CBS Network Portal, and FOX Network Portal.

<sup>931</sup> See, e.g., Yahoo, *Yahoo Screen*, <http://screen.yahoo.com> (visited Mar. 22, 2012); YouTube, <http://www.youtube.com>. See also *supra*, ¶ 248.

<sup>932</sup> See *Introducing Hulu Plus*; Hulu, *Hulu Plus > Devices*, <http://www.hulu.com/plus/devices> (visited Feb. 29, 2012) ("Hulu Plus Devices"); Hulu, *Hulu Plus*, <http://www.hulu.com/plus-> (visited Feb. 29, 2012).

<sup>933</sup> Hulu, *Help: Why Are There Ads In Hulu Plus?*, <http://www.hulu.com/support/article/20356372> (visited Feb. 24, 2012) ("Ads In Hulu Plus").

Netflix's subscription streaming video service allows a subscriber to access an unlimited amount of online content, commercial free.<sup>934</sup> Sometimes OVD subscriptions are part of a larger subscription product. One example is, Amazon Prime, a service from Amazon.com that, for payment of an annual fee, gives subscribers free two-day shipping on many items sold on its website, free book borrowing for Amazon Kindle, and unlimited, commercial-free, instant streaming of thousands of movies and television shows.<sup>935</sup>

293. As noted above, the four major U.S. professional sports leagues offer subscription-based online video services as well. These services provide live games online, each with its own variations or tiers depending on factors such as in-market availability; home equipment; and/or MVPD subscription.<sup>936</sup>

294. Some OVDs offer "rental" content on a pay-per-program basis. For example, under YouTube's movie rental service, a user that purchases a "24 hour pass" for a movie may begin streaming that movie any time within the next 30 days, with all viewing completed within 24 hours of initiating playback.<sup>937</sup> Other OVDs, such as Facebook, Vudu, and Amazon have similar services, allowing users to view a movie or program during a fixed period of time for a one-time fee.<sup>938</sup>

295. The EST model is also prevalent. A consumer who purchases video content via EST can watch that content as many times as he or she desires (although certain files might become unusable over time or may not be viewable using competing platforms).<sup>939</sup> One well-known EST OVD is Apple, which provides downloadable media files, including movies and television shows, via iTunes.<sup>940</sup> Once a file is

<sup>934</sup> See Netflix Signup; Don Reisinger, *Netflix Not Into Ads*, CNET, Feb. 11, 2011, [http://news.cnet.com/8301-13506\\_3-20031514-17.html](http://news.cnet.com/8301-13506_3-20031514-17.html) (visited Feb. 24, 2012).

<sup>935</sup> See Amazon Prime.

<sup>936</sup> See, e.g., Mark Newman, *Must-have MLB.TV Features New Lower Prices*, mlb.com, May 2, 2011, [http://mlb.mlb.com/news/article.jsp?ymd=20110430&content\\_id=18432398&vkey=news\\_mlb&c\\_id=mlb](http://mlb.mlb.com/news/article.jsp?ymd=20110430&content_id=18432398&vkey=news_mlb&c_id=mlb) (visited Feb. 24, 2012); DIRECTV, *NFL Sunday Ticket*, [http://www.directv.com/DTVAPP/content/sports/nfl\\_online\\_mobile](http://www.directv.com/DTVAPP/content/sports/nfl_online_mobile) (visited Feb. 24, 2012) ("NFL Mobile"); Phillip Rosenberg, *Kickoff the NFL Season on PS3 With the NFL SUNDAY TICKET App, Available Today on Playstation Network*, PlayStation.Blog, Sept. 6, 2011, <http://blog.us.playstation.com/2011/09/06/kickoff-the-nfl-season-on-ps3-with-the-nfl-sunday-ticket-app-available-today-on-playstation-network/> (visited Feb. 24, 2012); NBA.com, *NBA League Pass*, <http://www.nba.com/leaguepass/index.html> (visited Feb. 24, 2012); NBA.com, *NBA League Pass Broadband*, <https://account.nba.com/leaguepass/broadband/> (visited Feb. 24, 2012); NBA.com, *NBA League Pass Mobile*, <http://www.nba.com/leaguepass/mobile/> (visited Feb. 24, 2012); NHL.com, *NHL GameCenter Live*, <https://gamecenter.nhl.com/nhlgc/secure/gclsignup> (visited Feb. 24, 2012).

<sup>937</sup> YouTube World, *YouTube Movie Rental Service Streams 3000 More Movies*, <http://youtubeking10.blogspot.com/2011/05/youtube-movie-rental-service-streams.html> (visited Feb. 24, 2012); Barb Gonzalez, *YouTube Movie Rental Service – Review*, About.com, <http://hometheater.about.com/od/Network-Media-Player-Reviews/fr/YouTube-Movie-Rental-Service-Review.htm> (visited Feb. 24, 2012).

<sup>938</sup> See, e.g., Ben Fritz and Jessica Guynn, *Facebook to Offer Movie Rentals*, L.A. TIMES, Mar. 9, 2011, <http://articles.latimes.com/2011/mar/09/business/la-fi-facebook-movies-20110309> (Facebook movie rental allows a user to watch a movie within a 48 hour period for \$3.00) (visited Feb. 24, 2012); Vudu, *Terms of Service*, <http://www.vudu.com/termservice.html> (when content is rented from Vudu, a user "will typically have 30 days to initiate viewing. Once initiated, viewing must typically be completed within 24 hours or before the end of the 30th day from date of initiation, whichever occurs sooner.") (visited Feb. 24, 2012); Amazon.com, *Amazon Instant Video*, [http://www.amazon.com/gp/video/ontv/start/ref=sv\\_mov\\_aiv\\_1](http://www.amazon.com/gp/video/ontv/start/ref=sv_mov_aiv_1) ("Rentals start at \$2.99. If you rent, you'll have 30 days from when you rent to start watching, and once you've downloaded or start watching, most movies have a 24-hour window to finish watching.") (visited Feb. 24, 2012).

<sup>939</sup> Digital Glossary.

<sup>940</sup> What's On iTunes.

downloaded, users can watch it as many times as they want on their computers, televisions, iPods, iPhones, and/or iPads.<sup>941</sup> Sales, as opposed to rentals, of movies by Vudu and Amazon follow an EST model as well.<sup>942</sup>

#### b. Non-Price Rivalry

296. OVDs compete with, and differentiate themselves from, one another based on several non-price factors. Key points of non-price rivalry include the content of an entity's program library; advertising; and multi-device accessibility.

