

GAMECHANGE: CORD CUTTERS, TECHNOLOGY, AND THE LEGALITIES OF THE RACE TO REPLACE CABLE

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I. INTRODUCTION

Technology has changed the entertainment landscape since the advent of widespread Internet-based distribution networks such as Netflix in 2008.¹ Cord Cutters, or entertainment consumers who no longer use traditional cable or satellite outlets as content suppliers, now make up over 13% of all consumers under age thirty-five.² The pace of this sea change is quickly accelerating.³ Online groups, some even ironically hosted by traditional providers themselves,⁴ have become missionaries for the shift with quasi-

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¹ Ken Auletta, *Annals of Communications, Outside the Box*, THE NEW YORKER, February 3, 2014, at 54.

² Janko Roettgers, *Cord Cutters Alert: 5 Percent Of Broadband Users Watch All Of Their TV Online*, GIGAOM (Aug 1, 2013), <http://gigaom.com/2013/08/01/five-percent-cord-cutters/> (Noting that as of August 2013, 5 percent of internet broadband consumers utilize only online video services. The article also notes that 40 percent of broadband users use some online sources for TV, 70 percent of under-35 year olds with broadband access stream some of their entertainment, and 13 percent of under-35 year olds stream all of their content from the internet without the use of traditional cable).

³ See Jim Edwards, *TV is Dying, And Here Are The Stats That Prove It*, BUSINESS INSIDER (Nov. 24, 2013), <http://www.businessinsider.com/cord-cutters-and-the-death-of-tv-2013-11> (Noting after a discussion of the collapse of broadcast and cable TV subscriptions that “[w]e’re at the beginning of a major historical shift from watching TV to watching video — including TV shows and movies — on the internet or on mobile devices.”); Alex Tretbar, *Morgan Stanley Study Points To A Steadily Growing Number Of Cord-Cutters*, DIGITAL TRENDS (March 14, 2014), <http://www.digitaltrends.com/home-theater/morgan-stanley-report-us-tv-subscribers-to-cut-cord-2014>; Farhad Manjoo, *Comcast vs. the Cord Cutters*, THE NEW YORK TIMES (Feb. 15, 2014), <http://www.nytimes.com/2014/02/16/business/media/comcast-vs-the-cord-cutters.html>.

⁴ *Cord Cutting 101*, DIGITAL TRENDS, <http://www.digitaltrends.com/topic/cord-cutting-101/> (hosted by “The Digital Trends Connected Home Presented By Verizon Fios”) (last visited July 9, 2014).

religious zeal. A representative Cord Cutting website proclaims: “A revolution has begun. Fed up with constantly increasing prices, endless fees and taxes, and programming packages that include forty channels you don’t want for every one that you do, cable and satellite customers across the US are kicking their service providers to the curb by cutting the cord and sourcing their TV programming elsewhere.”⁵ In fact, all three authors are Cord Cutters, and none have traditional cable or satellite service in their respective households.

But the law has not kept pace with the advance of technology that has made Cord Cutting possible⁶ and at present there are many unanswered legal questions concerning content delivery mechanisms that belie the state of the technologic art.⁷ There are additional content delivery restrictions⁸ enfeebling technologies that are quickly replacing cable television. This paper attempts to provide a brief history, to summarize the current state of the relevant technologies and the applicable law, and to make predictions for the evolution of that legal environment that will shape the growth of these new content delivery mechanisms in the coming decade.

II. BEFORE BROADBAND – B.C. & D.C. – A PRIMER ON THE PREVIOUS AND CURRENT ERAS

In the era before the current one, which we term *B.C.*, (that is “*Before Cable*”),⁹ television was broadcast using analog signals over regional antenna towers to an unlimited number of television owners with their own,

⁵ *Id.*

⁶ See generally Note, *Enabling Television Competition In A Converged Market*, 126 HARV. L. REV. 2083 (2013).

⁷ See James Grimmelmann, *Why Johnny Can’t Stream: How Video Copyright Went Insane*, ARS TECHNICA (Aug. 30, 2012), <http://arstechnica.com/tech-policy/2012/08/why-johnny-cant-stream-how-video-copyright-went-insane/> (“Deploying 10,000 tiny antennas makes no technical sense – but the law demands it.”).

⁸ See *Verizon v. F.C.C.*, 740 F.3d 623 (D.C. Cir. 2014) (discussed in more detail *supra*); see generally the other continuing controversies regarding network neutrality, including those compiled in the *Forty-Third Selected Bibliography On Computers, Technology And The Law*, 38 RUTGERS COMPUTER & TECH. L.J. 277, 376 (2012); Larry Downes, *Unscrambling the FCC’s Net Neutrality Order: Preserving the Open Internet - - But Which One?*, 20 COMM. LAW CONSPICUOUS 83 (2011); Daniel A. Lyons, *Virtual Takings: The Coming Fifth Amendment Challenge to Net Neutrality Regulation*, 86 NOTRE DAME L. REV. 65 (2011); Eric Null, *The Difficulty with Regulating Network Neutrality*, 29 CARDOZO ARTS & ENT. L. J. 459 (2011); Caroline S. Scala, *The FCC’s Role in Regulating Network Neutrality: Protection of Online Innovation & Business*, 15 CHAP. L. REV. 419 (2011); James B. Speta, *Supervising Managed Services*, 60 DUKE L.J. 1715 (2011); Jennifer Wong, *Net Neutrality: Preparing for the Future*, 31 J. NAT’L ASS’N L. JUD. 669 (2011); Christopher S. Yoo, *Technologies of Control and the Future of the First Amendment*, 53 WM. & MARY L. REV. 747 (2011).

⁹ Pun intended.

smaller household antennas that received the signal.¹⁰ There were no fees charged to the individual consumer for right to view the television programming available to the viewing public. These Over-the-Air (or “OTA”) broadcast television stations were—and continue to be—either publicly supported stations (for instance, the Corporation for Public Broadcasting¹¹) or they were supported through advertisers’ purchase of airtime¹² from the stations and networks in order to broadcast commercials to the viewing public.¹³

The current era, which we term *D.C. (“During Cable”)*, arose with the growth of today’s traditional cable industry and later with the advent of satellite television. According the FCC, “Cable television (originally called CATV or community antenna television) was developed in the late 1940’s for communities unable to receive TV signals because of terrain or distance from TV stations.”¹⁴

The FCC’s authority to regulate cable was first granted in the original 1934 Communications Act, although cable itself did not exist at the time.¹⁵

¹⁰ The first television station appeared in the late 1920’s. *The First Television Show*, POPULAR MECHANICS, August 1930, at 177-79, available at <http://books.google.com/books?id=iuIDAAAAMBAJ&lpg=PA177&dq=Popular%20Science%201930%20plane%20%22Popular%20Mechanics%22&pg=PA177#v=onepage&q&f=true> (last visited July 9, 2014); *Golden Age, 1930’s Through 1950’s*, Federal Communications Commission, available at <http://transition.fcc.gov/omd/history/tv/1930-1959.html> (last visited July 9, 2014).

¹¹ 47 U.S.C. 396 (k)(3)(B)(i) (1967) (“The Corporation shall utilize the funds allocated pursuant to subparagraph (A)(ii)(II) and subparagraph (A)(iii)(II) to make grants for production of public television or radio programs by independent producers and production entities and public telecommunications entities, producers of national children’s educational programming, and producers of programs addressing the needs and interests of minorities, and for acquisition of such programs by public telecommunications entities.”).

¹² This airtime-driven model is breaking down. “Television advertising, once viewed as the pillar of advertising media outlets, is facing numerous challenges from alternative media (e.g., Internet) and from the invasion of technology devices, such as digital video recorders (DVR) that have empowered customers to be more selective when choosing advertisements to view. To combat this, many networks and local television stations have altered the types of advertising they permit, including offering ads with shorter runtimes (e.g., 15-second ads) or longer run-times (e.g., 30-minute infomercial).” PAUL CHRIST, KNOWTHIS: MARKETING BASICS, 2ND ED., 237, KNOWTHIS MEDIA, (2012).

¹³ See *BIA/Kelsey Reports Local Television Revenues Rose 23.2% to \$19.4 Billion in 2010, Driven by Political Campaigns and National Advertising*, BIA KELSEY, [http://www.biakelsey.com/Company/Press-Releases/110429-Local-Television-Revenues-Rose-23.2-Percent-to-\\$19.4-Billion-in-2010.asp](http://www.biakelsey.com/Company/Press-Releases/110429-Local-Television-Revenues-Rose-23.2-Percent-to-$19.4-Billion-in-2010.asp) (last visited July 9, 2014).

¹⁴ Federal Communications Commission, *FCC Encyclopedia, Evolution of Cable Television*, FED. COMM’NS COMM’N, <https://www.fcc.gov/encyclopedia/evolution-cable-television#evol> (last visited July 9, 2014).

¹⁵ See *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968); see generally *F.C.C. v. Midwest Video Corp.*, 99 S.Ct. 1435 (1979); *Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9 (D.C. Cir. 1977).

The FCC first attempted to do so in regulations in 1965 and 1966, which were confirmed in the *Southwestern Cable Co.* case in 1968.¹⁶ The 1934 Act was amended by the Cable Communications Act of 1984.¹⁷ Since the 1984 Act Congress and the FCC have continually exerted varying degrees of control over traditional cable broadcasters.¹⁸ This included rate and capacity controls embodied in the Cable Television Consumer Protection and Competition Act of 1992¹⁹ and the deregulating influence of the Telecommunications Act of 1996.²⁰

Satellite based television services had a more recent evolution but are still subject to extensive regulation. “Until 1988, satellite providers could not legally transmit network broadcasting to their customers because Congress had not provided satellite providers with statutory protection from copyright infringement.”²¹ In that year Congress enacted the Satellite Home Viewer Act of 1988.²² The 1988 Act “[w]as designed to limit satellite transmission of network programming to unserved households because advertisers and broadcasters were concerned that if urban households were permitted to subscribe to distant networks, those households would stop watching their local affiliates in favor of the distant networks.”²³ Unserved households were narrowly defined to exclude households within reach of the generally urban-sited transmission towers.²⁴ The essential problem with this regime was that the bulk of the viewing public was located in urban and suburban areas,²⁵ and therefore were not classified as “unserved.”²⁶ This meant that the bulk of the potential satellite audience couldn’t be supplied with what was most in

¹⁶ 392 U.S. at 178.

¹⁷ 47 U.S.C. §521 *et. seq.*

¹⁸ For a more in depth discussion of the regulation of classic cable television, see Jeffrey E. Wallace, *Contextual Regulation of Indecency: A Happy Medium for Cable Television*, 21 VAL. U. L. REV. 193, 195-99 (2011).

¹⁹ Pub.L. 102-385 (1992).

²⁰ Pub.L. 104-104, 110 Stat. 56 (1996).

²¹ Kevin W. Harris, *I Want my MTV . . . and My ABC, CBS, NBC, and FOX: CBS Broadcasting, Inc. v. Echostar Communications Corp., The Satellite Home Viewer Act Of 1988, And An Argument For Consumer Choice In Distant Network Broadcasting*, 2007 B.Y.U. L.REV. 1055, 1060 (2007).

²² 17 U.S.C. §119, Satellite Home Viewer Act of 1988 (SHVA), title II, Pub. L. No. 100-667, 102 Stat. 3935, 3949 (1988).

²³ 2007 B.Y.U. L.REV. at 1063.

²⁴ 17 U.S.C. § 119(d)(10)(A-E) (2000); see also the discussion at 2007 B.Y.U.L.REV. at 1061-62.

²⁵ See Paul Christ, *Television Advertising*, (2014), KNOWTHIS.COM, <http://www.knowthis.com/types-of-advertising-media/television-advertising> (last visited Oct. 30, 2014); see generally Franklin M. Fisher, John J. McGowan & David S. Evans, *The Audience-Revenue Relationship for Local Television Stations*, 11 THE BELL JOURNAL OF ECONOMICS 694 (1980) (Discussing in part the relationship of audience size and characteristics to revenue and appeal).

