Public Knowledge

Testimony of Gigi B. Sohn,
President, Public Knowledge

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Chairman Walden, Ranking Member Eshoo, members of the Subcommittee, thank you for inviting me to talk about the future of video. My name is Gigi Sohn, and I am President of Public Knowledge, a non-profit public interest organization that seeks to ensure that the public benefits from a communications system that is open, competitive and affordable.

INTRODUCTION

There is widespread agreement that we are currently living in the golden age of television. Programs like *Mad Men*, *Breaking Bad*, *Game of Thrones*, *Modern Family*, *The Daily Show* and *The Colbert Report* have become part of our cultural landscape, and even in this era of 500 channels, still inspire discussions around the water cooler. There are numerous new ways to watch TV – be it on a flat screen LED television, on a tablet or on a smartphone. And the Internet and DVRs have the ability to allow a viewer to watch what they want to watch when they want to watch it.

Despite all of the great programming and groundbreaking devices, Americans are locked into a television business model that limits competition and choice; keeps prices for video high and limits technology and online video from achieving their full potential. This business model is made possible largely by an outdated regulatory structure created by incumbents to gain competitive advantage. It is time for Congress and the FCC to revamp this regulatory structure so that new video competition can thrive – giving consumers greater options and the ability to watch video whenever they want and on the device of their choosing.

Congress and the FCC can achieve this goal in three ways. First, they can clear away some of the outdated rules that slow down the evolution of the video marketplace. Second, they can extend the successful policies that allow competitors to access high-value content to certain online providers. Third, they can protect Internet openness and prevent discriminatory billing practices that hold back online video. By doing this they will increase competition, which will mean lower prices, better services, and more flexibility and control for consumers.

BACKGROUND

For nearly a century the federal government has shaped the development of electronic media. In the 1920s the Federal Radio Commission brought order to the chaotic and experimental landscape that characterized early broadcasting. In doing so it set the conditions that allowed radio and then television broadcasting to develop into what it was in its heyday, and what it is today. In the 1960s and 1970s the FCC took steps to protect broadcasting from the disorganized and innovative early cable industry.[1] By doing this it made sure that cable became an adjunct to rather than a replacement for established broadcasting.[2]

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[1] *See United States v. Southwestern Cable Co.*, 392 US 157 (1968). This case, in addition to being an important case setting out the bounds of FCC authority, contains a summary of the FCC's early efforts at cable regulation. *See also* OFFICE OF TELECOMMUNICATIONS POLICY, CABLE: REPORT TO THE PRESIDENT (1974), which contains an early history of the cable industry and attempts at cable regulation, as well as policy recommendations.

[2] The 1974 OSTP Report said that "cable is not merely an extension or improvement of broadcast television. It has the potential to become an important and entirely new communications medium, open while and available to all." OSTP Report at 13. But cable did succeed in providing viewers with more content it fell short of this early promise, and the regulatory system that developed ensured that cable extending the reach of broadcasting instead of developing into a competitor to it.

After Congress passed the Cable Act of 1984, the tables turned and cable became the monopoly. Cable operators controlled who did and didn't get on the new medium, using their power to require cable programmers, such as the fledgling CNN and Discovery, to provide "pay for play" equity interests to cable operators, or sign exclusive agreements prohibiting programmers like MTV from appearing on potential competitors such as Direct Broadcast Satellite (DBS). At the same time, cable operators received access to needed inputs such as poll attachment rights and broadcast programming. The lack of competition led to high prices and poor service, but the cable incumbents' control over "must have" programming made it impossible for any competing services to emerge.

It was not until the 1992 Cable Act[3] that Congress embarked on an express policy of increasing competition in the television market. It realized that potential competitors needed access to the same content as large cable systems with market power. New laws such as program access rules that gave competitors access to programming owned by the cable operators, and program carriage rules that prevented cable operators from demanding an equity share as a condition of carriage ("pay for play"), helped make it possible for new "multi-channel video programming" providers (MVPDs) to compete with cable operators, as did changes to the law to make it easier for competitors to get access to broadcast programming.[4] These policies of increasing competition were somewhat successful

[3] Cable Television Consumer Protection and Competition Act of 1992, PL 102-385, 106 Stat. 1460 (1992).
[4] E.g., The Satellite Home Viewer Improvement Act of 1999, Pub.L. No. 106-113, 113 Stat. 1501, 1501A-526 to 1501A-545 (Nov. 29, 1999).

but their promise was not entirely fulfilled.[5] They enabled some new competitors to operate but these new competitors did not change the fundamental shape of the market. They did not slow the increasing power of cable generally and a few large cable companies in particular.[6] And they did little or nothing to keep the market from consolidating in ways detrimental to consumers and independent content producers alike.