297. *Content Library.* The breadth and timeliness of an OVD's video content library helps establish its identity and business strategy. Increasingly, OVD consumers expect access to a wide variety of content, including newly released movies and recently aired television shows. As discussed below, many of the major players in the OVD marketplace have worked to expand and improve their content libraries, but face challenges in doing so.

298. The degree to which broadcast and cable networks make their programming available online via their portals varies tremendously. Some networks have been aggressive in making their content libraries fully available, particularly through their applications. For example, through HBO Go, HBO subscribers can obtain unlimited access to every episode of every season of HBO original programming without additional cost.<sup>943</sup>

299. The bigger OVD players tend to provide large libraries of content to users. For example, NBC, ABC, and FOX all provide content to Hulu, including current and past episodes of television programs.<sup>944</sup> Hulu Plus subscribers have access to all current-season episodes of many hit shows, plus classic shows, including many full-series runs.<sup>945</sup> This content is provided in HD, where available.<sup>946</sup> In late 2011, Hulu acquired licensing rights to make 11 sitcoms from Carsey Werner TV Distribution available to Hulu Plus subscribers, and entered into a five-year licensing agreement to stream in-season episodes of The CW network television shows to its subscribers.<sup>947</sup> The parent companies that have invested in Hulu have made full-length movies – often library content several years or decades old –

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<sup>941</sup> *Id.*

<sup>942</sup> Vudu.com, *Knowledgebase Home > Billing*, <http://supports.vudu.com/questions/93/How+much+does+VUDU+cost%3F+> (visited Feb. 27, 2012); Amazon.com, *Instant Video Terms of Use*, <http://www.amazon.com/gp/help/customer/display.html?nodeId=200026970> (visited Feb. 27, 2012).

<sup>943</sup> HBO Go, *What is HBO Go?*, <http://www.hbogo.com/#whatis/> (visited Mar. 12, 2012).

<sup>944</sup> Hulu, *Frequently Asked Questions*, [http://www.hulu.com/about/media\\_faq](http://www.hulu.com/about/media_faq) (visited Feb. 27, 2012). CBS still has not provided any content for Hulu in the U.S. market. *Id.*; Nikki Finke, *SURPRISE! Holdout CBS To Deliver Content To Hulu – But Only For Japan Market*, Deadline, Sept. 1, 2011, <http://www.deadline.com/2011/09/surprise-cbs-to-deliver-content-to-hulu-for-japanese-subscribers/> (visited Feb. 27, 2012).

<sup>945</sup> Introducing Hulu Plus.

<sup>946</sup> *Id.*

<sup>947</sup> Haseeb Ali, *Report: Hulu Secures Licensing Rights to 11 Sitcoms*, SNL Kagan, Nov. 23, 2011; Tim Kenneally, *CW Strikes 5-Year Deal With Hulu for New Shows*, Reuters, Oct. 28, 2011, <http://www.reuters.com/article/2011/10/28/idUS190340544120111028> (visited Feb. 28, 2012).

available on Hulu as well.<sup>948</sup> As of December 2011, Hulu's website lists more than 300 content partners.<sup>949</sup>

300. In addition, Hulu has announced plans to raise capital to expand into original programs that it would make available both to free users and paid subscribers.<sup>950</sup> Hulu may spend as much as \$500 million on new television shows and films.<sup>951</sup> Andy Forssell, chief content officer at Hulu, states that, "[w]e considered giving earlier access to [Hulu] Plus users and other benefits, but right now the aim is to get . . . [shows and films] out to as many folks as possible."<sup>952</sup>

301. Netflix has expanded its library of streaming content in recent years as well. Netflix first began to allow viewers to watch movies and television shows on their computers in 2007 on a "metered" basis of hours. In January 2008, Netflix offered unlimited PC streaming to consumers with unlimited subscriptions.<sup>953</sup> When Netflix first introduced its Watch Instantly streaming video service, its catalog was comprised mostly of older movies.<sup>954</sup> On October 1, 2008, Netflix announced a partnership deal with Starz to bring 2,500 new movies and television shows to Watch Instantly.<sup>955</sup> Netflix made a more aggressive move to distribute newer movies when it agreed in August 2010 to pay an estimated \$900 million to cable channel Epix for the five-year streaming rights to films from Paramount Pictures, Lionsgate, and Metro-Goldwyn-Mayer.<sup>956</sup> Now, Netflix has streaming deals with almost every major television content creator, including, but not limited to, NBC, ABC, CBS, FOX, The CW, and Time Warner.<sup>957</sup> On the other hand, Starz recently ended its streaming relationship with Netflix, causing the

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<sup>948</sup> Hulu, *Movies, All Universal Pictures Titles*, <http://www.hulu.com/studio/universal-pictures?sort=name> (listing of Universal Pictures movie titles) (visited Feb. 27, 2012); Hulu, *Movies, All Twentieth Century Fox Titles*, <http://www.hulu.com/studio/twentieth-century-fox?sort=name> (listing of Twentieth Century Fox movie titles) (visited Feb. 27, 2012); Hulu, *Movies, All Miramax Titles*, <http://www.hulu.com/studio/miramax?sort=name> (listing of Miramax movie titles) (visited Feb. 27, 2012).

<sup>949</sup> Hulu, *Content*, <http://www.hulu.com/partners> (visited Feb. 27, 2012).

<sup>950</sup> Andy Fixmer, *Hulu Plans to Raise Money to Fund Expansion into Original Shows*, BLOOMBERG BUSINESSWEEK, Jan. 18, 2012, <http://www.businessweek.com/news/2012-01-18/hulu-plans-to-raise-money-to-fund-expansion-into-original-shows.html> (visited Feb. 28, 2012).

<sup>951</sup> *Id.*

<sup>952</sup> *Id.*

<sup>953</sup> See Netflix, Press, <https://signup.netflix.com/Press> (visited Feb. 28, 2012); *supra*, ¶ 252.

<sup>954</sup> See Saul Hansell, *iTunes Movie Rentals and Netflix Online: Different Markets*, N.Y. TIMES, Jan. 16, 2008, <http://bits.blogs.nytimes.com/2008/01/16/itunes-movie-rentals-and-netflix-online-different-markets> (visited Feb. 29, 2012). At the beginning of 2008, Watch Instantly had only 6,000 titles. *Id.*

<sup>955</sup> Dawn Chmielewski, *More Mainstream Movies for Netflix Online*, L.A. TIMES, Oct. 1, 2008, <http://latimesblogs.latimes.com/entertainmentnewsbuzz/2008/10/more-mainstream.html> (visited Feb. 29, 2012).