²⁶ *Supra* note 24.

demand—content from their local network affiliates.²⁷ In order to secure those local signals, satellite consumers were forced to install secondary OTA antennas to receive analog broadcasts from the local transmission towers.²⁸ That situation changed relatively quickly. Within the next decade the Home Viewer Improvement Act of 1999²⁹ significantly expanded satellite broadcasting to become a functional equal of cable providers within the marketplace by permitting satellite companies to provide local broadcast channels otherwise accessible OTA to all subscribers in that local market.³⁰ “This ability to provide local broadcast channels is commonly referred to as ‘local into local’ service.”³¹

A primary differentiator between television in the *B.C.* era and the *D.C.* era is the fact that satellite and cable providers receive a significant portion of their income not just from advertisers³² but also from retransmission fees³³ and subscriber fees.³⁴ “The vast majority of these revenues consist of subscription fees paid by consumers and businesses for video programming, high-speed Internet access, telephone services, and related equipment.”³⁵

²⁷ Stephen Super, *Congress Gives Satellite Viewers Local Station Option*, 6 B. U. J. SCI. & TECH. L. 329 (2000).

²⁸ *Id.*; Incidentally, the FCC has authority to regulate the placement of satellite dishes and antennae with a limited preemption of local ordinances. The FCC ban limits imposed by state and local governments that hinder installation, maintenance or use of video antennas less than one meter in diameter (or larger within Alaska). 47 C.F.R. §1.4000. Pursuant to the ban, restrictions that unreasonably delay or prevent installation, maintenance or use; (2) unreasonably increase the cost of installation, maintenance or use; or (3) preclude reception of an acceptable quality signal are impermissible. *Id.* at (a)(3)(i-iii). The rule applies to rented properties too. *Id.* at (a)(1). For a detailed review of the law surrounding that authority, see Christopher Neumann, *FCC Preemption of Zoning Ordinances That Restrict Satellite Dish Antenna Placement: Sound Policy or Legislative Overkill?*, 71 ST. JOHN’S L. REV. 635 (1997).
²⁹ 17 U.S.C. §122 (2011).

³⁰ *Id.* at §122(a)(1-2).

³¹ Federal Communications Commission, *FAQS – Satellite*, FED. COMM’NS COM’N <http://www.fcc.gov/encyclopedia/faqs-satellite#shvia> (last visited July 9, 2014).

³² See *supra* note 25.

³³ See discussion, *infra*. Retransmission fees are at the center of current litigation that directly impacts the industry and the Cord Cutting movement.

³⁴ See Bortz Media & Sports Group, Inc., *Cable Across America: An Economic Impact Report (2012)*, NAT’L CABLE & TELECOMM. ASS’N, <https://www.ncta.com/sites/prod/files/bortz.pdf> (last visited Oct. 30, 2014).

³⁵ *Id.* at 9; For exceptionally detailed discussions of the finances of cable providers in the *D.C.* era see also *2012 Time Warner Cable Annual Report*, TIME WARNER CABLE, http://ir.timewarnercable.com/files/doc_financials/Annual%20Reports/468244_010.pdf (last visited July 9, 2014); *Comcast 2012 Annual Review*, COMCAST, http://www.comcast.com/2012annualreview/d/CMCSA_AR12_full_10K.pdf?SCRedirect=true?SCRedirect=true (last visited July 9, 2014); *c.f. Verizon 2012 Annual Review*, VERIZON, http://www.verizon.com/investor/app_resources/interactiveannual/2012/downloads/12_vz_ar.pdf (last visited July 9, 2014).

Advertising has taken a back seat to the subscription model³⁶ that currently raises such ire with the viewing public.³⁷

This cable/satellite situation at the height of the *D.C.* era at the turn of and in the first decade of the millennium is the “classic” view of the home consumer entertainment landscape.³⁸ The vast majority of entertainment consumers received their content in one of four ways: either through their cable company exclusively; through their satellite broadcaster exclusively; through the functional equivalent of a cable company such as Verizon Fios exclusively;³⁹ or through OTA Analog signals exclusively.⁴⁰

III. AFTER CABLE – THE LEGAL AND TECHNICAL FOUNDATIONS

The now-waning *D.C.* (“*During Cable*”) era is rather quickly being eclipsed by an emerging era that the authors term *A.C.* (“*After Cable*”).⁴¹ Although we are not yet fully immersed in this new phase—consider this a transitional period—four necessary events were predicates for the current rise of the *A.C.* era. Although inextricably interrelated, two of these events are technological predicates and the remainder are legal predicates.

³⁶ *Supra* note 12.

³⁷ *Supra* note 4.

³⁸ See *Big Bets for the U.S. Cable Industry, Key Opportunities for Future Revenue Growth*, PRICEWATERHOUSECOOPERS (2005), www.pwc.com/us/en/...center/.../mso_wb-x.pdf (“At the same time, the pool of subscribers to multi-channel video services is unlikely to grow beyond where it stands today: 86 percent of U.S. television households. The majority of those subscribers are served by cable. The remaining subscribers are served either by satellite television, the cable industry’s established competitor, or by a telecommunications carrier [such as Verizon Fios], an emerging competitor.”)

³⁹ *Id.*

⁴⁰ Current estimates range between 7% and 20% of the viewing public. Pro-broadcast company surveys tend to cite the lower figure, and pro-Cord Cutting surveys tend to present higher numbers. “The most recent study found that [7] percent of [OTA] households rely solely on antennas for TV reception. The CEA’s estimate stands in contrast to figures released by media analysts at GfK, publisher of The Home Technology Monitor. GfK found that 19.3 percent of American households—as many as 60 million Americans—rely exclusively on over-the-air TV.” TV Technology Staff, *CEA Study Says Seven Percent of TV Households Use Antennas*, TV TECH. (Jul. 30, 2013), <http://www.tvtechnology.com/article/cea-study-says-seven-percent-of-tv-households-use-antennas-/220585>.

⁴¹ The authors considered the term *B.E.* (“*Broadband Era*”) for this nascent period. However, we discarded the term for two reasons: first, because broadband – defined here as always-on internet capable of 3 gigabit per second or better download speeds – is a technology that could be replaced without changing the underlying premises of this article; and second, because the AC/DC mnemonic conjures images of a certain 1980s hair band at the height of cable’s MTV Music Television ascendancy – thus making it easy to recall.

A. Technological Predicates

The technological predicates, broadband internet access,⁴² and the rise of Netflix and its imitators,⁴³ directly accelerated the current transition to the A.C. era. Indeed, the A.C. era would not be possible without them.

1. Broadband

Broadband internet access seems ubiquitous today. It is, however, a creature of the first decade of this century.⁴⁴ There are numerous technical and enthusiast descriptions of the rise of broadband internet, but one of the better descriptions of the rise of broadband internet access in a legal context is contained in 2014's *Verizon v. F.C.C.*:⁴⁵ "In the Internet's early days, most users connected to the Internet through dial-up connections over local telephone lines."⁴⁶ Recall the old America Online commercials and the flood of sign-up disks in your mailbox circa 1999.⁴⁷ Those outmoded computer disks enabled dialup telephone access to the internet at slow speeds orders of magnitude below current standards.⁴⁸ "Today, access is generally furnished through "broadband," i.e., high-speed communications technologies, such as cable modem service."⁴⁹ The authors define broadband as always-on internet capable of 3 gigabit per second or better download speeds⁵⁰ because that speed can provide DVD or better quality streaming video.⁵¹

Broadband's rise created a virtuous cycle of new products and new technologies feeding upon the growth of the other: "[h]igher-speed residential Internet connections in the late 1990s 'stimulated' the

⁴² See the discussion of *Broadband*, *infra*.

⁴³ See the discussion of *Netflix and Its Imitators*, *infra*.

⁴⁴ See *Verizon v. F.C.C.*, 740 F.3d 623 (D.C. Cir. 2014).

⁴⁵ *Id.* at 629.

⁴⁶ *Id.*, citing *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 F.C.C.R. 4798, 4802-03 ¶ 9 (2002).

⁴⁷ See M.G. Siegler, *How Much Did It Cost AOL To Send Us Those CDs In The 90s? "A Lot!," Says Steve Case*, TECH CRUNCH (Dec. 27, 2010), <http://techcrunch.com/2010/12/27/aol-discs-90s/>.

⁴⁸ 56 kilobits per second was the standard dialup internet connection speed. Alex Freeman, *Why is 56k the fastest dialup modem speed?*, 10 STRIPE, <http://www.10stripe.com/articles/why-is-56k-the-fastest-dialup-modem-speed.php> (last visited July 9, 2014). That speed is .018% of one of the slowest broadband speeds, 3gbs. See *Supra* note 41.

⁴⁹ *Verizon*, 740 F.3d at 629, citing *In re Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 25 F.C.C.R. 9556, 9557, 9558-59 ¶¶ 1, 4 (2010) ("Sixth Broadband Deployment Report"); 47 U.S.C. § 1302(d)(1) (2013)

⁵⁰ *Supra* note 41.

⁵¹ *Infra* note 54.

development of streaming video,⁵² a service that requires particularly high bandwidth, “which in turn encouraged broadband providers to increase network speeds.”⁵³ The transition from dialup internet to broadband has been accomplished quite quickly.⁵⁴ According data from the *Pew Internet Research Project* as of September 2013, 70% of Americans had access to broadband internet access at home.⁵⁵ Compare the current penetration of broadband to the situation at the turn of the century: “In June 2000, when about half of adults were online [using dialup], only 3% of American households had broadband access.”⁵⁶ The increase in dramatic and it is the great enabler of the *A.C.* era.

2. The Rise of Netflix and Its Imitators

Netflix is an integral part of the race to replace cable. Netflix began in 1997 as a mail-in (via “snailmail”⁵⁷) competitor to established video rental services like Blockbuster Video.⁵⁸ Subscribers would choose movies on the Netflix website and the company would—and it still does—mail a rental DVD or Blu-Ray movie to the subscriber.⁵⁹ In 2002 the Netflix Annual Report described their business as follows: “Our subscribers never go to the video store on a Saturday night to rent a movie—or make a return trip to avoid a late fee. Instead, Netflix offers our subscribers direct home delivery of their DVD selections, usually the next day.”⁶⁰ After viewing was complete, the subscriber would mail the movie back to Netflix.⁶¹ In fact,

⁵² See the discussion of Netflix, *supra*.

⁵³ *Verizon*, 740 F.3d at 644, citing *Open Internet Order*, 25 F.C.C.R. at 17911 ¶ 14 n. 23.

⁵⁴ PEW RESEARCH INTERNET PROJECT, *Broadband Technology Fact Sheet*, <http://www.pewinternet.org/fact-sheets/broadband-technology-fact-sheet/> (last visited July 9, 2014).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Defined as “the conventional postal system, as opposed to electronic mail.”

DICTIONARY.COM, <http://dictionary.reference.com/browse/snail+mail> (last visited July 9, 2014).

⁵⁸ NetFlix Media Center, *A Brief History of the Company That Revolutionized Watching of Movies and TV Shows*, NETFLIX, <https://pr.netflix.com/WebClient/loginPageSalesNetWorksAction.do?contentGroupId=10477&contentGroup=Company+Timeline> (last visited July 9, 2014).

⁵⁹ See Netflix Annual Report 2002, <http://files.shareholder.com/downloads/NFLX/3041394245x0x16168/7C8B7B63-6DC2-45D5-AC8F-424C27C6D2C9/2002AR-print.pdf> (last visited July 9, 2014).

⁶⁰ *Id.* at 3.