The Internet is changing the video marketplace just as it changed the market for music, news, books, and other forms of media. But it's not a foregone conclusion that the Internet will *disrupt* the video marketplace. Dominant players in the market today have control both over the content their nascent online competitors need for their service, and over the pipes they must use to reach consumers. As a result much high-value programming is not available online, and online video providers have to contend with artificially low bandwidth caps and other discriminatory practices that keep them from reaching their full potential.

Thus while it's inevitable that IP technologies and the Internet will play an ever-larger part of video delivery, it remains an open question whether consumers or

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[5] *See* Annual Assessment of the Status of Competition in the Market for Video Programming, Thirteenth Annual Report, MB Docket No. 06-189 (rel. Jan 16, 2009), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-206A1.pdf. *See also* Comments of Public Knowledge in Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 07-269 (June 8, 2011), *available at* http://www.publicknowledge.org/files/docs/PK_Comments_MVPD-Competition-Report.pdf.

[6] For example, Adelphia's cable assets were sold to Time Warner Cable and Comcast. *See* Adelphia Sold to Time Warner, Comcast, BUFFALO BUSINESS FIRST, April 21, 2005, http://www.bizjournals.com/buffalo/stories/2005/04/18/daily37.html?page=all. Comcast's cable assets and NBC Universal have been combined in a joint venture that is controlled by, and 51% owned by Comcast. *See* General Electric, New NBCU, http://www.ge.com/newnbcu.

incumbents with market power will enjoy the lion's share of the benefits. Consumers will still suffer from a lack of choice and independent content producers will still struggle to reach viewers if existing incumbents in the content and the MVPD industry continue to thwart disruptive change and manage the transition for their own benefit. Congress should once again take the necessary steps to ensure that incumbents cannot throttle (literally as well as figuratively) the legions of potential competitors trying to reach willing consumers.

At the same time, Congress should prune away the needless overgrowth of older rules, like syndicated exclusivity, the sports blackout rule and the network non-duplication rule, that exist only to protect the business model of local broadcasting. Senator DeMint and Representative Scalise are on the right track with their bill that would clear away much of the regulatory underbrush that holds back the evolution of the video marketplace,[7] although the bill goes too far by eliminating ownership restrictions still needed to maintain diversity in traditional media. Some other rules, like retransmission consent and the compulsory copyright license, are outdated, but part of an interwoven fabric of regulatory and business expectations. They should be reformed, but cautiously.

At the same time, measures that are designed to mitigate the market power of certain large video providers should not be repealed until true competition develops. In some respects they should be extended. For example, online video providers that wish to voluntarily operate as "multichannel video programming distributors"

[7] Next Generation Television Marketplace Act, H.R. 3675 and S. 2008.

(MVPDs) under Title VI of the Communications Act[8] should be able to do so, as this would enable them to access certain valuable content and protect them against anticompetitive actions by incumbents.[9] This would ensure that consumers had more choices for high-value content than they do today and would eliminate the incentives that keep certain content from being licensed widely.

Finally, the fact that the largest residential broadband ISPs, such as Comcast, are also MVPDs invested in the existing video distribution models raises concerns. These ISP/MVPDs can impose a variety of policies that prevent genuinely disruptive competition. For example, the ability to control how much data subscribers may access through data caps, the ability to privilege some content over others through prioritization or exemption from data caps, and the ability to control what devices can connect to the network, give cable operators (and other broadband providers like FIOS) the ability to pick winners and losers just as cable operators did from 1984 to 1992.

DETAILED ANALYSIS AND RECOMMENDATIONS

The video marketplace is unique, not only because of its complicated business and regulatory structures, but because video incumbents are better placed to counter the threat the Internet poses to their business models. They do this in varied and creative ways.

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[8] 47 USC §602 (13)

[9] *See* Comments of Public Knowledge in Interpretation of the Terms "Multichannel Video Programming Distributor" and "Channel" as Raised in Pending Program Access Proceeding, MB Docket No. 12-83 (filed May 14, 2012) (Sky Angel Comments), *available at* http://www.publicknowledge.org/interpretation-mvpd.