<sup>956</sup> Brian Stelter, *Netflix to Stream Films from Paramount, Lions Gate, MGM*, N.Y. TIMES, Aug. 10, 2010, <http://mediadecoder.blogs.nytimes.com/2010/08/10/netflix-to-stream-films-from-paramount-lionsgate-mgm> (visited Feb. 29, 2012).

<sup>957</sup> See Paul Bond, *What Hollywood Execs Privately Say About Netflix*, THE HOLLYWOOD REPORTER, Jan. 14, 2011, <http://www.hollywoodreporter.com/news/hollywood-execs-privately-netflix-71957> (visited Feb. 29, 2012); Paul Bond, *Netflix Renews Deal With NBCUniversal for Streaming TV Shows, Movies*, THE HOLLYWOOD REPORTER, July 21, 2011, <http://www.hollywoodreporter.com/news/netflix-renews-deal-nbcuniversal-streaming-210792> (visited Feb. 29, 2012) ("Netflix NBC Deal"); Todd Spangler, *Disney/ABC Extends Netflix Deal, Cuts One With Amazon*, MULTICHANNEL NEWS, Oct. 31, 2011, <http://www.multichannel.com/article/475953-Disney-ABC-Extends-Netflix-Deal-Cuts-One-With-Amazon.php> (visited Feb. 29, 2012); Netflix CW Deal.

OVD to lose access to a major source of new movie streaming content.<sup>958</sup> Many other studios reportedly are reluctant to allow Netflix to stream new titles for fear that doing so would harm DVD sales and video-on-demand rental revenues.<sup>959</sup>

302. In some cases, Netflix is able to stream content to users soon after it initially airs. For example, Netflix's deal with NBC allows it to stream episodes of many shows one day after they are initially broadcast.<sup>960</sup> In other cases, users must wait before certain content is available for streaming via Netflix. Under Netflix's agreement with Disney/ABC, for example, episodes from the current season's series will not be made available to the OVD until 30 days after the last episode of each season airs.<sup>961</sup>

303. Netflix provides an illustrative example of how OVDs acquire and distribute studios' content. Netflix has provided an outlet for studios to recoup their costs for network programming.<sup>962</sup> For example, in 2011 Netflix purchased streaming rights from Warner Brothers for FX's *Nip/Tuck* (after Warner Brothers failed to sell off-network syndication rights) and from Lionsgate for AMC's *Mad Men*.<sup>963</sup> The latter was unusual because *Mad Men* has not aired in syndication, as have most other programs included in subscription video-on-demand ("SVOD").<sup>964</sup> As of 2011, 60 percent of Netflix streams were television episodes.<sup>965</sup> Netflix has been increasing the number of television series it offers (from 477 to 1,080 between January 2011 and September 2011) faster than the number of movies it offers (from 8,950 to 9,342 during the same period).<sup>966</sup> Moreover, as discussed above, Netflix has also commissioned several original television series.<sup>967</sup> Netflix develops programming based on analysis of its database of its customers' viewing patterns and quality ratings. Its intent is to attract a smaller but more dedicated cadre of viewers than network programming. Netflix offers television consumers the ability to view sequentially episodes of television series that they may have missed. Thus, Netflix may create demand for in-season viewing of network series. Netflix's impact on movie audiences may be different, leading studios to limit delivery of streaming content.<sup>968</sup>

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<sup>958</sup> Ben Fritz, Joe Flint & Dawn C. Chmielewski, *Starz to End Streaming Deal with Netflix*, L.A. TIMES, Sept. 2, 2011, <http://articles.latimes.com/2011/sep/02/business/la-fi-ct-netflix-starz-20110902> (visited Feb. 29, 2012).

<sup>959</sup> Netflix CW Deal.

<sup>960</sup> Netflix NBC Deal.

<sup>961</sup> Netflix Inc., *Netflix and Disney-ABC Television Group Announce Extension of Existing Licensing Agreement to Stream TV Shows* (press release), Oct. 31, 2011.

<sup>962</sup> Andrew Wallenstein, *Digital Dollars Amp Syndie Biz*, VARIETY, July 21, 2011, <http://www.variety.com/article/VR1118040194> (visited Feb. 29, 2012).

<sup>963</sup> Deana Myers, *Digital Rights in Off-Network Syndication Deals*, SNL Kagan, Apr. 20, 2011.

<sup>964</sup> Andrew Wallenstein, *ABC-WBTV Deal Rewrites Syndie, Digital Rights*, VARIETY, Nov. 14, 2011, <http://www.variety.com/article/VR1118046062Cached> (visited Feb. 29, 2012). Subscription OVDs, such as Netflix and Amazon Prime, are considered subscription video-on-demand services.

<sup>965</sup> Ben Fritz & Joe Flint, *Netflix Less About Flicks, More About TV*, L.A. TIMES, Feb. 4, 2012, <http://articles.latimes.com/2012/feb/04/business/la-fi-ct-netflix-20120205> (visited Feb. 29, 2012); Perkin di Grazia, *Netflix's Future is In TV*, SNL Kagan, Oct. 24, 2011.

<sup>966</sup> *Id.*

<sup>967</sup> *See supra*, ¶ 262.

<sup>968</sup> Netflix 2010 Form 10-K at 6-7.

304. YouTube provides a significant amount of streaming television content. Each of the four major broadcast networks has a YouTube channel,<sup>969</sup> as do a host of basic<sup>970</sup> and premium<sup>971</sup> cable networks. These channels focus on short clips, however, rather than full episodes. YouTube's ability to acquire distribution rights to long-form broadcast television content is limited by the relationships News Corp., NBC Universal, and Disney have with Hulu.<sup>972</sup> YouTube also partners with a wide variety of third-party content creators to provide numerous free channels to users.<sup>973</sup> In October 2011, YouTube announced plans to launch more than 100 new video channels featuring ad-supported free original content provided by third-party partners such as *The Wall Street Journal*, Jay-Z, Madonna, Ashton Kutcher, and Shaquille O'Neal.<sup>974</sup> The YouTube channels will feature videos in 20 different categories like sports, comedy, and news.<sup>975</sup>

305. In addition, YouTube allows users to rent (*i.e.*, stream on a pay-per-movie basis) films from the Sundance Film Festival and thousands of full-length feature films from major Hollywood studios.<sup>976</sup> In November 2011, it announced that hundreds of Walt Disney movies would be coming to

<sup>969</sup> YouTube, *NBC Network*, <http://www.youtube.com/user/NBC> (visited Feb. 29, 2012); YouTube, *ABC Television*, <http://www.youtube.com/user/abcnetwork?blend=2&ob=4> (visited Feb. 29, 2012); YouTube, *CBS*, <http://www.youtube.com/user/cbs?blend=1&ob=4> (visited Feb. 29, 2012); YouTube, *FOX*, <http://www.youtube.com/user/FoxBroadcasting> (visited Feb. 29, 2012).