⁶¹ *Id.*

volume was such that Netflix was able to negotiate—at least for a time—special rates and treatment from the U.S. Postal Service.⁶²

The rise of broadband⁶³ enabled the transition of Netflix from a mail-based subscription service to an on-demand streaming video service that has profoundly impacted the entertainment landscape. In 2007 “Netflix introduce[d] streaming, which allows members to instantly watch television shows and movies on their personal computers.”⁶⁴ Broadband internet access of at least 3gbs is required for internet video streaming at DVD level quality.⁶⁵ The combination of a low pricing model,⁶⁶ and broadband access that had reached 70% of the American population⁶⁷ by 2012 changed Netflix’s business model. In 2012 the video streaming model clearly dominated the company’s growth efforts and revenue streams, and Netflix streaming began to stimulate change within the industry. Netflix describes its growth as such in its 2012 annual report:

Netflix, Inc. . . . is the world’s leading Internet television network with more than 33 million members in over 40 countries enjoying more than one billion hours of TV shows and movies per month, including original series. For one low monthly price, our members can watch as much as they want, anytime, anywhere, on nearly any Internet-connected screen. Additionally, in the United States (“U.S.”), our subscribers can receive standard definition DVDs, and their high definition successor, Blu-ray discs . . . delivered quickly to their homes.⁶⁸

Netflix has many imitators and competitors. Netflix itself describes the competitive video streaming market over broadband as follows:

⁶² See *GameFly Inc. v. Postal Regulatory Commission*, 704 F.3d 145, (D.C. Cir. 2013) (In discussing the costs of mailing disks back and forth through the traditional mails, the court noted that “[t]he Postal Service has saved Netflix—apparently its biggest DVD mailer customer—from this crippling otherwise industry-wide problem by diverting Netflix mail from the automated letter stream, shifting it to specially designated trays and containers, hand culling it, and hand processing it. Rather obviously, this is not without cost to the Postal Service. Nonetheless, the Service provides it to Netflix free of charge.”) *Id.* at 146-47.

⁶³ See the discussion of Broadband, *supra*.

⁶⁴ *Supra* note 58.

⁶⁵ *How fast should my Internet connection be to watch Netflix?*, NETFLIX, <https://help.netflix.com/en/node/306> (last visited July 9, 2014).

⁶⁶ \$7.99 per month for unlimited streaming in 2014. See landing page at <https://www.netflix.com/> (last visited July 9, 2014).

⁶⁷ *Supra* note 54.

⁶⁸ See Netflix Annual Report 2012 at 1, http://files.shareholder.com/downloads/NFLX/3041394245x0x658002/2604be28-a3d3-49e6-a504-df6cb4856a02/2012_10K.pdf (last visited July 9, 2014).

Multichannel video programming distributors . . . with free TV Everywhere applications such as HBO GO or Showtime Anytime in the U.S. . . . and other on demand content from cable providers, such as Time Warner and Comcast; direct broadcast satellite providers, such as DIRECTV and EchoStar; . . . telecommunication providers such as AT&T and Verizon “Over-the-top” Internet movie and TV content providers, such as, Amazon.com’s Prime Video, Hulu.com and Hulu Plus, LOVEFiLM, Clarovideo, Viaplay, and Google’s YouTube, [and] [t]ransactional content providers, such as Apple’s iTunes, Amazon’s Instant Video, GooglePlay, and Vudu.⁶⁹

What this means in practical terms is that entertainment consumers are no longer tied to the traditional “classic” view of the home consumer entertainment landscape discussed *supra*.⁷⁰ They can stream, instantly, very high quality high definition streams⁷¹ from a variety of providers.⁷² That technical capability, however, is not enough to instigate a transition from the classic cable model. Streaming video alone, even on ultra-fast broadband connections,⁷³ without other legal enabling laws, does not provide the consumer with high quality versions of the traditional network channels⁷⁴ – those channels that the average member of the public consider to be basic

⁶⁹ *Id.* at 2.

⁷⁰ *Supra* note 38.

⁷¹ These video streams, their quality, and the impact of same on viewer behaviors have been extensively studied in other disciplines. See Krishnan, S. Shunmuga, & Ramesh K. Sitaraman. “Video stream quality impacts viewer behavior: inferring causality using quasi-experimental designs.” In *Proceedings of the 2012 ACM conference on Internet measurement conference*, pp. 211-24. ACM, 2012; see generally Balachandran, Athula, Vyas Sekar, Aditya Akella, Srinivasan Seshan, Ion Stoica, & Hui Zhang. “Developing a predictive model of quality of experience for internet video.” In *Proceedings of the ACM SIGCOMM 2013 conference on SIGCOMM*, pp. 339-350. ACM, 2013; Liu, Xi, Florin Dobrian, Henry Milner, Junchen Jiang, Vyas Sekar, Ion Stoica, & Hui Zhang. “A case for a coordinated internet video control plane.” In *Proceedings of the ACM SIGCOMM 2012 conference on Applications, technologies, architectures, and protocols for computer communication*, pp. 359-370. ACM, 2012.

⁷² *Supra* note 69.

⁷³ Google Fiber, for instance, is now available in limited areas and is extremely fast at “[u]p to 1,000 Mbps, Google Fiber is 100 times faster than today’s basic broadband.” *The goodness of Internet and TV. Times 100.*, GOOGLE FIBER, <https://fiber.google.com/about/> (last visited July 9, 2014).

⁷⁴ Defined here as ABC, NBC, CBS (the original broadcast networks). Douglas Blanks Hindman & Kenneth Wiegand, *The Big Three’s Prime-Time Decline: A Technological and Social Context*, 52(1) JOURNAL OF BROADCASTING AND ELECTRONIC MEDIA, 119 (2008). We also include newer broadcast networks such as FOX, ION, CW, MyNetworkTV, and, among Spanish language viewers, Telemundo and Univision. *Id.* at 120.

requirements of a television entertainment package.⁷⁵ For that portion of our analysis we turn to the legal predicates of the *A.C.* era.

B. *Legal Predicates*

Two legal predicates, the forced Digital OTA Television Transition⁷⁶ and the *Cablevision* Litigation⁷⁷ enabled the current transition to the *A.C.* era. Without these legal spurs towards the future the growth of Cord Cutting behavior would have been severely curtailed.

1. The Analog to Digital OTA Television Transition

The broadcast networks continued to broadcast analog signals well into the 21st century.⁷⁸ These analog signals were of middling quality⁷⁹ and by their very nature as non-digital signals there were limitations to what those signals could achieve for the end user.⁸⁰

However, emerging technologies, increasingly crowded airwaves and the chance to burnish the public treasury birthed The Digital Television Transition and Public Safety Act of 2005.⁸¹ Originally “[i]n the U.S., regulations for the transition from analog to digital over-the-air broadcast were initiated by the Federal Communications Commission and amended and modified by the Telecommunications Act of 1996 and the Balanced Budget Act of 1997.”⁸² “In the section of the [Telecommunications Act of 1996⁸³] pertaining to broadcasting, Congress directed the FCC to provide new licenses (at no cost) to incumbent broadcasters for the provision of [digital over the air] broadcasting under the condition that broadcasters would have

⁷⁵ See Comcast, *Differences Between Limited Basic and Expanded Basic Cable*, COMCAST <https://customer.comcast.com/help-and-support/cable-tv/difference-between-limited-basic-and-expanded-basic-cable/> (last visited May 28, 2014)(discussing the differences between Limited Basic Cable and higher tier cable packages, which serves as a proxy for the basic requirements of the average consumer).

⁷⁶ See the discussion of *The Analog to Digital OTA Television Transition*, *infra*.

⁷⁷ See the discussion of *The “Cablevision” Case - Cartoon Network v. CSC Holdings*, *infra*.

⁷⁸ See Eugene Ho, *The Constitutional Right to Watch Television: Analyzing the Digital Switchover in the Context of the First Amendment*, 57 AM. UNIV. LAW REVIEW 179 (2007).

⁷⁹ See *10 Frequently Asked Questions about Digital & High Definition TV*, WGUV PUBLIC MEDIA, <http://www.wgvu.org/home/dcpdfs/10faqs.pdf> (last visited July 9, 2014).

⁸⁰ *Id.*

⁸¹ Pub. L. No. 109-171, §§ 3001-3013, 120 Stat. 4, 21-28 (2006).

⁸² Joshua T. Block, *Regulating the Transition From Analog to Digital Television Broadcasting in North America:*

A Comparison of the Canadian, U.S., And Mexican Experiences, 17 MEDIA L. & POL’Y 20, 21 (2008).

⁸³ Pub. L. No. 104, 110 Stat. 56 (1996).

to return either the new or original analog license at some date.”⁸⁴ This was Congress’s “carrot” to spur a transition to a digital broadcasting future.

The Balanced Budget Act of 1997⁸⁵ supplemented the 1996 Act’s⁸⁶ “carrot” with a “stick” that required an end to analog broadcasting by the end of 2006.⁸⁷ But at the same time it undercut the 2006 hard-and-fast date by permitting extensions past the 2006 deadline.⁸⁸ “If 85 percent of households in any given market either did not have DTV-ready receivers or were subscribers of cable or satellite, the deadlines would not apply and the DTV transition in that market would not proceed.”⁸⁹ Because of the extensions written into the law and the facts on the ground—“[b]y 2005, only 3.3 percent of television households were capable of receiving DTV signals”⁹⁰—there was little chance of a timely, smooth, or orderly transition. The Digital Television Transition and Public Safety Act of 2005 provided a hard date for the transition with no extensions past the final analog broadcast date of February 17, 2009.⁹¹

The February 2009 date, too, was pushed back as concerns regarding public readiness grew. The new Obama administration promulgated the DTV Delay Act that provided a new deadline of June 12, 2009.⁹² Since that date for all intents and purposes the Digital OTA Television Transition has been complete.

The reaction to the transition has been positive. “Ultimately, the change will have a positive effect for consumers because [digital television] provides better sound, sharper images, and more viewing options than have ever been available over the air.”⁹³ “Many commentators consider [broadcast digital television] to be the most significant development in television technology since the advent of color TV.”⁹⁴

Outside of the realm of the Cord Cutter a]n important benefit of the switch to all-digital broadcasting is that parts of the valuable broadcast spectrum have been freed up for public safety communications by groups such as police, fire departments and

⁸⁴ James Miller & James E. Priege, *The Broadcasters’ Transition Date Roulette: Strategic Aspects Of The DTV*

Transition, 9 J. ON TELECOMM. & HIGH TECH. L 437, 463 (2011).

⁸⁵ See *supra* note 82.

⁸⁶ *Supra* note 83.

⁸⁷ 9 J. ON TELECOMM. & HIGH TECH. L at 463.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 464.

⁹¹ 47 U.S.C. 309(j)(14) (2006).

⁹² DTV Delay Act, Pub. L. No. 111-4, 123 Stat. 112 (2009).

⁹³ 17 MEDIA L. & POL’Y at 20.

⁹⁴ 57 AM. UNIV. L. REV. at 181.

rescue squads. Also, some of the spectrum has been auctioned to companies that will be able to provide consumers with advanced wireless services, such as wireless broadband.⁹⁵

For the Cord Cutter the Digital OTA Television Transition provides an experience comparable to, and arguably better than, the experience provided by cable and satellite providers with regard to local broadcast channels. That experience is free of monthly fees and subscriptions. Commentators have succinctly described the improvements Digital OTA provides over analog television signals, including the ability to receive uncompressed high definition (“HDTV”) signals:

Viewers cannot ignore the dramatic improvements offered by the DTV conversion. Visually, HDTV captures viewers with crystal clear resolution and razor sharp detail. Individual hairs, labels on footballs and the subtle effect of wind blowing through grass are all clearly visible through HDTV. Also, the detailed resolution and color provides an image similar to a movie-theater screen. Combined with the capacity to deliver enhanced Dolby Digital surround sound, HDTV produces an advanced home theater effect. DTV provides viewers with sharper images, better sound, and more viewing options than have ever been available over the air.⁹⁶

It is axiomatic that traditional television providers charge fees to consumers to access television channels through the “classic” routes: their cable company; their satellite broadcaster; or through the functional equivalent of a cable company such as Verizon Fios.⁹⁷ Those fees continue to outpace the rate of inflation:

The Federal Communications Commission reported this week that average cable television bills nationwide jumped by 5.8 percent in the one-year period through July [2013], considerably higher than the 3.7 percent increase in the price of all goods and services.⁹⁸

⁹⁵ *Digital Television*, FED. COMM’NS COMM’N, <https://www.fcc.gov/digital-television> (last visited July 9, 2014).