Threats to Internet Openness

For a long time it looked as though ISPs would continue doing what Comcast did when it started degrading BitTorrent traffic—picking and choosing which Internet protocols and services got preferential or discriminatory treatment. But recently ISPs have found that it is more effective to discriminate via billing practices. Some ISPs have set their bandwidth caps so low as to make it financially unattractive to switch over entirely to online video, as this would put viewers over their caps and perhaps subject them to overage charges.[10] At the same time, at least one ISP exempts its own video services that are delivered over the same infrastructure from the caps.[11] These practices disadvantage services like Netflix and Amazon Instant Video and relegate most online video to the role of a supplement to, rather than replacement for, traditional MVPD services.

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[10] ANDREW ODLYZKO, BILL ST. ARNAUD, ERIK STALLMAN, & MICHAEL WEINBERG, KNOW YOUR LIMITS: CONSIDERING THE ROLE OF DATA CAPS AND USAGE BASED BILLING IN INTERNET ACCESS SERVICE 48 (Public Knowledge 2012) ("Comcast's own estimate for the amount of data required to replace its pay-television offering with an over the top competitor is 288 GB per month. In light of this, it may come as no surprise that Comcast's data cap is set at 250 GB per month."). Comcast has since raised its cap, but it is worth observing that the 288 GB per month figure is based on an unknown mix of standard and high-definition content; presumably, a higher percentage of high-definition video would lead to a higher figure. *See* Mark Israel and Michael L. Katz, *The Comcast/NBCU Transaction and Online Video Distribution*, Submitted by Comcast Corporation, MB Docket No. 10-56 (May 4 2010) at 33, *available at* http://apps.fcc.gov/ecfs/document/view?id=7020448237.

[11] Michael Weinberg, *Comcast Exempts Itself From Its Data Cap, Violates (at least the) Spirit of Net Neutrality*, PUBLIC KNOWLEDGE (March 26, 2012), http://www.publicknowledge.org/blog/comcast-exempts-itself-its-data-cap-violates-.

To counter this, Congress needs to stand behind the FCC's attempts to protect Internet openness.[12] At the same time these protections need to be strengthened, their loopholes need to be closed, and they need to take into account the fact that that discrimination can happen through billing, as well as through Internet "fast lanes" and other forms of technological discrimination.

Restrictions on the Availability of Content

The current regulatory system makes it so that incumbent MVPDs but not online providers can carry broadcast content,[13] and it makes it easy for incumbents to share content with each other while keeping it out of the hands of potential new competitors.[14] And while it's unlawful for incumbent providers to behave anti-competitively towards each other, they are free to keep their content away from online services, and to use exclusionary contracts and "most favored nation" clauses to limit the online distribution of independent programming.[15]

As a result, while a lot of very good video programming is available online, the most popular programming is not.[16] Popular broadcast and cable channels are not available online. Many popular shows are not available online at all or are only made available after a "windowing" period. Some programs are put online reasonably

[12] Preserving the Open Internet, *Report & Order*, GN Docket No. 09-191, FCC 10-201, *available at* http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-10-201A1.pdf.
[13] 47 U.S.C. § 325; 47 C.F.R. § 76.64.
[14] 47 U.S.C. § 548. *See* Revision of the Commission's Program Access Rules, *Notice of Proposed Rulemaking*, MB Docket No. 12-68, FCC 12-30 (rel. Mar. 20, 2012) for an overview of the program access rules.
[15] Jon Brodkin, *DOJ probing Big Cable Over Online Video Competition*, ARS TECHNICA, June 13, 2012 (noting that "[t]he DOJ is also investigating contracts programmers sign to be distributed on cable systems, which include 'most-favored nation clauses' that may favor cable companies over online video distributors.")
[16] *See* Carlos Kirjner, Internet TV (or Why It Is So Hard to Go Over the Top), Bernstein Research (June 15, 2012).

promptly, but are only viewable in inconvenient ways. Some of the best online content is only available to viewers who also have cable subscriptions, through TV Everywhere and similar efforts. Live sports, and especially live local sports, are generally not available online at all. Thus, while online services make it easy to watch great documentaries, classic movies, and old sitcoms, the kinds of culturally-current programming that people talk about at the office and online are usually not available without a cable or satellite subscription.

This problem would be largely abated if online providers like Sky Angel were permitted to operate as MVPDs, like they want to.[17] The rules that ensure that all MVPDs can access certain content would then protect them as well as incumbents. At the same time, the FCC should find that the current rules that prohibit incumbents from behaving anti-competitively toward each other also prohibit them from taking anti-competitive acts against even those online video providers that choose not to operate as MVPDs.[18] But even short of that, if more content were

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[17] *See* Sky Angel Comments.