<sup>970</sup> See, e.g., YouTube, *TruTV*, <http://www.youtube.com/user/truTVnetwork> (visited Feb. 29, 2012); YouTube, *ESPN*, <http://www.youtube.com/user/espn?blend=1&ob=4> (visited Feb. 29, 2012); YouTube, *Discovery Channel*, <http://www.youtube.com/user/discoverynetworks?blend=1&ob=4> (visited Feb. 29, 2012); YouTube, *Lifetime Television*, <http://www.youtube.com/user/lifetime?blend=1&ob=4> (visited Feb. 29, 2012); YouTube, *History*, <http://www.youtube.com/user/historychannel?blend=1&ob=4> (visited Feb. 29, 2012); YouTube, *TLC*, <http://www.youtube.com/user/tlc?blend=1&ob=4> (visited Feb. 29, 2012).

<sup>971</sup> See, e.g., YouTube, *HBO's Channel*, <http://www.youtube.com/user/HBO?feature=watch> (visited Feb. 29, 2012); YouTube, *Showtime*, <http://www.youtube.com/user/showtime?blend=1&ob=4> (visited Feb. 29, 2012); YouTube, *Cinemax's Channel*, <http://www.youtube.com/user/cinemax?blend=1&ob=4> (visited Feb. 29, 2012).

<sup>972</sup> See, e.g., Peter Kafka, *Hulu Buyers Would Get Exclusive Content, With Strings Attached*, All Things D, June 27, 2011, <http://allthingsd.com/20110627/hulu-buyers-would-get-exclusive-content-with-strings-attached/> (discussing Hulu's content relationships with Disney and News Corp) (visited Feb. 29, 2012).

<sup>973</sup> See YouTube, *Add Channels*, <http://www.youtube.com/members?t=a&p=1&s=ms&g=0> (browsable menu of YouTube channels) (visited Feb. 29, 2012).

<sup>974</sup> See Erik Gruenwedel, *YouTube Bows Original Content Channels; Google TV Gets Reboot*, HOME MEDIA MAGAZINE, Oct. 29, 2011, <http://www.homemediamagazine.com/streaming/youtube-bows-original-content-channels-google-tv-gets-reboot-25503> (visited Feb. 24, 2012); Michael Grotticelli, *YouTube to Launch 100 Online Channels*, BROADCAST ENGINEERING, Nov. 3, 2011, [http://broadcastengineering.com/news/youtube\\_launch\\_100\\_channels\\_110311/](http://broadcastengineering.com/news/youtube_launch_100_channels_110311/) (visited Feb. 28, 2012); *YouTube to Launch 100 Channels; Madonna, Ashton Kutcher, Jay-Z to Produce Shows*, INTERNATIONAL BUSINESS TIMES, Oct. 29, 2011, <http://www.ibtimes.co.uk/articles/239892/20111029/youtube-launch-100-channels-madonna-ashton-kutcher.htm> (visited Feb. 28, 2012).

<sup>975</sup> See *id.*

<sup>976</sup> Athima Chansanchai, *Now at YouTube: 3,000 More Movie Rentals*, msnbc.com, May 11, 2011, <http://technolog.msnbc.msn.com/news/2011/05/10/6617922-now-at-youtube-3000-more-movie-rentals> (visited Feb. 29, 2012) ("Now at YouTube"); YouTube, *Broadcasting Ourselves, the Official YouTube Blog, Get More Into Movies on YouTube*, May 9, 2011, <http://youtube-global.blogspot.com/2011/05/get-more-into-movies-on-youtube.html> (visited Feb. 29, 2012).

YouTube.<sup>977</sup> In many cases, YouTube's movies are available for streaming simultaneously with DVD release.<sup>978</sup>

306. Amazon has 13,000 titles available on Amazon Prime,<sup>979</sup> and over 100,000 movies and television shows available overall.<sup>980</sup> The company has been entering into deals recently to grow its television catalog in particular. In July 2011, Amazon acquired the rights to stream thousands of CBS shows online, in a deal estimated to be worth more than \$100 million.<sup>981</sup> Amazon also obtained a license from Disney in October 2011 that will make more than 800 episodes of ABC television shows available to Amazon Prime subscribers.<sup>982</sup>

307. Vudu's library has more than 30,000 movies and television episodes, and the company claims it has the largest catalog of HD movies available on demand.<sup>983</sup> Almost all of its movies are available the same day that they are released on DVD.<sup>984</sup>

308. *Advertisements.* OVDs also compete based on the amount and type of advertising contained in the programming they provide to consumers. Often, OVD content that is provided to users free of charge will contain advertisements, and users expect this to be the case. Subscription or pay-per-program OVD content, however, generally contains fewer or no advertisements.

309. Crackle and Yahoo Screen provide free content that contains advertisements.<sup>985</sup> Similarly, full television episodes viewed via the network portals for the four major broadcast networks contain advertisements,<sup>986</sup> as does content provided via Hulu's non-subscription service.<sup>987</sup> Hulu Plus content contains advertisements as well, purportedly to keep the subscription price low and because of the

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<sup>977</sup> YouTube, *Broadcasting Ourselves, the Official YouTube Blog, Welcoming Your Favorite Disney Movies to Rent on YouTube*, Nov. 23, 2011, <http://youtube-global.blogspot.com/2011/11/welcoming-your-favorite-disney-movies.html> (visited Feb. 29, 2012).

<sup>978</sup> Now at YouTube.

<sup>979</sup> See Amazon.com, *What is Prime Instant Video*, <http://www.amazon.com/gp/feature.html?ie=UTF8&docId=1000739191> (visited Feb. 29, 2012).

<sup>980</sup> Matt Burns, *Watch Out Netflix, Amazon Instant Video Reaches 100,000 On-Demand Titles*, Tech Crunch, Aug. 18, 2011, <http://techcrunch.com/2011/08/18/watch-out-netflix-amazon-instant-video-reaches-100000-on-demand-titles/> (visited Feb. 29, 2012).

<sup>981</sup> *CBS Licenses Shows to Amazon in Challenge to Netflix and Hulu*, ADVERTISING AGE, July 20, 2011, <http://adage.com/article/mediaworks/cbs-licenses-shows-amazon-challenge-netflix-hulu/228815/> (visited Feb. 29, 2012).

<sup>982</sup> *The Streaming Video Wars: Amazon Prime Adds ABC and Disney TV Shows*, ADVERTISING AGE, Oct. 31, 2011, <http://adage.com/article/mediaworks/streaming-war-amazon-prime-adds-abc-disney-tv-shows/230732/> (visited Feb. 29, 2012).