⁹⁶ *Supra* note 79.

⁹⁷ *Supra* note 39.

⁹⁸ Mark Baumgartner, *Average Cable Rates on the Rise*, ABC NEWS (Feb. 16, 2014), <http://abcnews.go.com/Business/story?id=88614>.

That average bill is expected to be \$123 per month in 2015.⁹⁹ Yet the paid, cable and satellite versions of the broadcast channels provide an inferior product when compared to the uncompressed Digital OTA HDTV signals available for free. Most, if not all, cable and satellite providers to some degree compress their digital signals by removing image information from the channels that they sent to their subscribers.¹⁰⁰ They are forced to do this because of the current state of technology and the limits of the “pipe” connecting them to their customer base.¹⁰¹ This is not the case with Digital OTA HDTV signals. Those signals are generally not as compressed or uncompressed.¹⁰² Therefore, they are sent in their purest form, with markedly higher quality for free to the consumer. In 2012-2013, 94 of the top 100 rated television shows were offered by networks that broadcast Digital OTA HDTV signals through their local affiliates.¹⁰³

Therefore, the Digital OTA Transition has enabled a situation where with regard to the major network broadcast channels the consumer has a choice of a demonstrably inferior, yet expensive, subscription model to a traditional provider’s services, or the choice of free higher quality signals for the exact same programming. That programming is most of the programming that most people watch.¹⁰⁴ That fact has been instrumental to the Cord Cutter Movement.

2. The “Cablevision” Case - Cartoon Network v. CSC Holdings

Perhaps one of the most influential legal predicates—one to test the limits of digital recordings of coaxial cable transmissions—occurred in 2007

⁹⁹ The NPD Group: *Average Monthly Pay-TV Subscription Bills May Top \$200 by 2020*, NPD GROUP (Apr. 10, 2012), https://www.npd.com/wps/portal/npd/us/news/press-releases/pr_120410/.

¹⁰⁰ Chis Williams, *Cable’s Crunched Signals Irritate HD Die-Hards*, ABC NEWS, <http://abcnews.go.com/Technology/story?id=4691553> (last visited July 9, 2014).

¹⁰¹ *Id.* See also Robert Silva, *Macroblocking and Pixelation - Similarities and Differences*, HOME THEATER, <http://hometheater.about.com/od/hometheatervideobasics/qt/Macroblocking-And-Pixelation-Similarities-And-Differences.htm> (last visited July 9, 2014).

¹⁰² See Dwight Silverman, *The Houston Chronicle, Cord-cutting on the cheap: Over-the-air HDTV saved to a Boxee DVR*, CHRON, (Oct. 9, 2012), <http://blog.chron.com/techblog/2012/10/cord-cutting-on-the-cheap-over-the-air-hdtv-saved-to-a-boxee-dvr/> (“It’s an irony of the age of digital television that the best picture you can get on your big-screen, HDTV comes from old-school, rabbit-ear antennas. Yep, the free TV you get from your local broadcast station has a less-compressed signal than those delivered by cable TV, which means the visuals are a lot better.”)

¹⁰³ See, e.g., TVB Local Media Marketing Solutions, *Seasons of Premieres: Fall Broadcast and Summer Cable*, TELEVISION BUREAU OF ADVER., http://www.tvb.org/research/2053636/summer_primetime_broadcast (last visited July 9, 2014).

¹⁰⁴ *Id.*

with the *Cartoon Network v. CSC Holdings* case (commonly referred to as *Cablevision*).¹⁰⁵ The case arose from Cablevision's March 2006 announcement offering subscribers a new "Remote Storage DVR system" (RS-DVR) feature. This technology, much like a set-top DVR, would permit subscribers to record cable programming and to play the recorded content on demand, using their remote control and their Cablevision cable box.¹⁰⁶ Cablevision's content providers and copyright holders (hereafter referred to as "plaintiffs") sued Cablevision, alleging the operation of the RS-DVR would directly infringe upon their right to control the reproduction and public performance of copyrighted works.¹⁰⁷

The District Court for the Southern District of New York awarded summary judgment for the plaintiffs, enjoining Cablevision from operating the RS-DVR without first obtaining licenses from the content providers.¹⁰⁸ On appeal however, the Second Circuit reversed, vacated and remanded, holding that Cablevision's RS-DVR system "would not directly infringe on plaintiffs' exclusive right to reproduce and publicly perform their copyrighted works."¹⁰⁹ Of apparent importance to the Second Circuit's ruling was the operation of the RS-DVR technology. The court's opinion describes, in detail, the platform Cablevision used to record and retransmit programming to its subscribers.¹¹⁰ Since this analysis remains important in the recent *ABC v. Aereo* case (discussed *supra*), a summary of the technology is relevant.¹¹¹

In the typical scenario, Cablevision gathered programming from its various content providers and transmitted it to subscribers in real time via a "single stream" of data.¹¹² By way of illustration, imagine that a subscriber wanted to watch HBO's "Game of Thrones" Sunday evening at 9:00 p.m. Cablevision received a data transmission of the program from HBO at 9:00 p.m. and immediately re-transmitted the data to the subscriber in a single stream. With the advent of the RS-DVR feature however, that single stream of data was broken into two separate streams.¹¹³ The first data stream, as before, was provided immediately to the subscribers who watched Game of Thrones in "real time." The second stream moved through a data buffer onto

¹⁰⁵ *Cartoon Network v. CSC Holdings*, 536 F.3d 121 (2d Cir. 2008).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*; see *Twentieth Century Fox Film Corp. v. Cablevision Sys. Corp.*, 478 F.Supp. 2d 607 (S.D. N.Y. 2007).

¹⁰⁹ *Id.* at 140.

¹¹⁰ *Id.* at 124-26.

¹¹¹ See *ABC v. Aereo Inc.*, 712 F.3d 676 (2d Cir. 2013).

¹¹² *Cartoon Network*, 536 F.3d at 124.

¹¹³ *Id.*

a server located at a Cablevision facility.¹¹⁴ There, the server determined if any subscribers had selected to record Game of Thrones. If a subscriber indicated she wished to record the program, the second data stream moved to a secondary buffer and onto a portion of a hard disk allocated specifically to that subscriber.¹¹⁵ After the RS-DVR subscriber recorded the program, a copy of that program resided on the hard disk of the Cablevision server.¹¹⁶ When the subscriber wished to watch Game of Thrones she called the program up using the remote and accessed the copy of the program through the Cablevision server.¹¹⁷

Through this process plaintiffs claimed that two of their rights under the Copyright Act were implicated. First, “‘the right to reproduce the copyrighted works in copies,’ which occurred when the subscriber recorded the program.”¹¹⁸ Second, the right ‘to perform the copyrighted works publicly,’” which occurred when the subscriber viewed the recorded program.¹¹⁹ The court recognized that in order for a violation of the Copyright Act to occur two requirements must be met. First, “‘the work must be embodied in a medium, i.e., placed in a medium such that it can be perceived, reproduced, etc. from that medium.’”¹²⁰ Second, “‘it must remain thus embodied ‘for a period of more than transitory duration.’”¹²¹ The court concluded that because the program data only resided in the buffer for a few seconds (1.2 seconds to be precise) it was merely transitory in nature and therefore the operation of the RS-DVR did not create “copies” as defined by the Copyright Act.¹²² Moreover, the court concluded that the copy that remained on the hard disk after a program was recorded was attributable to the subscriber, not Cablevision.¹²³ Regarding the question of whether or not the playback of the RS-DVR was a “public performance” in violation of the Act, the court held it was not, because the RS-DVR “only makes one transmission to one subscriber using a copy made by that subscriber.”¹²⁴

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 124-25.

¹¹⁶ *Id.* at 130.

¹¹⁷ *Id.* at 125.

¹¹⁸ *Id.* at 126 (citing 17 U.S.C. §106(1),(4)).

¹¹⁹ *Id.*

¹²⁰ *Id.* at 127; *see also* 17 U.S.C. §101.

¹²¹ *Id.* (citing 2 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* §8.02[B][3], at 8-32 (2007)).

¹²² *Id.* at 130.

¹²³ *Id.* at 133.

¹²⁴ *Id.* at 134-37 *citing* 17 U.S.C. §106(4).

The Second Circuit's decision in *Cablevision* was criticized for reasons ranging from the court's interpretation of the "transitory duration"¹²⁵ to its finding that the replay of the program was not a public performance.¹²⁶ Scholars accurately prognosticated the likelihood of further litigation arising from the *Cablevision* decision.¹²⁷ As predicted, less than 5 years later, the Second Circuit and ultimately the Supreme Court would again be confronted with the limits of digital recordings in the *Aereo* case discussed below.¹²⁸

V. NETWORK NEUTRALITY

Imagine, for a moment, that private American highway companies reserved a lane for Ford cars. That would be good for Ford, but obviously would affect competition as between Ford and General Motors. It would also slow innovation— for it would no longer be the best car that wins, but the one that signs the best deal and slows down their competitors. The race is no longer to build a better car, but to fight for a better deal with the highway company.¹²⁹

¹²⁵ Daniel J. Buller, *Copyright Infringement in the Ether: RAM Buffering and the Copyright Act's Duration Requirement*, 59 KAN. L. REV. 659 (March 2011) (noting that the court's timeline analysis is fraught with problems and provides little guidance to future courts).

¹²⁶ Jeffrey Malkan, *The Public Performance Problem in Cartoon Network LP v. CSC Holdings, Inc.*, 89 OR. L. REV. 505 (2010) (stating "[t]he transmission of a performance of an RS-DVR copy to an individual's cable box, even though that transmission will go only to one subscriber, should have been found to be a public performance because RS-DVR will be an interactive service that will enable public performances to be received by subscribers who pay for the convenience of receiving their performances (or, if you will, accessing their RS-DVR copies) in 'separate places' and at 'different times.'").

¹²⁷ Christopher Vidiksis, *How to Buffer Your Way Out of a Scrape: Potential Abuse of the Cartoon Network v. Cablevision Decision*, 4 BROOK. J. CORP. FIN. & COM. L. 139 (Fall 2009) (noting "[t]he decision will likely increase future litigation over whether copyright infringement has occurred when data is quickly overwritten or obtained through the use of buffers."); see also Zohar Efroni, *The Cartoon Network v. CSC Holdings & Cablevision Systems*, STANFORD LAW SCH. CENTER FOR INTERNET AND SOC'Y (Aug. 2008) <http://cyberlaw.stanford.edu/blog/2008/08/cartoon-network-v-csc-holdings-cablevision-systems>; Jesse Harman, *Drawing a Line Between Direct and Contributory Copyright Infringement: The Second Circuit's Take on a Copying Service Provider's Direct Liability in Cartoon Network v. CSC Holdings*, 19 DEPAUL J. ART TECH. & INTELL. PROP. L. 397 (Spring 2009) (expressing agreement with court's reasoning but asserting that the court failed to foreclose direct infringement claims against providers of copying technology).

¹²⁸ See 712 F.3d 676.

¹²⁹ Network Neutrality: Competition, Innovation, and Nondiscriminatory Access, Hearing before the H. Comm. on the Judiciary Telecom and Antitrust Task Force, 109th Congress (2006) (prepared statement of Tim Wu, Professor, Columbia School of Law).