[18] As Public Knowledge has argued,

> The [FCC] should use its authority over the video programming distribution market to protect online video distribution generally, by prohibiting MVPDs from behaving anticompetitively in ways that harm any video distributor, whether or not it is an MVPD. Section 628 of the Communications Act provides authority for this. This Section bans any actions "the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing ... programming to subscribers or consumers." The close connection between the markets for MVPD and non-MVPD video distribution mean that anticompetitive actions taken against an non-MVPD would likely have a deleterious effect on the ability of a competitive MVPD to offer programming—for example, by increasing its costs, or inhibiting the ability of an MVPD to offer programming on demand or online.

available from online services that might choose to operate as MVPDs, the incentive to keep content offline would evaporate to the benefit of the entire video marketplace.

The current pay TV MVPD model is very lucrative for some because it forces viewers to pay for programming they don't want. Even some popular programmers like Time Warner, who have no direct stake in the cable business, find it more profitable to give exclusives to MVPDs than to make their programming available to willing buyers online.[19] This is because people pay for large bundles of cable channels, some of which are very expensive, even if they only want to watch a few.[20] Every cable subscriber has to pay for broadcast channels, even though they are available over the air for free. This leads to high prices that just keep getting higher. The result of all of this is a loss for consumers.

One quick way to fix this would be to scrap the rules that require that cable systems carry broadcast stations as part of their basic tier—customers should be able to choose what they pay for. And while video providers should be free to bundle content and should not be required to offer everything a la carte, it seems logical that increased competition from online providers would force today's providers to begin offering their customers more flexibility.

Sky Angel Comments at 24-25.

[19] Brian Stelter, *HBO Says No, for Now, to Fans Who Want a Web-Only Option*, NY TIMES MEDIA DECODER, June 6, 2012, http://mediadecoder.blogs.nytimes.com/2012/06/06/hbo-says-no-for-now-to-fans-who-want-a-web-only-option.

[20] Peter Kafka, *Hate Paying for Cable? Here's Why*, ALLTHINGSD, March 10, 2010, http://allthingsd.com/20100308/hate-paying-for-cable-heres-the-reason-why.

Marketplace Consolidation

The merger between Comcast and NBC Universal brought a large amount of programming under the control of a cable system that has an incentive to limit its distribution online.[21] While it is true that both the Department of Justice and the FCC conditioned their transaction on Comcast's commitment to make certain programming available to online distributors,[22] as Public Knowledge has argued, behavioral remedies are, in general, insufficient to overcome all the anti-competitive effects of mergers, joint ventures, and other structural changes that create incentives to limit distribution and innovation.[23] Unfortunately, yet another such change has been proposed, whereby Verizon and several large cable companies plan to create various joint entities to develop new video technologies and to market each other's products rather than compete.[24] In addition to limiting competition in existing markets, these arrangements could mean that much video in the future will be locked up in proprietary platforms, and could mean that anticompetitive "authentication" schemes like TV Everywhere become even more widespread. If

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[21] Competitive Impact Statement of the Department of Justice at 4, United States v. Comcast Corp., 1:11-cv-00106, (D.D.C. Jan. 18, 2011), available at http://www.justice.gov/atr/cases/f266100/266158.pdf

[22] Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc., for Consent to Assign Licenses and Transfer Control of Licenses, Memorandum Opinion & Order, 26 FCC Rcd. 4238 (2011); Final Judgment in United States v. Comcast, United States District Court for the District of Columbia, Case No. 1:II-cv-00l06 (Sept. 1, 2011).

[23] Petition to Deny of Public Knowledge and Future of Music Coalition in WT Docket No. 11-65 (filed May 31, 2011), at 62-70, available at http://www.publicknowledge.org/files/docs/pk_fmc-att_tmo-petition_to_deny.pdf.

[24] *See* Petition to Deny of Public Knowledge et al. in WT Docket No. 12-4 (filed Feb. 21, 2012), *available at* http://www.publicknowledge.org/files/pk_verizon_spectrumco_petition.pdf.

policymakers truly wish to safeguard the future of video, they should prevent these sorts of anticompetitive agreements from taking place.