<sup>983</sup> Jillian, *Taking a Swing at Netflix, VUDU Expands TV Content Library*, PadGadget, Sept. 22, 2011, <http://www.padgadget.com/2011/09/22/taking-a-swing-at-netflix-vudu-expands-tv-content-library/> (visited Feb. 15, 2012); Vudu, *The Vudu Difference*, <http://www.vudu.com/difference.html> (visited Feb. 15, 2012).

<sup>984</sup> See *id.*

<sup>985</sup> David Jackson, *Sony's Crackle Expands Ad-Supported Video Streaming*, The Stream Report, Mar. 29, 2011, <http://thestreamreport.com/?p=262> (visited Feb. 29, 2012); E.B. Boyd, *Yahoo Launches Video Destination Site*, FAST COMPANY, Oct. 4, 2011, <http://www.fastcompany.com/1784990/yahoo-launches-video-destination-site> (visited Feb. 29, 2012).

<sup>986</sup> See ABC Network Portal; NBC Network Portal; CBS Network Portal; FOX Network Portal.

<sup>987</sup> About Hulu.

licensing costs associated with premium content.<sup>988</sup> Hulu has distinguished itself from its broadcasting counterparts by showing fewer advertisements. For example, it has just two minutes of promotions in an episode of a situation comedy compared to eight minutes of advertising on broadcast television.<sup>989</sup> Hulu also gives users some control over the advertising experience, sometimes allowing viewers to choose between one long commercial at the beginning of a show or several short ones spread throughout a program,<sup>990</sup> and to swap out less relevant advertisements for more relevant ones.<sup>991</sup>

310. Content provided via Netflix's subscription service is ad free,<sup>992</sup> as is content provided to Amazon Prime customers.<sup>993</sup> Movie rentals via Facebook, Amazon, and YouTube contain no advertisements.<sup>994</sup> EST OVD programming provided by Vudu, Amazon, and iTunes is free of advertisements as well.<sup>995</sup>

311. *Multi-Device Accessibility.* Consumers increasingly wish to view content whenever they want and wherever they are. As a result, the trend in the OVD marketplace is toward making content available to users via a wide variety of devices. Many of the leading OVDs make their service available via a wide variety of consumer electronics products, including computers, Internet-connected televisions, Blu-ray disc players, home theater systems, DVRs, set-top boxes, Internet video players/boxes, and mobile devices.

<sup>988</sup> Ads In Hulu Plus.

<sup>989</sup> Chuck Salter, *Can Hulu Save Traditional TV?*, FAST COMPANY, Nov. 1, 2009, at 4, <http://www.fastcompany.com/magazine/140/the-unlikely-mogul.html> (visited Feb. 29, 2012).

<sup>990</sup> Kevin Purdy, *Watch Hulu Shows With Only One Commercial*, Lifehacker, Feb. 23, 2009, <http://lifehacker.com/5158623/watch-hulu-shows-with-only-one-commercial> (visited Feb. 29, 2012).

<sup>991</sup> Tom Cheredar, *Hulu's "Ad Swap" Puts Users in Control of What Commercials to Watch*, Venturebeat, Oct. 3, 2011, <http://venturebeat.com/2011/10/03/hulu-commercials/> (visited Feb. 29, 2012).

<sup>992</sup> Sony, *Crackle Is First to Offer Ad-Supported Full-Length Hollywood Movies and Television Series on Sony's PlayStation 3, BRAVIA, Streaming Player, Blu-Ray Players and on Roku Devices* (press release), Mar. 29, 2011 ("Crackle Full-Length Movies"); Kristie Bertucci, *Netflix vs. Hulu Plus (Comparison)*, Gadget Review, Jan. 8, 2012, <http://www.gadgetreview.com/2012/01/netflix-vs-hulu-plus.html> (visited Feb. 29, 2012); Jeff Bertolucci, *Hulu Plus vs. Netflix: Which Is Better?*, PC WORLD, June 30, 2010, [http://www.peworld.com/article/200246/hulu\\_plus\\_vs\\_netflix\\_which\\_is\\_better.html](http://www.peworld.com/article/200246/hulu_plus_vs_netflix_which_is_better.html) (visited Feb. 29, 2012).

<sup>993</sup> Amazon.com, Inc., *Amazon Prime Members Now Get Unlimited, Commercial-free, Instant Streaming of More Than 5,000 Movies and TV Shows at No Additional Cost* (press release).

<sup>994</sup> See Facebook, *Movie Rentals*, <http://www.facebook.com/movie.rentals> (visited Mar. 21, 2012); Amazon.com, *Movies & TV > Amazon Instant Video > Rental*, [http://www.amazon.com/s/ref=amb\\_link\\_357789482\\_3?ie=UTF8&bbn=2858778011&rh=n%3A2625373011%2Cn%3A%212644981011%2Cn%3A%212644982011%2Cn%3A2858778011%2Cp\\_drm\\_rights%3ARental&page=1&pf\\_rd\\_m=ATVPDKIKX0DER&pf\\_rd\\_s=center-1&pf\\_rd\\_r=06WBFJC2JBXXCJ7F8C1E&pf\\_rd\\_t=101&pf\\_rd\\_p=1324306922&pf\\_rd\\_i=2858778011](http://www.amazon.com/s/ref=amb_link_357789482_3?ie=UTF8&bbn=2858778011&rh=n%3A2625373011%2Cn%3A%212644981011%2Cn%3A%212644982011%2Cn%3A2858778011%2Cp_drm_rights%3ARental&page=1&pf_rd_m=ATVPDKIKX0DER&pf_rd_s=center-1&pf_rd_r=06WBFJC2JBXXCJ7F8C1E&pf_rd_t=101&pf_rd_p=1324306922&pf_rd_i=2858778011) (visited Mar. 21, 2012); YouTube Movies.