For proponents of Network Neutrality, like Tim Wu, who both coined the term¹³⁰ and provided the car analogy to describe a world without it, the desire to have the government ensure that all traffic on the internet moves at the same speed regardless of who owns it is a continuation of the de facto condition of the internet that has existed since it was first developed. However, the formalization of Network Neutrality as a regulatory requirement has been aggressively challenged in recent years.¹³¹ The policy's fate has important implications for Cord Cutters that this section will explore by first describing the circumstances that lead to this controversy, then examining the current state of the law, and finally considering the consequences of the end of Network Neutrality for consumers.

A. Rise of the Net Neutrality Controversy

Throughout the 1990s, the internet was different in two important ways: first, the content did not directly compete with television or cable television services; and second, access to it was generally purchased from companies using leased telephone lines to provide a stand-alone service.¹³² Consequently, there was no market reason for any company providing access to the internet to be concerned about what was being delivered over these new internet connections.¹³³ The evolution of technology to its current state and the competitive forces of the marketplace have radically changed that dynamic.

Today, there is no content than can be thought of as purely internet, telephone, or cable content. Both cable and telephone companies sell packages of video services, telephone services and internet access, known as the "bundle." In any given geographic area, the direct competition for a bundle of cable services will not come from another cable company but rather from a telephone company.¹³⁴ For example, the cable company Comcast does not compete with the cable company Time Warner Cable but,

¹³⁰ See generally Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. TELECOMM. & HIGH TECH. L 141 (2003).

¹³¹ See Gerald R. Faulhaber, *The Economics of Network Neutrality: Are "Prophalactic" Remedies to Nonproblems Needed?*, REGULATION, Winter 2011-12, at 18 (describing the economic policy rationale for opposing net neutrality regulation).

¹³² See J. Scott Marcus, *Network Neutrality: The Roots of the Debate in the United States*, INTERECONOMICS, January/February 2008, at 30.

¹³³ See the discussion of *Broadband*, *supra*.

¹³⁴ J. Scott Marcus, *Network Neutrality: The Roots of the Debate in the United States*, INTERECONOMICS, January/February 2008, at 30, 34.

depending on the market, may compete with either the telephone company AT&T or the telephone company Verizon.¹³⁵

Telephone and cable companies invested billions of dollars to build the infrastructure that allows them to compete with each other.¹³⁶ When the investments in infrastructure were made, it looked like the battle to sell customers a bundle of services would be a two-horse race. That assumption turned out to be painfully wrong.

It seems unimaginable today but there was a time when it was unclear whether the internet could ever be used to deliver video. The conventional wisdom was that it might be able to do so for short video clips, delivered at a low resolution.¹³⁷ That kind of video delivery might make the internet a useful marketing tool but it did not look like it would ever be a direct competitor to the established video service providers. That too turned out to be painfully wrong.

As the technology and infrastructure improved, the type of content that could be offered on the internet evolved. Not only can consumers watch online video, they can have multiple streams of high definition, movie-length video coming into their homes, using the average high speed internet service offered by their cable or telephone company to access services like Netflix, Hulu, and Amazon Prime, providing all the video they need at a fraction of the cost of traditional cable packages.¹³⁸

This development limits revenue growth for cable and telephone companies. It may also begin to cut into existing revenue if more customers become Cord Cutters. The problem, from the perspective of telephone and cable companies, is that the internet-based video providers are making millions of dollars using their infrastructure for free in order to offer a product that directly competes with their business. The solution, they believe, is to force those online video services to pay for the bandwidth used to deliver their product which requires an end to net neutrality.

¹³⁵ See generally Miriam Gottfried, Comcast, *Time Warner Cable Use Wide-Angle Deal Lens*, WALL ST. J. ONLINE (April 9, 2014, 5:09pm)

<http://online.wsj.com/news/articles/SB10001424052702303873604579491900136138052>.

¹³⁶ NCTA, *Platform: Technology, TV and the Future*, NAT'L CABLE & TELECOMM. ASSOC. (Jan. 27, 2014) <https://www.ncta.com/platform/public-policy/why-its-a-good-thing-that-broadband-isnt-a-common-carrier> (asserting that cable broadband providers have invested more than \$210 billion in their networks since 1996). *But cf.* Brendan Greeley, *America's 10-Year Experiment in Broadband Investment Has Failed*, BLOOMBERG BUSINESSWEEK (Feb. 20, 2014) <http://www.businessweek.com/articles/2014-02-20/americas-10-year-experiment-in-broadband-investment-has-failed> (describing the level of investment in broadband in comparison to other countries).

¹³⁷ See *supra* notes 51-54.

¹³⁸ See the discussion of *Broadband and The Rise of Netflix and Its Imitators*, *supra*.

B. Legal Challenges to Net Neutrality

The roots of the legal challenges surrounding net neutrality are largely a matter of classification. What is broadband internet access? Is it a telecommunications service? Is it an information service? The answer to those questions determines how much authority the FCC will have to regulate high speed internet access offered by both cable and telephone companies. Those two categories, telecommunications services and information services, were defined within the Telecommunications Act of 1996.¹³⁹ Under Title II of the Act, Telecommunications Services are regulated as common carriers, which requires, among other things, that they charge reasonable rates and allow other entities to connect to their network.¹⁴⁰ In contrast, information services are not regulated as common carriers, “though the Commission has jurisdiction to impose additional regulatory obligations under its Title I ancillary jurisdiction.”¹⁴¹

Although the Telecommunications Act of 1996 created two clearly defined categories, it did not specify how newly developing broadband internet service should be classified, leaving that determination to the FCC. In a Declaratory Ruling issued in March 2002, the FCC decreed that broadband services were not telecommunications services but rather information services which made them exempt from common carrier requirements.¹⁴² “Numerous parties petitioned for judicial review, challenging the Commission’s conclusion....[b]y judicial lottery, the Court of Appeals for the Ninth Circuit was selected as the venue for the challenge.”¹⁴³

In the *Brand X* case the Ninth Circuit ruled against the FCC, vacating the determination that broadband services were not telecommunication services. In reaching that conclusion, the Ninth Circuit failed to apply the *Chevron* framework, which requires deference to the agency interpretation of ambiguous statutes.¹⁴⁴ Consequently, the Supreme Court granted certiorari, hearing the case in 2005.¹⁴⁵

The Supreme Court ruled that the FCC determination that broadband services were not telecommunications services merited *Chevron* deference despite the respondent’s argument that the agency’s interpretation had changed over time. The decision indicated that:

¹³⁹ NCTA v. Brand X, 545 U.S. 967, 975 (2005); see Pub. L. No. 104, 110 Stat. 56 (1996).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 976.

¹⁴² *Id.* at 977-78.

¹⁴³ *Id.* at 979.

¹⁴⁴ *Id.* at 980; see also *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

¹⁴⁵ *Brand X*, 545 U.S. at 980.

Agency inconsistency is not a basis for declining to analyze the agency's interpretation under the Chevron framework. Unexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act. For if the agency adequately explains the reasons for a reversal of policy, change is not invalidating, since the whole point of Chevron is to leave the discretion provided by the ambiguities of a statute with the implementing agency.¹⁴⁶

Ultimately, in the *Brand X* case, the FCC successfully defended its own determination that it did not have the responsibility, or the right, to impose common carrier requirements on broadband internet services. That determination, as well as the principles articulated in this case regarding the correct application of the *Chevron* framework, is of continuing importance in the legal and policy challenges involving Network Neutrality.

From a regulatory perspective, the first significant articulation of the network neutrality principles appeared in 2004, when FCC Chairman Michael Powell outlined four significant principles that were formalized one year later as the Internet Policy Statement.¹⁴⁷ It is important to note that the concept of network neutrality did not first arise when these principles were outlined. network neutrality had been a widely shared value and the *de facto* rule applied to the internet since its inception. The Internet Policy Statement only became necessary when it appeared that network neutrality could be undermined or threatened. The network neutrality principles included a right to access any lawful content, to use applications, to attach personal devices, and to obtain service plan information.¹⁴⁸

In 2007, a formal complaint was filed with the FCC against Comcast Corporation for violating the Internet Policy Statement by interfering with consumers' use of their high speed internet service to access peer-to-peer file sharing content.¹⁴⁹ The FCC ruled that Comcast had interfered, that the company had other viable options to manage its network, and that the interference violated federal policy. Comcast challenged that ruling on a variety of grounds but the Court resolved the case purely on the basis of the

¹⁴⁶ *Id.* at 981 (Internal citations omitted).

¹⁴⁷ 20 FCC Rcd 14986 (2005).

¹⁴⁸ Michael Powell, Chairman, FCC, *Preserving Internet Freedom: Guiding Principles for the Industry*, FED. COMM'NS COMM'N (Feb. 8, 2004), available at <http://go.usa.gov/8CZe> (Referenced in FCC 14-61 at 93)

¹⁴⁹ *Comcast v. FCC*, 600 F.3d 642, 644 (D.C. Cir. 2010). See also *In Re Formal Compl. of Free Press & Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications*, 23 F.C.C.R. 13,028 (2008) (Order).

jurisdictional issue.¹⁵⁰ The FCC argued that regulation of Comcast's network management should be permitted based on the ancillary jurisdiction granted in Section 4(i) of the Communications Act of 1934 which allows the agency to "[m]ake such rules and regulations, and issue such orders....as may be necessary in the execution of its functions."¹⁵¹ The Court rejected that position because the FCC failed to "[t]ie its assertion of ancillary authority over Comcast's Internet service to any statutorily mandated responsibility."¹⁵²

In 2010, the FCC tried again to assert its authority to preserve network neutrality by issuing the Open Internet Order which adopted three rules: (1) transparency, requiring broadband providers to disclose their network management practices, (2) anti-blocking, prohibiting the blocking of lawful content, and (3) anti-discrimination, prohibiting unreasonable discrimination in the transmission of lawful traffic.¹⁵³ The transparency requirement allowed consumers to be aware of the ways that their broadband provider manages the traffic in their network. The anti-blocking provision prohibited a broadband provider from preventing a consumer from accessing the content of their choice, while the anti-discrimination provision forbade broadband providers from unreasonably slowing down some content while allowing other content to transverse their networks unimpeded.

Verizon challenged the Open Internet Order based on both the FCC's lack of statutory authority and the violation of a statutory provision preventing the imposition of common carrier requirements on broadband providers.¹⁵⁴ Both of these issues were addressed on the merits by the D.C. Court of Appeals in resolving the case, avoiding "additional contentions that the Order violates the First Amendment and constitutes an uncompensated taking."¹⁵⁵ The Court found that the FCC did have statutory authority to regulate broadband providers based on the agency's reinterpretation of Section 706 of the Telecommunications Act of 1996.¹⁵⁶ However, the Court also determined that the manner in which the agency elected to regulate broadband providers imposed per se common carrier obligations in violation of the Communications Act of 1934.¹⁵⁷ Consequently, the anti-blocking and

¹⁵⁰ *Comcast*, 600 F.3d at 645.

¹⁵¹ *Id.*; see generally *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968); *United States v. Midwest Video Corp.* 440 U.S. 649 (1972); and *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) (interpreting the extent of the FCC's ancillary jurisdiction).

¹⁵² *Comcast*, 600 F.3d. at 661 (quoting *Am. Library v. FCC*, 406 F.3d at 692 for the language "statutorily mandated responsibility").

¹⁵³ *In re Preserving the Open Internet*, 25 F.C.C.R. 17905, 17906 (2010).

¹⁵⁴ See *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

¹⁵⁵ *Id.* at 634.

¹⁵⁶ *Id.* at 649.

