



6-2-2014

# Forcing the Connection: The Antitrust Concerns With Broadband Data Caps and Data Discrimination in the Wake of the New Internet Television Age

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Dara Ashrafi, Comment, *Forcing the Connection: The Antitrust Concerns With Broadband Data Caps and Data Discrimination in the Wake of the New Internet Television Age*, 54 SANTA CLARA L. REV. 465 (2014).

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**FORCING THE CONNECTION: THE ANTITRUST  
CONCERNS WITH BROADBAND DATA CAPS  
AND DATA DISCRIMINATION IN THE WAKE OF  
THE NEW INTERNET TELEVISION AGE**

**Dara Ashrafi\***

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## INTRODUCTION

The television landscape is changing. New entrants in the form of Online Video Distributors (“OVDs”)<sup>1</sup> like Netflix, Hulu, Amazon, and Apple, are beginning to take on the incumbent Multichannel Video Programming Distributors (“MVPDs”)<sup>2</sup>, most notably Comcast, Charter Communications, and Cox Communications. The consumer market for OVDs has only recently taken hold, but the business model’s viability has led to a vast number of market entrants. This demonstrates the lucrateness of the service,<sup>3</sup> as well as the apparent threat to the old guard.

Since its advent, television watchers have flocked to online video en masse. For example, a May 2011 survey found that seventy-one percent of Internet-using adults have used online video sites.<sup>4</sup> Nevertheless, incumbent MVPDs are not taking this change lying down. The OVDs have forcefully dragged cable providers into the twenty-first century, kicking and screaming,<sup>5</sup> and these MVPDs have retaliated with heavy investment in the online delivery of their normal content through an industry-wide initiative known as “TV Everywhere.”<sup>6</sup>

The MVPDs’ foray into online distribution, however, has raised a number of eyebrows regarding alleged anticompetitive conduct. In June 2012, news sources reported that the Justice Department began an antitrust investigation into the conduct of a number of major cable providers.<sup>7</sup> Particularly, the Justice Department focused on

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1. OVDs are “any entity that offers video content by means of the Internet or other Internet Protocol (IP)-based transmission path provided by a person or entity other than the OVD.” Fed. Comm’n Comm’n, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 27 FCC RCD. 8610, 8612 ¶ 2 n.6 (2012).

2. MVPDs are “companies that offer multiple channels of video programming to consumers for a subscription fee.” *Id.* at 8612 ¶ 2 n.4.

3. *Id.* at 8720 ¶ 239.

4. *Id.* at 8748 ¶ 316.

5. Mike Masnick, *DOJ Realizes That Comcast & Time Warner Are Trying To Prop Up Cable By Holding Back Hulu & Netflix*, TECHDIRT (Jun. 14, 2012, 7:16am), <http://www.techdirt.com/articles/20120614/01292519313/doj-realizes-that-comcast-time-warner-are-trying-to-prop-up-cable-holding-back-hulu-netflix.shtml>.

6. Fed. Comm’n Comm’n, *supra* note 1, at 8618 ¶ 21.

7. Thomas Catan & Amy Schatz, *U.S. Probes Cable for Limits on Net Video*, WALL ST. J. (Jun. 12, 2012, 12:08pm), <http://online.wsj.com/article/SB10001424052702303444204577462951166384624.html>.

the anticompetitive effects (in relation to OVDs) of the broadband data caps set by cable companies, as well as instances of MVPDs giving priority to their own online data at the expense of these third party distributors.<sup>8</sup>

Inspired by the Justice Department's investigation, this paper will analyze whether a prima facie case of monopolization exists against major cable providers for their potentially anticompetitive actions against OVDs.<sup>9</sup> Further, assuming the cable companies' actions would not qualify as monopolization, this paper proposes theories by which liability may be imposed under the Sherman Act, including duty to deal,<sup>10</sup> attempted monopolization,<sup>11</sup> and tying.<sup>12</sup>

## I. BACKGROUND

In order to find an MVPD liable under Section 2 of the Sherman Act, an MVPD must satisfy two elements: "(1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of the power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."<sup>13</sup> The Supreme Court has clarified that Section 2 requires a monopoly to involve "something more than extraordinary commercial success."<sup>14</sup> Further, the Court has stated in dicta that the Sherman Act should never be misused to proscribe competition itself, regardless of its severity, but only to penalize *conduct* that has the effect of destroying competition.<sup>15</sup> While this explanation was made in reference to attempted monopolization, it nevertheless provides a lens by which to view the scope of the Sherman Act.

The broad terms of the Act do not necessarily lend themselves to fixed, bright line rules concerning the legality of a firm's behavior. An antitrust analysis must therefore "always be attuned to the particular structure and

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8. *Id.*

9. *See infra* Part IV.

10. *See infra* Part V.A.

11. *See infra* Part V.B.

12. *See infra* Part V.C.

13. *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966).

14. *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 390 (1956).

15. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993).

circumstances of the industry at issue.”<sup>16</sup> Consequently, these broad terms allow antitrust analyses to adapt to the continually evolving commercial markets.<sup>17</sup>

#### A. Overview of the Relevant Market Analysis

Analysis of whether an MVPD holds market power, and subsequently, whether it is liable under the Sherman Act, is based on the definition of its product’s relevant, and competitive, market.<sup>18</sup> This market definition is crafted through an examination of both the *product* and the *geographic* market.<sup>19</sup> The difficulty thus lies in defining the market’s scope. Typically, a narrow market definition would potentially find any company liable for monopoly, while a broad definition would do just the opposite, undermining all the protections offered by the Sherman Act.<sup>20</sup>

#### B. The Relevant Product Market

The process of defining the relevant product market begins by examining the similarities of the various products, either by their character or use, or by their perceived substitutability through the eyes of the consumer.<sup>21</sup> It is far from a requirement, however, that products be perfectly fungible in order to be substitutable.<sup>22</sup> Likewise, the consumer’s use of the products need not be completely identical,<sup>23</sup> though the way in which the product is used is a controlling factor.<sup>24</sup> If this use based analysis were not followed, only perfectly fungible products could be said to compete in the same relevant market, making monopolists of

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16. *Verizon Commc’n Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 411 (2004).