<sup>995</sup> Simply Sight & Sound, Inc., *Vudu's PC Streaming Now Available*, <http://simplysightandsound.com/audio-video-installation-services/vudus-pc-streaming-now-available/> (visited Feb. 29, 2012); What's On iTunes; Amazon.com, *Movies & TV > Amazon Instant Video > Purchase*, [http://www.amazon.com/s/ref=amb\\_link\\_357789482\\_4?ie=UTF8&bbn=2858778011&rh=n%3A2625373011%2Cn%3A%212644981011%2Cn%3A%212644982011%2Cn%3A2858778011%2Cp\\_drm\\_rights%3APurchase&page=1&pf\\_rd\\_m=ATVPDKIKX0DER&pf\\_rd\\_s=center-1&pf\\_rd\\_r=06WEAX8VA0ZNK20GZWN9&pf\\_rd\\_t=101&pf\\_rd\\_p=1324306922&pf\\_rd\\_i=2858778011](http://www.amazon.com/s/ref=amb_link_357789482_4?ie=UTF8&bbn=2858778011&rh=n%3A2625373011%2Cn%3A%212644981011%2Cn%3A%212644982011%2Cn%3A2858778011%2Cp_drm_rights%3APurchase&page=1&pf_rd_m=ATVPDKIKX0DER&pf_rd_s=center-1&pf_rd_r=06WEAX8VA0ZNK20GZWN9&pf_rd_t=101&pf_rd_p=1324306922&pf_rd_i=2858778011) (visited Mar. 21, 2012).

312. For example, more than 700 devices can stream Netflix, including video game consoles, Video Players, HDTVs, home theater systems, set-top boxes, and smartphones.<sup>996</sup> Vudu states that its service is available on “virtually every internet-connected Blu-ray player and HDTV on the market,” as well as Xbox 360, Sony PS3, the Apple iPad, and other devices.<sup>997</sup> While users of Hulu’s free service can view content only on their computers, Hulu Plus subscribers can access Hulu programming on a wide variety of smartphones, tablets, gaming consoles, smart TVs, Blu-ray players, and set-top boxes.<sup>998</sup> Sony’s Crackle users can access content with their computers (via [www.crackle.com](http://www.crackle.com), other OVD websites such as YouTube, Hulu, and TV.com, and an app for Google Chrome), Internet-connected televisions, Xbox 360, Sony PlayStation 3, various smartphones, set-top boxes and media players, and Sony HDTVs.<sup>999</sup> Over 300 devices are compatible with Amazon’s Instant Video service, including computers, various HDTVs, set-top boxes, Blu-ray players, DVRs, and the Kindle Fire.<sup>1000</sup> YouTube allows users to view content on computers, Android devices, some Internet-connected televisions, iPhones, and other devices with that have browsers, Adobe Flash Player 11.0+, and a broadband Internet connection of at least 1 Mbps.<sup>1001</sup>

313. Some sports leagues make content available via multiple devices as well. For example, NBA League Pass is available via computers and mobile devices.<sup>1002</sup> NHL GameCenter Live is available via computer, iPad, iPhone, or Android devices.<sup>1003</sup> Online NFL games are available via computer, smartphones, tablets, or PlayStation3.<sup>1004</sup> The Big Ten makes its online content available via mobile devices,<sup>1005</sup> and the ACC Digital Network is viewable on a variety devices, including computers, iPhones, iPads, and Android devices.<sup>1006</sup>

#### 4. OVD Performance

314. As we have noted, the performance of OVDs is an evolving story. Virtually all OVDs entered the marketplace within the last ten years, and, because of the nature of the product and services provided, do not necessarily report their financial performance by the indicia traditionally used by other media firms. As such, the details surrounding the finances of OVDs are not readily discerned because many OVDs are divisions of larger media firms and the OVD-related activities are not reported

<sup>996</sup> Netflix, *Company Overview*, <https://signup.netflix.com/MediaCenter?country=1&rdirdc=true> (visited Feb. 29, 2012).

<sup>997</sup> See Vudu Devices; Vudu, *Get Vudu On Your iPad*, [http://www.vudu.com/setup\\_ipad.html](http://www.vudu.com/setup_ipad.html) (visited Feb. 29, 2012).

<sup>998</sup> See Hulu Plus Devices; Introducing Hulu Plus.

<sup>999</sup> Crackle, *Platforms*, <http://www.crackle.com/outreach/platforms> (visited Feb. 28, 2012); Crackle Full-Length Movies.

<sup>1000</sup> See Amazon Devices.

<sup>1001</sup> YouTube, *YouTube Help > YouTube on Other Devices*, <http://support.google.com/youtube/bin/answer.py?hl=en&answer=1231722> (visited Feb. 29, 2012); eHow, *How to Use YouTube on an iPhone*, [http://www.ehow.com/how\\_5935516\\_use-youtube-iphone.html](http://www.ehow.com/how_5935516_use-youtube-iphone.html) (visited Feb. 29, 2012).

<sup>1002</sup> NBA, *NBA League Pass > Features-At-A-Glance*, <http://www.nba.com/leaguepass/3pp/> (visited Feb. 29, 2012).

<sup>1003</sup> NHL, *NHL GameCenter Devices*, <http://mobile.gamecenter.nhl.com/devices/> (visited Feb. 29, 2012).

<sup>1004</sup> NFL Mobile; NFL To PlayStation.

<sup>1005</sup> BTN2GO Kicks Off; BTN2Go FAQ. BTN2Go indicates that an Android application for viewing the service’s content is expected to launch in early 2012. *Id.*

<sup>1006</sup> ACC Launches.

separately. Moreover, our analysis of OVD performance is limited to a few of the most widely recognized industry players, and is not intended to be a comprehensive assessment of the entire OVD industry. With these limitations, in this section of the Report we describe OVD viewership, revenue, investment, and profitability.<sup>1007</sup>

**a. OVD Viewership**

315. The most relevant indicators of the viewing of OVD content appear to be the profile of the OVD audience, the overall volume of OVD shows viewed, subscriberships, and consumer purchase transactions.

316. *Audience.* Available data illustrate a steady increase in the online viewing of video content. A May 2011 Pew survey indicates that 71 percent of online adults use online video sites.<sup>1008</sup> The data reveal a considerable increase in comparison to Pew survey results from 2009, when it estimated U.S. online video viewership (e.g., television content, movies) at 32 percent of online users, up from 16 percent of online users in 2007.<sup>1009</sup>

317. Research firm eMarketer estimates that as of April 2010, 66.7 percent of U.S. Internet users, representing 147.5 million people, watch online video each month. Among adults, 18-34 year olds are most likely to watch video online.<sup>1010</sup> In 2010, about 86.0 percent of 18-24 year olds and 84.1 percent of adults 25-34 watched online video at least once a month, compared with 43.5 percent of 55-64 year olds and 25.8 percent of adults aged 65 years or older. Among the 147.5 million people watching video online, 24.0 percent are 18-24 years old, 30.7 percent are 25-34 years old, and 26.6 percent are 35-44 years old. EMarketer notes that the availability of free long-form videos, typically videos lasting longer than 10 minutes in their entirety, on Hulu has been a factor in making viewing online video an attractive option to a wider range of demographic groups.<sup>1011</sup>

318. Recent data reveal that in 2011 online video viewing has surpassed 50 percent penetration among the total U.S. population.<sup>1012</sup> Forty-nine percent of U.S. adult online video viewers

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<sup>1007</sup> Our overall performance analysis include data regarding OVDs that distribute professionally produced as well as user-generated video content. Research, ratings and marketing firms that conduct analyses of consumers' use of OVDs do not generally distinguish between these types of video content provided by the OVDs.