¹⁵⁷ *Id.* at 657-58.

anti-discrimination provisions of the Open Internet Order were vacated, leaving only the disclosure rule in force.¹⁵⁸

The January 2014 decision in the *Verizon* case forced the FCC to once again consider the available options for protecting network neutrality. Based on the guidance from the Court in the *Verizon* case, there are at least two options: adopting less stringent rules that do not impose a *per se* common carrier obligation, relying on the Section 706 of the Telecommunications Act, or reclassifying broadband access as a telecommunication service which would allow it to be regulated as a common carrier under the existing law. Both options are considered in a May 2014 Notice of Proposed Rulemaking issued by the FCC that solicits public input.¹⁵⁹ It is unclear what the final rule will be but the risk is that the approach will either be ineffective in protecting network neutrality or be struck down by the court, again. Neither option results in strong protection for network neutrality, which has profound implications for Cord Cutters and the businesses that are creating innovative new products to serve them.

C. Impact of Weak or Non-Existent Net Neutrality Policies on Cord Cutters

In the absence of network neutrality, companies that provide services to Cord Cutters will have to secure agreements and pay fees to broadband providers, which will have to be recouped through higher prices or a less robust product. Either way, the options will be less favorable for consumers. Given the ability to purchase “fast lane”¹⁶⁰ access to consumers, some of those companies will gain an advantage over their competitors. This process will favor larger, better established players at the expense of innovative new entrants.¹⁶¹

For example, Netflix and Amazon Prime might compete to negotiate the best deal with Comcast, offering money in exchange for better access to

¹⁵⁸ *Id.* at 659.

¹⁵⁹ In the Matter of Protecting and Promoting the Open Internet, Notice of Proposed Rulemaking, FCC 14-61, ¶4 (May 15, 2014).

¹⁶⁰ FCC Chairman Tom Wheeler’s initial proposal for revised net neutrality rules would prohibit blocking but allow paid prioritization, or the creation of “fast lanes.” See generally Brendan Sasso, *FCC Chief Danes and Dodges on Plan for Internet Fast Lanes*, NAT’L JOURNAL (May 20, 2014) <http://www.nationaljournal.com/tech/fcc-chief-dances-and-dodges-on-plan-for-internet-fast-lanes-20140520>.

¹⁶¹ See generally Marvin Ammori, *The Case for Net Neutrality*, FOREIGN AFFAIRS (July/August 2014) <http://www.foreignaffairs.com/print/138591> (discussing the potential for internet services in the absence of net neutrality to evolve to resemble the traditional cable television model requiring new companies to give up equity stakes or not reach the market).

consumers.¹⁶² If Netflix is successful, the company will gain a substantial advantage in the marketplace that is independent of the quality of their product and the preferences of consumers. Consequently Amazon Prime will be positioned at a significant disadvantage. However, the worst outcome under this scenario is reserved for the company whose name is not yet known, the next generation video provider that may never make it into the marketplace. Consumers will have a choice between a more expensive product from Netflix or a less desirable product from Amazon due to delivery speed and consequent image quality and responsiveness issues. New players will be unlikely.

Despite their attempts to collect fees from companies like Netflix in order to allow them to deliver content to consumers, broadband providers are also moving in the direction of charging consumers more for internet access based on usage.¹⁶³ Ultimately, consumers may have to pay more for both the services they choose to subscribe to and for access to the internet.

VI. AFTER CABLE (A.C.) - THE GORILLA IN THE ROOM – THE *AEREO* SAGA

The latest chapter in the ongoing legal saga of content delivery mechanisms is *ABC v. Aereo*.¹⁶⁴ Entrepreneur Chet Kanojia launched Aereo in February of 2012.¹⁶⁵ According to its rather carefully worded website: Aereo's "technology provides a consumer the ability to use a remotely located individual antenna to access free-to-air broadcasts, make a personal copy of a program on a remote DVR and play back that copy only to him or herself."¹⁶⁶ Specifically, the Aereo system works by capturing live over-the-air broadcast signals from networks like ABC, NBC and CBS using a tiny

¹⁶² Netflix has signed an agreement with Comcast, paying in exchange for faster delivery to consumers, while continuing to fight for Network Neutrality. Comcast broadband customers experienced a slowdown in the delivery of Netflix prior to the agreement and then a surge in the delivery speed when the deal was completed. See Max Ehrenfreund, *This Hilarious Graph of Netflix Speeds Shows the Importance of Net Neutrality*, WASHINGTON POST, (April 25, 2014, 11:20am) <http://knowmore.washingtonpost.com/2014/04/25/this-hilarious-graph-of-netflix-speeds-shows-the-importance-of-net-neutrality/>.

¹⁶³ See Amadou Diallo, *Comcast to Cord-Cutters: You Should Pay More*, FORBES, (May 15, 2014 at 10:29am) <http://www.forbes.com/sites/amadoudiallo/2014/05/15/comcast-to-cord-cutters-you-should-pay-more/>.

¹⁶⁴ *Id.*; see also *ABC v. Aereo Inc.*, 874 F. Supp. 2d 373 (S.D.N.Y. 2012).

¹⁶⁵ See *Love is in the Aereo*, *Presenting our Mission and Team as we Reach for the Sky*, AEREO (Feb. 14, 2012), <http://blog.aereo.com/2012/02/>.

¹⁶⁶ See *Protect my Antenna*, PROTECT MY ANTENNA, <http://protectmyantenna.org/> (last visited July 9, 2014).

remote antenna.¹⁶⁷ These fingernail-sized antennas, one for each subscriber, are stored in server centers located within the local markets that Aereo serves. Subscribers not only can use the antenna to watch live television broadcasts, but they can also record the broadcasts to watch later using a cloud-based DVR system.¹⁶⁸ Aereo does *not* have a license from copyright holders to record or retransmit their programs.¹⁶⁹

The legal battle over the copyright implications of Aereo's technology is hardly surprising.¹⁷⁰ Aereo's founder and chief Kanojia anticipated the impending litigation, noting in a February 2012 interview with the New York Times, "[w]e understand that when you try to take something meaningful on, you have to be prepared for challenges."¹⁷¹ These "challenges" would soon bring Aereo and its service delivery methods squarely before the United States Supreme Court.

On March 1, 2012, Fox and PBS filed the first Complaints against Aereo in the U.S. District Court for the Southern District of New York. ABC, CBS and NBC soon followed suit.¹⁷² All plaintiffs filed a consolidated motion for preliminary injunction, claiming Aereo was directly liable for copyright infringement by publicly performing plaintiffs' copyrighted works.¹⁷³ They asked the court to enjoin the portion of Aereo's service whereby subscribers could view plaintiffs' copyrighted television programs concurrently with the over-the-air broadcast of the program.¹⁷⁴ In contrast, Aereo argued that its content delivery was protected by *Cablevision*, stating:

[L]ike the RS-DVR system in *Cablevision*, its system creates unique, user-requested copies that are transmitted only to the

¹⁶⁷ Steve Kovach, *TV Networks Are So Scared About This App, They're Taking It All The Way To The Supreme Court*, BUSINESS INSIDER, (April 22, 2014)

<http://www.businessinsider.com/aereo-2014-4?op=1#ixzz31oIxRmYL>.

¹⁶⁸ *Id.*

¹⁶⁹ ABC v. Aereo, 712 F.3d 676 (2d Cir. 2013) (this case represents the consolidated cases of Fox, PBS, ABC, CBS and NBC).

¹⁷⁰ See Nathan Ingraham, *Aereo Launching Streaming Broadcast TV Service in NYC on March 14*, THE VERGE, (February 14, 2012), <http://www.theverge.com/2012/2/14/2797616/aereo-streaming-broadcast-tv-pilot-launch-nyc>. (noting "networks likely won't take kindly to a service that could move consumers away from cable and lower the fees they receive from providers."); see also Brian Stelter, *New Service Will Stream Local TV Stations in New York*, NEW YORK TIMES, (February 14, 2012), available at <http://mediadecoder.blogs.nytimes.com/2012/02/14/new-service-will-stream-local-tv-stations-in-new-york/?scp=2&sq=Aereo&st=cse>.

¹⁷¹ See Brian Stelter, *supra* note 170; see also Beth Carter, *Introducing Aereo: One Small Step for Cord Cutting, One Giant Leap of Faith*, WIRED, (February 14, 2012), <http://www.wired.com/2012/02/aereo-cord-cutting/>.

¹⁷² See ABC v. Aereo, 874 F.Supp.2d 373 (S.D. N.Y. 2012).

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 375.

particular user that created them and, therefore, its performances are nonpublic. Moreover, Aereo submits that because each of its antennas function independently, even if the Court adopts Plaintiffs' view that these copies are not legally significant, an injunction still should not issue because each user is receiving a distinct transmission generated by their own individually rented antenna.¹⁷⁵

Plaintiffs countered by arguing that *Cablevision* was not dispositive because Aereo's technology was nothing more than a "technological gimmick" used to transmit plaintiffs' copyrighted content to the public.¹⁷⁶ Specifically, plaintiffs claimed:

[B]ecause Aereo's subscribers are watching these programs as they are still being broadcast, they are not using the copies Aereo creates for "times-shifting" and these copies therefore do not 'break[] the chain of the [over-the-air] transmission' received by Aereo. Thus, Plaintiffs contend, Aereo is engaged in a public performance that "emanates from the original broadcast signal" much like a "community antenna" which simply passes along a broadcast signal to the public.¹⁷⁷

The court dismissed plaintiff's argument pursuant to *Cablevision*, finding that "the copies Aereo's system creates are not materially distinguishable from those in *Cablevision*."¹⁷⁸ Accordingly the court denied plaintiffs' request for a preliminary injunction.¹⁷⁹

The Second Circuit affirmed, again relying on *Cablevision*.¹⁸⁰ After weighing whether Aereo's service infringed on plaintiffs' public performance right under the Copyright Act, the court concluded that it did not. Rather, it found that Aereo's transmissions were "unique copies" of broadcast programs that were "created at its users' request and transmitted while the programs were still airing on broadcast television."¹⁸¹ As such, the court held that they were not "public performances" under the Copyright Act.¹⁸² Judge Chin dissented, distinguishing the case from *Cablevision*, as

¹⁷⁵ *Id.* at 385.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 385 (citing brief for plaintiffs at 22-23; reply brief for plaintiffs at 10 & 14).

¹⁷⁸ *Id.* at 386.

¹⁷⁹ *Id.*

¹⁸⁰ *ABC v. Aereo*, 712 F.3d 676 (2d Cir. 2013).

¹⁸¹ *Id.* at 696.

¹⁸² *Id.*

well as arguing that the plain meaning of the Copyright Act and the legislative history commanded a different result.¹⁸³

Plaintiffs petitioned the Supreme Court for *writ of certiorari*. On January 10, 2014, the Supreme Court granted *cert*.¹⁸⁴ The nuances of the parties' arguments are perhaps best captured in the "question presented" sections of their respective briefs. There, Aereo likened its business model to that of an "equipment provider," whereby the individual user utilizes equipment provided to them by Aereo to make a personal copy of over-the-air broadcast programming:

Whether Aereo "perform[s] ... publicly," under §101 and §106 of the Copyright Act, 17 U.S.C. §§101, 106, by supplying remote equipment that allows a consumer to tune an individual, remotely located antenna to a publicly accessible, over-the-air broadcast television signal, use a remote digital video recorder to make a personal recording from that signal, and then watch that recording.¹⁸⁵

In contrast, petitioners analogized Aereo's business to that of a provider permitting unauthorized retransmissions of copyrighted programming. Accordingly, petitioners stated the question before the Court as:

Whether a company "publicly performs" a copyrighted television program when it retransmits a broadcast of that program to thousands of paid subscribers over the Internet.¹⁸⁶

Oral arguments were held on April 22, 2014. During oral argument the Justices first engaged in a line of questioning as to why Aereo was not considered a "cable company," reasoning that if Aereo were a cable company it would be forced to obtain compulsory licenses and the public performance issue would become moot.¹⁸⁷ For the remainder of the argument the Justices focused heavily on the issue of whether a ruling for petitioners would imperil

¹⁸³ *Id.* at 705.