Outdated Rules That Protect Incumbent Business Models

Protectionist Measures

Finally, there are some rules on the books today that seem designed to prop up legacy business models and have long outlived any functions they may once have served. Many of them can and should be repealed today. Examples of these include sports blackout rules, network nonduplication, and syndicated exclusivity provisions,[25] and the previously-mentioned rule that requires that all MVPD viewers pay for free over-the-air television.[26] Some of these rules were passed to protect aspects of the video distribution system from disruption before Internet video was a possibility, and when it seemed that if local broadcasters lost revenue nothing could replace them. Exclusivity rules not only keep cable systems from carrying signals from "distant" markets but they prevent networks from distributing content on a non-exclusive basis. The world these rules were written for is gone now and they have outlived their purpose. Some local broadcasters never provided unique local programming, and the various public goals that they provide can be achieved more effectively through other means. Traditional models of video distribution are still valuable, and local broadcasters who serve their communities will continue to thrive after any regulatory reform. But the broadcasting industry no longer needs

[25] 47 C.F.R. §§ 76.92(f), 76.106(a), 76.111, 76.120, and 76.127-130.
[26] 47 C.F.R. § 76.901(a) ("The basic service tier shall, at a minimum, include all signals of domestic television broadcast stations provided to any subscriber"); 47 C.F.R. § 76.920 ("Every subscriber of a cable system must subscribe to the basic tier in order to subscribe to any other tier of video programming or to purchase any other video programming.").

extraordinary protection against changes in technology, business models, and viewer behavior.

Outdated, but Complex Rules

Some other rules are outdated, but so interconnected with other rules and marketplace expectations that they need to be approached carefully. Among these are the compulsory copyright license,[27] retransmission consent,[28] and must-carry.[29] The compulsory license cannot be reformed unless video providers are given assurance that they never have to stop carrying programming just because they don't know whom to contact for a license, and to make sure that they can cope with any potential holdout problems. And it would make no sense to embark on a comprehensive reform of the laws governing video carriage in a way that replicated the problems that afflict the retransmission consent process today, while introducing new ones. Short of dealing with the compulsory license and retransmission consent together, several reforms could improve the current retransmission consent process. Many of the rules that have already been mentioned give an unfair advantage to broadcasters and drive up the rates they can charge. And some broadcasters have engaged in brinksmanship tactics that harm viewers, where they pull their signals from MVPDs right before high-profile events.[30] These problems can at least be alleviated with meaningful "good faith" standards that discourage unfair negotiation tactics, and interim carriage

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[27] 17 U.S.C. § 111.
[28] 47 U.S.C. § 325; 47 C.F.R. § 76.64.
[29] 47 U.S.C. § 534; 47 C.F.R. § 76.55.
[30] Amendment of the Commission's Rules Related to Retransmission Consent, *Notice of Proposed Rulemaking*, 26 FCC Rcd. 2718, ¶15 (2011).

requirements that minimize disruption to viewers.[31] Finally, while the must-carry system is used by many low-value broadcasters in ways that Congress never intended, public and non-commercial stations continue to serve a valuable role and policymakers should find ways to protect the good that they do.

Policies That Are Still Needed

Still other rules serve a function and should be maintained, at least until competition develops. These include the program access, program carriage rules, as well as set-top box competition rules. The program access rules and related protections prevent any one MVPD from having exclusive rights to content. Although the video market is not as competitive as it can be in the Internet age, the fact remains that the American video distribution market is more competitive than that of many other countries. The program access rules are to thank for that, and they should be extended to all services that wish to operate as MVPDs, even ones that are exclusively online. Similarly, the program carriage system, which protects independent programmers from the negative effects of bottleneck control by some MVPDs, still serves a role in ensuring that viewers can enjoy content from diverse sources. Lastly, the directive expressed by Congress under Section 629 to have true set-top box competition has remained largely unfulfilled. Until Internet-delivered video becomes a true substitution, preserving the FCC's authority to promote set-top box competition will remain necessary.

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[31] *See* Comments of Public Knowledge and New America Foundation in MB Docket No. 10-71 (filed May 27, 2011), *available at* http://www.publicknowledge.org/files/docs/11-05-27PK-NAF_retrans_comments.pdf.

Copyright and Spectrum Policy

There are two other kinds of regulations that can hold back the development of online video. Policymakers don't always see them as "regulations" in the same sense as things like syndicated exclusivity. But copyright and spectrum laws are regulations nonetheless, and they have profound effects on the shape of the market.