<sup>1008</sup> Kathleen Moore, *71% of Online Adults Now Use Video Sharing Sites*, Pew Internet, July 26, 2011, <http://pewinternet.org/Reports/2011/video-sharing-sites.aspx> (visited Mar. 9, 2012). Pew reports that among 18-29 year olds, 92 percent have used video sharing sites; and among 30-49 year olds, 80 percent have used video sharing sites. *Id.* Alternatively, comScore reports that 86 percent of U.S. Internet users view online video. comScore Inc., *comScore Releases July 2011 U.S. Online Video Rankings* (press release), Aug. 22, 2011.

<sup>1009</sup> Kristen Purcell, *The State of Online Video*, *Pew Internet & American Life Project*, Pew Internet, June 3, 2010, at 2 & 5, <http://pewinternet.org/Reports/2010/State-of-Online-Video.aspx> (visited Mar. 9, 2012).

<sup>1010</sup> eMarketer, *Online Video Goes Mainstream*, Apr. 28, 2010, <http://www.emarketer.com/Article.aspx?R=1007664> (visited Mar. 9, 2012).

<sup>1011</sup> *Id.* The Interactive Advertising Bureau (IAB) defines long form video as video content that may be professionally produced or user generated which has a content arc with a beginning, middle and end, and which typically lasts longer than 10 minutes in its entirety. Such content may include professionally produced content from television and cinema that has migrated online, as well as personal videos shared online. See Interactive Advertising Bureau, *Long Form Video Overview*, Sept. 2009, at 4, <http://www.iab.net/media/file/long-form-video-final.pdf> (visited Mar. 9, 2012).

<sup>1012</sup> eMarketer, *Online Video Viewing Passes 50% of Total US Population*, Dec. 8, 2011, <http://www.public.site1.mirror2.phi.emarketer.com/Article.aspx?R=1008724> (visited Mar. 9, 2012).

watched full-length television shows on the Internet at least monthly according to this report. Full-length movies are popular fare for web viewing, with some 37 percent of U.S. adult online viewers streaming or downloading at least one feature film monthly in 2011.<sup>1013</sup>

319. *Hits/Views.*<sup>1014</sup> ComScore Video Metrix counted 40 billion video views in September 2011,<sup>1015</sup> compared to Nielsen VideoCensus, which measured the online video market at just over 18 billion streams based on a combination of panel and direct site measurement.<sup>1016</sup> Among other differences, comScore includes advertising and adult content in its sampling and counts each segment of long-form segmented content as a distinct video stream.

320. Over time, the popularity of the most highly viewed online video websites has demonstrated fluctuation. In 2009, according to comScore, in terms of the number of videos viewed, Hulu was the number two site behind YouTube.<sup>1017</sup> In 2009, Hulu's views increased by more than 763 million from January to December, accounting for about four percent of the 18.4 billion increase in total online video views during that period.<sup>1018</sup> ComScore estimates that 923.8 million videos were viewed on Hulu during the month of November 2009, compared with more than 12 billion for YouTube.<sup>1019</sup> SNL Kagan estimates that in February 2010, Hulu had 39.2 million unique visitors, each watching about an estimated 23.3 videos during that month.<sup>1020</sup> Moreover, according to comScore data, Hulu supported 166.5 million viewing sessions by 26.4 million unique viewers in August, 2011.<sup>1021</sup>

321. According to the Nielsen Video Census, during November 2011, the top five websites (for professionally produced as well as user-generated videos) based on unique U.S. viewers watching

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<sup>1013</sup> *Id.*

<sup>1014</sup> Generally, a "hit" or a "page hit" is the retrieval of an item such as a web page or a graphic from a web server. Thus, if a given web page includes four pictures, images or graphics, that web page equals five hits – one hit for the page itself and four hits for the graphics. Accordingly, hits may be an imprecise measure of actual web traffic. Unique hits count the number of different individuals who have generated at least one hit. Page views are measurements often used in advertising where advertisers need to determine the number of page views a website receives in order to assess where to place their ad content. Generally, a "page view" is a web page that has been viewed by one visitor.

<sup>1015</sup> comScore, Inc., *comScore Releases September 2011 U.S. Online Video Rankings* (press release), Oct. 21, 2011.

<sup>1016</sup> Nielsen, *September 2011: Top U.S. Online Destinations for Video*, Nov. 3, 2011, [http://blog.nielsen.com/nielsenwire/online\\_mobile/september-2011-top-u-s-online-destinations-for-video/](http://blog.nielsen.com/nielsenwire/online_mobile/september-2011-top-u-s-online-destinations-for-video/) (visited Mar. 9, 2012); see also *The Economics of Online Video*, AD AGE White Paper at 6.

<sup>1017</sup> Publicly available data on YouTube hits and views do not distinguish between the number of visitors to the site that view the user-generated content as compared to the site's visitors that view other video content that may be produced professionally. Thus, any data in this Report regarding hits, views or other metrics of consumer engagement with YouTube is assumed to refer to all video content on the website, regardless of whether it is user-generated or professionally produced.

<sup>1018</sup> Will Richmond, *Why Did Online Video Consumption Spike in 2009*, VideoNuze, Feb. 24, 2012, <http://videonuze.com/blogs/?2010-02-24/Why-Did-Online-Video-Consumption-Spike-in-2009-/#id=2446> (visited Mar. 9, 2012) ("2009 Online Spike").

<sup>1019</sup> AD AGE White Paper at 1, 16-17.

<sup>1020</sup> Liza Castaneda, *With a Profitable Hulu, Why a Subscription Model?*, SNL Kagan, Apr. 26, 2010, <http://www.snl.com/interactivex/article.aspx?id=11082288&KPLT=6>.