¹⁸⁴ *ABC v. Aereo*, 134 S. Ct. 896 (2014)

¹⁸⁵ See brief for respondents, question presented, (March 26, 2014), [http://protectmyantenna.org/pdf/2_aereos_briefs/Aereo%20Response%20Brief%20\(March%2026,%202014\)%20FINAL%20FILED-1.pdf](http://protectmyantenna.org/pdf/2_aereos_briefs/Aereo%20Response%20Brief%20(March%2026,%202014)%20FINAL%20FILED-1.pdf).

¹⁸⁶ See brief for petitioners, question presented, (February 24, 2014), <http://sblog.s3.amazonaws.com/wp-content/uploads/2014/03/13-461-ts.pdf>.

¹⁸⁷ See oral argument transcript, at 5-6 (wherein Justice Sotomayor stated "[d]o we have to go to all of those other questions if we find that they're a cable company? We say they're a capable company, they get the compulsory license.").

the cloud-computing business.¹⁸⁸ In fact, the Justices seemed to have little concern for Aereo's business—stating at one point that Aereo's “technological model is based solely on circumventing legal prohibitions that you don't want to comply with. . .”¹⁸⁹

It came as little surprise that on June 25, 2014, the Supreme Court ruled against Aereo in a 6-3 decision.¹⁹⁰ Justice Breyer, writing for the majority, first addressed whether Aereo's method of retransmission was a “performance” pursuant to the Copyright Act.¹⁹¹ Relying heavily on the legislative history and purpose of the Copyright Act, the Court concluded that Aereo was more than a mere equipment supplier from which users could generate personal copies of a broadcast.¹⁹² Rather, it concluded that Aereo's conduct was precisely what the Copyright Act had intended to prevent and was therefore considered a “performance” under the Act.¹⁹³ In evaluating whether that performance was “public” pursuant to the Act, the majority found that it was, stating: when “Aereo transmits from the same or separate copies, it performs the same work; it shows the same images and makes audible the same sounds. Therefore, when Aereo streams the same television program to multiple subscribers, it ‘transmit[s] . . . a performance’ to all of them.”¹⁹⁴

In attempting to distinguish Aereo from the cloud-computing businesses the Court so zealously wished to safeguard, the Court emphasize the limited nature of its holding, stating: “we have not considered whether the public performance right is infringed when the user of a service pays primarily for something other than the transmission of copyrighted works, such as the remote storage of content.”¹⁹⁵

¹⁸⁸ *Id.* at 6-7, 12-15, 17-18, (April 22, 2014).

¹⁸⁹ *Id.* at 41-42 (Chief Justice Roberts stating: “All I'm trying to get at, and I'm not saying it's outcome determinative or necessarily bad, I'm just saying your technological model is based solely on circumventing legal prohibitions that you don't want to comply with, which is fine. I mean, that's—you know, lawyers do that. But I'm just wondering why.”).

¹⁹⁰ *See* *ABC v. Aereo*, 134 S. Ct. 2498 (2014).

¹⁹¹ *Id.* at 4.

¹⁹² *Id.* at 10.

¹⁹³ *Id.* at 5-10. (The Court engaged in an extensive discussion of *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U. S. 390 (1968) and *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U. S. 394 (1974), noting that Congress amended the Copyright Act in 1976 in large part to reject the Court's holdings in these cases; *see also* H. R. Rep. No. 94-1476, pp. 86-87 (1976) (The 1976 amendments overturned the Court's narrow construction of the Act in *Fortnightly* and *Teleprompter*).

¹⁹⁴ *Id.* at 14.

¹⁹⁵ *Id.* at 16 (additionally stating: “the history of cable broadcast transmissions that led to the enactment of the Transmit Clause informs our conclusion that Aereo “perform[s],” but it does not determine whether different kinds of providers in different contexts also.”); *but see* *ABC v. Aereo*, No. 13-461, dissent slip op. at 11 (June 25, 2014),

http://www.supremecourt.gov/opinions/13pdf/13-461_1537.pdf. (The dissent, written by

A few days after the Court's decision, Chet Kanojia informed subscribers in an email that Aereo "decided to pause our operations temporarily as we consult with the court and map out our next steps."¹⁹⁶ It seems, at least according to Kanojia, that Aereo may not be dead yet.¹⁹⁷

VII. A.C. – PREDICTIONS FOR THE AFTER CABLE ERA.

A. *Unbundling 1- Cable Adapts?*

Cable operators currently offer packages of channels arranged to reflect the company's priorities in terms of profit and reciprocal relationships with other video service providers. Cable consumers who wish to remain cable consumers have had only two choices: forego subscription video services entirely or order "bundles" of channels from a preselected menu offered by the cable company. In an unbundled marketplace, consumers would choose from a variety of channel providers without the intercession of a cable operator. In theory this policy would provide consumers with the ability to build their own package or lineup.

The term "unbundling" has been used to describe the consumer push for cable companies to offer channels on an *à la carte* basis rather than the current practice of packaging the channels together, effectively forcing the consumer to purchase all of the bundled channels even if only one or two channels in that bundle are of interest to that customer.¹⁹⁸ A bill currently before Congress, the Television Consumer Freedom Act of 2013¹⁹⁹ would:

[Allow] multichannel video programming distributors (MVPDs) (including cable operators, multichannel multipoint distribution services, direct broadcast satellite services, or television receive-

Justice Scalia and joined by Justices Thomas and Alito, warned that while "[t]he Court vows that its ruling will not affect cloud-storage providers and cable- television systems. . . it cannot deliver on that promise given the imprecision of its result-driven rule.")

¹⁹⁶ Chet Kanojia, CEO, *A Letter to Our Consumers: Standing Together for Innovation, Progress and Technology - An Update on Aereo*, emailed to subscribers on June 28, 2014.

¹⁹⁷ See the discussion of *Reactions to Aereo – If You Can't Beat them...A.C. – Predictions for the After Cable Era*, *infra*.

¹⁹⁸ Justin Bachman, *The Ugly Numbers Behind Unbundled Cable TV*, BLOOMBERG BUSINESSWEEK, (Dec. 6, 2013) (describing "unbundling" as the offering of cable networks on an *à la carte* basis with an analysis indicating that the cost structure for cable companies prevents that option without raising overall costs, resulting in suggestions for consumers to consider cord cutting) <http://www.businessweek.com/articles/2013-12-06/the-ugly-numbers-behind-unbundled-cable-tv>. See also David Leonhardt, *Why Unbundling Cable Would Not Save You Money*, NEW YORK TIMES, (May 15, 2014) (using the term "unbundling" to refer to a *la carte* distribution by cable companies) <http://nyti.ms/1mXHC4D>.

¹⁹⁹ S.912 — 113th Congress (2013-2014).

only satellite program distributors), except with respect to the minimum contents of programming required for basic tier service, to provide subscribers with any channel of video programming on an a la carte basis.²⁰⁰

No movement occurred on the bill in the last Congress, it was last referred to the Committee on Commerce, Science, and Transportation in May 2013 and died in committee.²⁰¹ There appears to be little support within the Congress for measures that would force an *à la carte* model.

The traditional providers have little incentive because of the costs structures involved to support an *à la carte* model. “Consumers want to choose the channels they get from their pay-TV providers but such a move would not only undermine the business model for media companies, it could also lead to higher prices for customers.”²⁰² In such an environment it is unlikely that the traditional providers will offer unbundling options in order to counter Cord Cutting trends.

B. *Unbundling 2 – The Do it Yourself Consumer Version*

In order to have true choice, consumers need direct access to a variety of content providers and a way to manage multiple sources of content that preserves the functionality of program menus, digital video recorders, and search functions. In the absence of that functionality, the alternative to cable may require too much work for the average consumer who may be willing to pay a monthly cable bill in exchange for those features.

Although the potential exists for the current range of options to evolve into an unbundled option, many questions remain unanswered. Will consumers select their own content or select an alternative content provider? Will Netflix or another service provider create a single walled garden for consumers that resembles the current cable company offerings in every way except for being a non-linear, on-demand style service? What may happen, what indeed is happening, is that consumers are unbundling themselves. In short, Cord Cutters are disassembling prior entertainment packages and instead are assembling disparate sources into a new, customized, personal entertainment “bundle.”

²⁰⁰ CONGRESS.GOV, S.912 - Television Consumer Freedom Act of 2013, <https://beta.congress.gov/bill/113th-congress/senate-bill/912> (last visited July 9, 2014).

²⁰¹ *Id.*

²⁰² Meg James, *A La Carte TV Pricing Would Cost Industry Billions, Report Says*, L.A. TIMES (Dec. 4, 2013) <http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-a-la-carte-pricing-would-cost-billions-of-dollars-20131204-story.html>.

One interesting alternative aggregation technology is Roku, which pulls together more than 1,500 streaming “channels” including Netflix, Hulu, and Amazon Prime into one easy point and click menu, allowing viewers to watch content from the internet on their televisions. Consumers purchase the Roku device for \$50-100 but do not pay any ongoing user or subscription fees. Subscriptions to Netflix, Hulu, Amazon Prime, and others are handled by those companies so Roku does not collect any fees from customers. Roku does not release sales figures but analysts estimate that more than 8 million units have been sold and the service is predicted to grow by 20% in 2014.²⁰³

Apple TV offers a similar device that has sold more than 20 million set-top despite costing nearly twice as much as a Roku, and allowing access to less content.²⁰⁴ Apple TV includes a very popular feature called AirPlay that allows users to stream almost any content, including music, photos and video, directly from an apple device like an iPhone or an iPad to a television.²⁰⁵

Amazon recently entered the market by launching Fire TV which offers a product similar to Roku but with additional features enabled by the incredibly well developed Amazon streaming infrastructure and extensive content rights. Special features include voice search and an intuitive system that begins a download based on prior usage before the consumer requests the content.²⁰⁶

Google’s Chromecast is not a substitute for a set-top box like the previously mentioned devices because it lacks a menu, remote control, and search function. The \$35 dongle that is about the size of a thumb drive is not designed to work as a stand-alone device. Instead it is can be used with a wide variety of devices including smart phones and tablets to stream video to a television.²⁰⁷ Roku has recently introduced a similar product called the Streaming Stick.²⁰⁸

There are a variety of other companies in various stages of development trying to establish services to fill the gap for cord-cutting customers

²⁰³ Joan E. Solsman, *Now with Streaming Stick, Roku isn’t Sweating the Blitz*, CNET (Mar. 5, 2014, 4:30 AM), <http://www.cnet.com/news/now-with-streaming-stick-roku-isnt-sweating-the-blitz>.

²⁰⁴ Roger Cheng, *Apple has Sold 20 Million Apple TV Units, CEO Says*, CNET (Apr. 23, 2014, 3:18 PM) (noting that Amazon Prime content is available from Roku but not Apple TV), <http://www.cnet.com/news/apple-ceo-cook-says-20m-apple-tv-units-sold>.

²⁰⁵ Apple, *Airplay, Play Content From your iPhone, iPad, or iPod Touch on your HDTV*, APPLE, <https://www.apple.com/airplay/> (last visited July 9, 2014).

²⁰⁶ David Altavilla, *Bezos’ Latest Play Could be Disruptive*, FORBES (May 31, 2014), <http://www.forbes.com/sites/davealtavilla/2014/05/31/amazon-prime-and-fire-tv-why-bezos-latest-play-could-be-disruptive/>

²⁰⁷ Will Greenwald, *Google Chromecast vs. Roku Streaming Stick: Media Streamers Compared*, PC (Apr. 10, 2014), <http://www.pcmag.com/article2/0,2817,2456300,00.asp>.