Copyright law shouldn't be misused to hold back the evolution of the video marketplace. Dish is being sued for making a DVR that's too sophisticated for the taste of some networks. But it's not illegal to skip commercials or for users to take full advantage of their home recording rights.[32] And Aereo's remote antenna is legal just as Cablevision's remote DVR is.[33] Copyrights are limited monopolies granted by the government, and they come with a series of limitations and exceptions designed to protect users as well as creators. They should not be a weapon used to limit experimentation with business models and services.

Nor should misplaced fears of piracy keep content offline. Some content industry executives have a view of technology and the Internet that can only be described as superstitious, and they think that if they give people access to content they'll lose control of it. But recent history shows that most people only turn to piracy when content is not available online though other means. From the perspective of limiting copyright infringement, limiting online distribution is simply counterproductive.

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[32] *See* John Bergmayer, *Networks Pull the Trigger on Dish, but They're Only Hurting Themselves*, PUBLIC KNOWLEDGE (May 25, 2012), http://www.publicknowledge.org/blog/networks-pull-trigger-against-dish-theyre-onl.

[33] *See* Brief of Amici Curiae Electronic Frontier Foundation and Public Knowledge in *WNET v. Aereo*, United States District Court for the Southern District of New York, Case No. 1:12-cv-01543-AJN, *available at* http://www.publicknowledge.org/files/aereo_amici_brief.pdf.

This is why it is particularly distressing that recent trade agreements contain language that could be interpreted as limiting the possibilities of online video distribution.[34]

To whom the government assigns spectrum and for what purpose it allocates it also has an impact on the video marketplace. As long as broadcasters use the public airwaves they will have public responsibilities. For example, they must operate transparently,[35] they must serve the needs of their communities,[36] and they cannot behave unreasonably in retransmission negotiations.[37] While it is true that fewer people rely on over-the-air television today than they did in its peak, due to the increasing costs of cable, a new generation of viewers is getting familiar with rabbit ears.[38] Thus, to say that broadcasting is no longer relevant is just as wrong as to say that it should remain at the center of the video marketplace. In a more competitive

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[34] Many free trade agreements appear to state that online retransmission may not occur without the permission both of the owner of the copyright in the programming, and of the broadcaster. This is at odds with the current system of a compulsory license plus retransmission consent, which requires MVPDs to obtain the permission only of the signal owner, not of the content owners. Some current reform proposals involve requiring an MVPD to obtain the permission of the copyright holders instead of the permission of the broadcaster, but not of both. *See* John Bergmayer, *The US-Colombia Free Trade Agreement: Policy Laundering in Action*, PUBLIC KNOWLEDGE (April 20, 2012), http://www.publicknowledge.org/blog/us-colombia-laundering. *But see* Comments of ABC, CBS, and NBC Television Affiliates in MB Docket No. 12-83 (filed June 13, 2012), *available at* http://apps.fcc.gov/ecfs/document/view?id=7021922660 (arguing that it would be consistent with the agreements if online systems were categorized as MVPDs and subsequently followed standard retransmission consent procedures).
[35] *See* 47 C.F.R. § 73.3526 (public file requirement).
[36] 47 C.F.R. § 73.3526(e)(11)(i).
[37] 47 U.S.C. §§ 325(b)(3)(C)(ii), (iii).
[38] Christopher S. Stewart, *Over-the-Air TV Catches Second Wind, Aided by the Web*, WALL STREET JOURNAL (Feb. 21, 2012), http://online.wsj.com/article/SB10001424052970204059804577229451364593094.html ("It's cool to have rabbit ears again.").

video marketplace there will no doubt be room for many different kinds of services. The solution is not to enshrine or attack broadcasting but to incentivize them to create great content, and to adopt policies that allow spectrum to be put to other uses. Not only would this be beneficial to communications policy generally but the impact on the video marketplace would be profound, as distribution channels adapt to fit a more decentralized and dynamic marketplace.

CONCLUSION

As they have in the past policymakers are starting to consider the implications of increasing change in the market for video distribution. History provides examples both of protectionist regulations that should be avoided today, and of pro-competitive measures that serve as more positive precedents. But today is different in one way: Finally, the technology exists that could eliminate the physical, bottleneck control of video distribution that has existed in various forms for decades. If policymakers take some simple steps to facilitate the development of competitive online video they can begin to disengage from regulations that were designed to counter the effects of this bottleneck control. However, if they fail to do this, it is likely that incumbents will be able to continue to shape the development of the video market and extend their current dominance indefinitely. While the Internet provides grounds for hoping that the future of video will be better for consumers, policymakers have a lot of work to do to help make that happen.