<sup>1021</sup> comScore, Inc., *comScore Releases August 2011 U.S. Online Video Rankings* (press release), Sept. 22, 2011.

video content were: (1) YouTube (130.8 million unique viewers); (2) Vevo<sup>1022</sup> (42.7 million unique viewers); (3) Yahoo! (34.4 million unique viewers); (4) Facebook (30.3 million unique viewers); and (5) MSN/WindowsLive/Bing (24.6 million unique viewers).<sup>1023</sup> Viewers spent the most time watching online video content during the month of November 2011 with these five OVDs: (1) Netflix (10 hours, 43 minutes); (2) Hulu (3 hours, 11 minutes); (3) GorillaVid<sup>1024</sup> (3 hours, 11 minutes); (4) YouTube (3 hours, 7 minutes); and (5) Justin.tv<sup>1025</sup> (3 hours).<sup>1026</sup> Data also show that during November 2011, there were 166.9 million unique U.S. video viewers who streamed 21.9 billion videos. During this same one-month period, video viewers spent on average more than five hours watching online video.<sup>1027</sup>

322. Analysts use a viewing session metric to gauge users' engagement with the website and/or associated advertisement. A viewing session is defined as a period of time with continuous video viewing followed by a 30-minute period of video inactivity.<sup>1028</sup> The comScore chart below illustrates, among other things, that 178 million U.S. Internet users watched online video content for an average of 16.8 hours per viewer (*i.e.*, 1008.3 minutes/60 minutes), averaging 35 viewing sessions each (*i.e.*, 6,255,493/178,447) in June 2011.<sup>1029</sup>

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<sup>1022</sup> Vevo is a joint venture between Sony Music Entertainment and Universal Music Group initiated in 2009. Adweek.com indicates that, as of June 2010, Vevo was delivering one billion views globally each month. The site's growth may be attributed to its U.S. Hispanic audience, which in 2010 was estimated to be 7.4 million Hispanic users. See Mike Shields, *Vevo Climbs Web Video Charts*, ADWEEK, July 30, 2010, <http://www.adweek.com/news/technology/vevo-climbs-web-video-charts-102944>.

<sup>1023</sup> NielsenWire, *November 2011: Top U.S. Online Destinations for Video*, Dec. 30, 2011, [http://blog.nielsen.com/nielsenwire/online\\_mobile/november-2011-top-u-s-online-destinations-for-video/](http://blog.nielsen.com/nielsenwire/online_mobile/november-2011-top-u-s-online-destinations-for-video/) (visited Mar. 9, 2012).

<sup>1024</sup> GorillaVid is a file hosting provider that offers online storage, remote backup capacity, uploading and downloading tools. GorillaVid is particularly useful for sending files that may be too large for sending via e-mail. See GorillaVid, *FAQ*, <http://gorillavid.com/faq.html> (visited Feb. 28, 2012).

<sup>1025</sup> Justin.tv is an online destination for watching videos and chatting with friends. See Justin.tv, *Frequently Asked Questions*, <http://www.justin.tv/p/faq> (visited Feb. 28, 2012).

<sup>1026</sup> NielsenWire, *November 2011: Top U.S. Online Destinations for Video*, Dec. 30, 2011, [http://blog.nielsen.com/nielsenwire/online\\_mobile/november-2011-top-u-s-online-destinations-for-video/](http://blog.nielsen.com/nielsenwire/online_mobile/november-2011-top-u-s-online-destinations-for-video/) (visited Mar. 9, 2012).

<sup>1027</sup> *Id.*

<sup>1028</sup> comScore, Inc., *comScore Releases June 2011 U.S. Online Video Rankings*, July 15, 2011, [http://www.comscore.com/Press\\_Events/Press\\_Releases/2011/7/comScore\\_Releases\\_June\\_2011\\_U.S.\\_Online\\_Video\\_Rankings](http://www.comscore.com/Press_Events/Press_Releases/2011/7/comScore_Releases_June_2011_U.S._Online_Video_Rankings) (visited Mar. 9, 2012). ComScore reports that the duration of the average online content video was 5.4 minutes and the average online video advertisement was 0.4 minutes long. *Id.*

<sup>1029</sup> *Id.*

**Table 23: Top U.S. Online Video Properties Ranked by Unique Views (June 2011)<sup>1030</sup>**

Property	Total Unique Viewers (in thousands)	Viewing Sessions (in thousands)	Minutes per Viewer
Google Sites <sup>1031</sup>	149,281	2,311,116	324.1
VEVO	63,003	399,503	112.0
Yahoo! Sites	52,665	247,834	34.8
Microsoft Sites	50,663	286,892	32.8
Viacom Digital	49,493	274,933	76.8
Facebook.com	47,687	167,137	20.7
AOL, Inc.	43,915	251,987	49.3
Turner Digital	30,063	121,301	46.2
Hulu	26,701	156,939	184.8
Amazon Sites	21,247	43,193	8.3
<b>Total:</b>	<b>178,447</b>	<b>6,255,493</b>	<b>1,008.3</b>

323. Screen Digest estimated that about 11 billion television episodes were viewed via the broadcast networks' own websites in 2010, in contrast to about 19 billion views of television episodes on AOL, MSN, Yahoo!, YouTube and Hulu.<sup>1032</sup> One analyst estimates that YouTube's partnerships with professional content owners, including Disney/ESPN and Univision, enabled it to more than double the number of video streams viewed on its website from 6.3 billion in January 2009 to 13.2 billion in December 2009.<sup>1033</sup> YouTube recently announced that it "logged 1 trillion hits in 2011" and that it expects to exceed that number in 2012 as politicians and other newsmakers turn to the Internet to distribute web advertisements, speeches and videocasts.<sup>1034</sup> Indeed, one YouTube executive predicts that soon 90 percent of web traffic will be video.<sup>1035</sup>

324. From the third quarter of 2008 to the third quarter of 2011, Nielsen reports a gain of 21.7 percent in the number of persons that watch video on the Internet and an increase of 79.5 percent in the amount of time spent watching video online.<sup>1036</sup> Consumer behavior is also reported by age, gender, and

<sup>1030</sup> comScore Video Metrix. These data reflect total U.S. home/work/university locations.

<sup>1031</sup> As reflected in this chart, "Google Sites" includes the website YouTube which hosts professionally produced as well as user-generated video content.

<sup>1032</sup> Charlie Jane Anders, *How the Nielsen TV Ratings Work – and What Could Replace Them*, IO9 Backgrounder, Sept. 17, 2010, <http://io9.com/5636210/how-the-nielsen-tv-ratings-work--and-what-could-replace-them> (visited Mar. 9, 2012).

<sup>1033</sup> 2009 Online Spike.

<sup>1034</sup> Hayley Tsukayama, *YouTube: The Future of Entertainment is on the Web*, WASH. POST, Jan. 12, 2012 (citing comments of Robert Kyncl, YouTube, Vice President of Global Content Partnership, speaking at 2012 International Consumer Electronics Show in Las Vegas).

<sup>1035</sup> *Id.*

<sup>1036</sup> Nielsen State of the Media, *The Cross-Platform Report Quarter 3, 2011 – US*, at 4 ("Nielsen Q3 2011 Cross-Platform Report").