²⁰⁸ *Id.*

including Mohu which will provide a unified program guide for over the air channels and internet channels,²⁰⁹ ChannelMaster offers an over-the-Air DVR.²¹⁰ These services are offered without any recurring, subscription fees. Several companies also offer services for Cord Cutters that require some form of subscription fee. For example, Tivo offers two DVRs that require a hardware purchase and then a monthly subscription fee for the program guide service.²¹¹

When the innovative devices like those previously profiled are combined with content on demand services like Netflix, they create a new set of “unbundled” options for consumers who can select the services that provide the best combination of value and features to suit their individual preferences. This approach may be attractive to consumers for a variety of reasons including price, control, content selection, and advanced features.²¹²

Cable customers have felt trapped by companies whom they believe have not been providing a quality service, so they are hungry for an alternative.²¹³ However, these new options still depend upon other companies to provide a high speed internet connection and quality content. As one analyst suggests, “To be successful in the evolving world of media, a company needs to control either the content, or the pipes. If it has neither, it’s a mere middleman, consigned to low or no profitability.”²¹⁴ For a company like Apple or Amazon, streaming devices are a small part of their business. Therefore a lack of profitability could cause them to focus their resources on other business lines. But for Roku, streaming devices *are* their business, so

²⁰⁹ Sean Buckley, *Mohu Channels Wants to Give Cord-cutters a Unified Menu*, ENGADGET, (April 15, 2014), <http://www.engadget.com/2014/04/15/mohu-channels-wants-to-give-cord-cutters-a-unified-menu>.

²¹⁰ Jim Rossman, *DVR+ Brings Over-the-Air Recording to Cord Cutters*, DALLAS NEWS, (April 26, 2014), <http://www.dallasnews.com/business/technology/headlines/20140426-dvr-brings-over-the-air-recording-to-cord-cutters.ece>.

²¹¹ Mike Snider, *Cutting the Cord: It Doesn't Mean Dissing the DVR*, USA TODAY, (May 10, 2014), <http://www.usatoday.com/story/tech/personal/2014/05/10/cutting-the-cord-dvrs/8843229>.

²¹² See generally Wayne Freidman, *TV Cord-Cutters Have No Regrets*, MEDIA POST (May 28, 2014, 10:40 AM) (discussing a study that shows that 84% of cord-cutters are “extremely happy” or “pretty happy” with their choice), <http://www.mediapost.com/publications/article/226760/tv-cord-cutters-have-no-regrets.html>.

²¹³ See Catey Hill, *The Most Hated Cable Company in America is...* WALL STREET JOURNAL (May 20, 2014, 12:06 AM) (describing the results of the American Customer Service Index data showing that the cable industry as a whole is “one of the most hated industries in America” and that “every major cable company saw a drop in their already- low customer satisfaction scores compared to last year”), <http://www.marketwatch.com/story/the-most-hated-cable-company-in-america-is-2014-05-20>.

²¹⁴ Neil Irwin, *Netflix vs. Amazon, and the New Economics of Television*, NEW YORK TIMES (Apr. 25, 2014) <http://nyti.ms/1kd5mBO>.

their commitment to same is unlikely to waiver as long as they are an ongoing concern.

Thus, as discussed *supra*, with these new technologies Cord Cutters are disassembling prior entertainment packages and instead are self-assembling disparate sources into a new, customized, personal entertainment “bundle.”

C. Reactions to Aereo – If You Can’t Beat Them...

The *Aereo*²¹⁵ ruling was a setback to the Cord Cutter movement. However, it also serves as shot across the bow of the cable companies. The decision hardly clears the air, and may even raise other, unintended issues:

If the big commercial broadcasters will go to such lengths to keep others from retransmitting their programming, should they really be treated as *broadcasters*? Should they continue to get cheap access to the broadcast spectrum—the “public airwaves”—and the right to force their way into cable system lineups?²¹⁶

In other words, should the broadcasters stop fighting these nascent technologies, and act to replicate the *Aereo* experience? In a word, yes.

[B]roadcast and cable companies should take the *Aereo* ruling as a stay before Congress acts to explicitly legalize competitors such as *Aereo*. In the time they have been given, they should move as fast as possible to respond to the clear customer demands that *Aereo* exposed.²¹⁷

Consumer demand, changing technologies, and increased political awareness of the issue will likely conspire to force a legislative denouement to the *Aereo* saga. What the Supreme Court would not grant Congress may. The traditional content providers can short circuit this process by essentially regulating themselves. If the traditional cable companies can develop a model that would out-*Aereo* *Aereo*, with their own freely available broadcast applications, then they can control advertising, content, and fees. They may co-opt the Cord Cutting movement, stave off legislative innovations that may

²¹⁵ See *ABC v. Aereo*, No. 13–461, slip op. (June 25, 2014), http://www.supremecourt.gov/opinions/13pdf/13-461_1537.pdf; see also the discussion of *Aereo*, *supra*.

²¹⁶ Justin Fox, *Aereo and the Strange Case of Broadcasters Who Don’t Want to Be Broadcast*, HARVARD BUS. REVIEW (June 25, 2014) <http://blogs.hbr.org/2014/06/aereo-and-the-strange-case-of-broadcasters-who-dont-want-to-be-broadcast/>.

²¹⁷ Alyssa Rosenberg, *How The Television Industry Should Respond to the Aereo Ruling*, THE WASHINGTON POST (June 25, 2014) <http://www.washingtonpost.com/news/act-four/wp/2014/06/25/how-the-television-industry-should-respond-to-the-aereo-ruling/>.

impact their business models, and ride the wave instead of being swamped by it.

But how should Aereo react? In a new twist, in the wake of the Supreme Court's Aereo ruling²¹⁸ Aereo is attempting to *join* its opponents. In a July 9, 2014 letter to the United States District Court for the Southern District of New York²¹⁹ (the Court to which the Aereo case was remanded following the Supreme Court's decision), Aereo argued that the Supreme Court's decision and the language within the Court's opinion has effectively morphed Aereo into a cable company.²²⁰ Accordingly, Aereo claims that it is entitled to a compulsory license under section 17 U.S.C. §111 of the Copyright Act rendering moot the broadcasters' argument that its transmissions infringe their rights under the Act.²²¹ This argument could effectively let Aereo circumvent the catastrophic effect of the Supreme Court's decision to get back in the game.

D. *Segmentation of the Internet – Data Caps and the Death of Network Neutrality*

Internet Service Providers (ISPs) are further hindering cord cutters efforts by implementing caps on wireless data usage and preferentially exempting *some* service providers, from these caps. This practice effectively creates a “two-tiered Internet” whereby some providers' content reaches the consumer at high speeds while other content gets slower, secondary service.²²² Public interest groups have criticized such caps as undermining network neutrality,²²³ while they have been staunchly defended by the

²¹⁸ See the discussion of *After Cable (A.C.) - The Gorilla in the Room – the Aereo Saga*, *supra*.

²¹⁹ See Joint Letter to Judge Nathan, ABC et al. v. Aereo Inc., 12-cv-1540, AEREO (July 9, 2014) <http://blog.aereo.com/2014/07/path-forward/2014-07-09-joint-letter-to-nathan-page-001/>

²²⁰ See ABC v. Aereo, No. 13–461, slip op. at 8 SUPREME COURT OF THE UNITED STATES (June 25, 2014), http://www.supremecourt.gov/opinions/13pdf/13-461_1537.pdf (stating “... history makes clear that Aereo is not simply an equipment provider. . . Aereo's activities are substantially similar to those of the CATV companies that Congress amended the Act to reach.”)

²²¹ See Joint Letter to Judge Nathan, ABC et al. v. Aereo Inc., 12-cv-1540 at 2 AEREO (July 9, 2014) <http://blog.aereo.com/2014/07/path-forward/2014-07-09-joint-letter-to-nathan-page-001/>

²²² See Sam Schechner & Ryan Knutson, *Telecoms Step Up Fight Over Net Neutrality*, WALL STREET JOURNAL (February 24, 2014 at 4:03 a.m.) (“Telecom providers say they should be free to set aside part of their infrastructure to sell advanced services, such as high-quality video, from particular technology or content companies. . . But tech companies and public-interest groups say such plans could lead to a two-tiered Internet, with some types of content available at top speed, but other content getting slower service if providers are unable to pay up.”)

²²³ Michael Weinberg, *T-Mobile Uses Data Caps to manipulate Competition Online, Undermine Net Neutrality*, PUBLIC KNOWLEDGE (June 19, 2014) (Public Knowledge, a tech

telecom industry as necessary to provide customers with “high-quality video, from particular technology or content companies.”²²⁴ The risk of such preferential treatment is those startups, nonprofits and other Internet users who cannot afford to pay for priority treatment may have their content pushed into the slow-lane and cost to consumers may increase.²²⁵

The FCC’s proposed rules on network neutrality ban ISPs from slowing down consumer Internet access, but may allow content providers to pay for more preferential, or fast-lane, access to consumers.²²⁶ (The agency has asked the public for comment as to whether it should ban the latter practice as “commercially unreasonable.”²²⁷) In response to the pending FCC action, Democrats unveiled the Online Competition And Consumer Choice Act, which would force the FCC to ban Internet “fast lanes.”²²⁸ Republicans alternatively proposed legislation that would prohibit the FCC from reclassifying ISPs as a “common carrier” and therefore limit regulation of the industry.²²⁹ Cord Cutters must stay tuned to see if, and how, their cord might be cut.

advocacy group, argues that exempting “a handful of music streaming services from their data cap is but the latest example of ISPs using data caps to undermine net neutrality.”
<https://www.publicknowledge.org/news-blog/blogs/t-mobile-uses-data-caps-to-manipulate-competition-online-undermine-net-neutrality>.

²²⁴ *Id.*; but see Holman Jenkins, *The Net Neutrality Lobby is Like a Frog*, WALL STREET JOURNAL (January 14, 2014 3:52 p.m.) (“data caps are good old-fashioned exercises in price discrimination”)

<http://online.wsj.com/news/articles/SB10001424052702303465004579326520651390190>.

²²⁵ The Editorial Board of the New York Times, *Creating a Two Speed Internet*, NEW YORK TIMES (April 24, 2014) http://www.nytimes.com/2014/04/25/opinion/creating-a-two-speed-internet.html?_r=1&version=meter+at+9®ion=FixedCenter&pgtype=article&priority=true&module=RegiWall-Regi&action=click (noting that “smaller content providers and start-ups that could not pay for preferential treatment might not be able to compete because their delivery speeds would be much slower. And consumers would have to pay more because any company that agrees to strike deals with phone and cable companies would undoubtedly pass on those costs to their users.”)

²²⁶ In the Matter of Protecting and Promoting the Open Internet, Notice of Proposed Rulemaking, FCC 14-61, ¶4 (May 15, 2014).

²²⁷ *Id.*

²²⁸ See Dave Smith, *Two Democrats Have A Proposal To Dismantle The FCC Plan That Could Ruin The Internet*, BUSINESS INSIDER (June 17, 2014, 12:44 p.m.)

<http://www.businessinsider.com/online-competition-consumer-choice-act-2014-6#ixzz37OYQt3W1>

²²⁹ See Christian Brazil Bautista, *Republicans Introduce Bill to Prevent the FCC From Reclassifying ISPs as a Utility*, DIGITAL TRENDS (May 30, 2014)

<http://www.digitaltrends.com/mobile/republican-bill-to-prevent-the-fcc-from-reclassifying-isps-as-utility/#ixzz37OaM0TSE>.

VIII. CONCLUSION

The Cord Cutting trend is not abating. As described in this paper technology has profoundly changed the entertainment landscape thanks to Netflix, Amazon Prime, and their ilk. There will, however, be detours, stops, U-turns and obstacles on the way to Cord Cutting ubiquity. The *Aereo* case raises questions regarding how far third parties may go in assisting individual Cord Cutters as they bundle their own entertainment content. The network neutrality debate threatens to raise costs for consumers and entertainment providers that operate outside of the traditional cable company universe, and it threatens to create a class system – a fast lane and a slow lane – on the internet. It is also possible but unlikely that the traditional companies will adapt, bow to the inevitable, and provide more content at lower prices to the public. But in the end, Cord Cutting, with all that it entails for choice, cost and freedom, is clearly one thing: the future.