17. *du Pont*, 351 U.S. at 386.

18. *Id.* at 393.

19. *T. Harris Young & Assoc., Inc. v. Marquette Elec., Inc.*, 931 F.2d 816, 823 (11th Cir. 1991).

20. Catherine J.K. Sandoval, *Antitrust Law on the Borderland of Language and Market Definition: Is There a Separate Spanish-Language Radio Market? A Case Study of the Merger of Univision and Hispanic Broadcasting Corporation*, 40 U.S.F. L. REV. 381, 445 (2006) (arguing that narrow market definitions result in distorted antitrust analyses).

21. *du Pont*, 351 U.S. at 393.

22. *Id.* at 394; *Telex Corp. v. Int’l Bus. Mach. Corp.*, 510 F.2d 894, 917–18 (10th Cir. 1975).

23. *Telex*, 510 F.2d at 918.

24. *du Pont*, 351 U.S. at 395.

nearly all manufacturers or firms.<sup>25</sup>

Thus, it is important to analyze the distinction between the use and the characteristics of a product, since a product's characteristics could materially distinguish it from any substitute in nearly every aspect.<sup>26</sup> Courts have developed a workable legal standard that questions whether comparative products are "reasonably interchangeable," taking into consideration the products' price, use, and qualities.<sup>27</sup> Any product that *is* reasonably interchangeable will generally be included in the relevant market.<sup>28</sup>

This definition of the relevant product market should nevertheless operate within some limits. Every product can realistically have a large number of substitutable products, and the Sherman Act should not seek to protect that infinite range.<sup>29</sup> "The circle must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will purchase."<sup>30</sup> Furthermore, relevant markets may be limited to a specific portion of customers, but the limitation must be based "on a distinction in the *product* sold to customers."<sup>31</sup>

### C. The Relevant Geographic Market

After establishing the relevant product market for MVPDs and OVDs, the relevant geographic market is then determined. The geographic market is defined as "the area in which the product or its reasonably interchangeable substitutes are traded."<sup>32</sup> In the event that an alleged monopolist engages in anticompetitive behavior, the geographic market is only relevant where consumers are unable to purchase goods from alternative sellers, outside of

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25. *Id.* at 394.

26. *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966); *see du Pont*, 351 U.S. at 394–04.

27. *Telex*, 510 F.2d at 918; *du Pont*, 351 U.S. at 404.

28. *Grinnell*, 384 U.S. at 571; U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 4.1.1 (2010) [hereinafter 2010 GUIDELINES].

29. *du Pont*, 351 U.S. at 415 (Warren, J., dissenting).

30. *Id.*; *see United States v. Microsoft Corp.*, 253 F.3d 34, 52 (D.C. Cir. 2001).

31. *T. Harris Young & Assoc., Inc. v. Marquette Elec., Inc.*, 931 F.2d 816, 824 (11th Cir. 1991).

32. *Id.* at 823.

their geographic area.<sup>33</sup>

*D. Determining a Firm's Market Power*

The term monopoly power has been widely defined as “the power to control prices or exclude competition,”<sup>34</sup> and the existence of this power can be inferred when a firm acquires a “predominant share of the market.”<sup>35</sup> By itself, the size of a firm’s market share is insufficient to prove monopoly power.<sup>36</sup> “[S]tatistics concerning market share and concentration, while of great significance, [are] not conclusive indicators of anticompetitive effects.”<sup>37</sup> Even possession of one hundred percent of the relevant market does not guarantee that the firm has the power to control prices or exclude competitors, particularly in cases where there are low or no barriers to entry.<sup>38</sup>

Barriers to entry are defined as “additional long-run costs that were not incurred by incumbent firms but must be incurred by new entrants,” or “factors in the market that deter entry while permitting incumbent firms to earn monopoly returns.”<sup>39</sup> Although anticompetitive conduct exercised by one firm against another may create a hostile market, this behavior does not itself qualify as a structural barrier to entry.<sup>40</sup>

As a result, proof of a large market share must be accompanied with evidence of the actual or potential exclusion of competitors through unnatural or coercive means.<sup>41</sup> It is important to note that a finding of monopoly power also requires a showing that one has “the power to exclude competition from the relevant market *generally*, and not just the power to exclude a particular competitor.”<sup>42</sup> On the other hand, if the firm lacks market power, even the most

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33. *Id.*

34. *See* United States v. Grinnell Corp., 384 U.S. 563, 571 (1966) (emphasis added).

35. *Id.*

36. Telex Corp. v. Int’l Bus. Mach. Corp., 510 F.2d 894, 927 (10th Cir. 1975).

37. United States v. Gen. Dynamics Corp., 415 U.S. 486, 498 (1974).

38. L.A. Land Co. v. Brunswick Corp., 6 F.3d 1422, 1425 (9th Cir. 1993).

39. *Brunswick*, 6 F.3d at 1427–28 (internal citation omitted).

40. *Id.* at 1427.

41. United States v. Aluminum Co. of Am. (*ALCOA*), 148 F.2d 416, 430 (2d Cir. 1945).

42. *Brunswick*, 6 F.3d at 1426–27 (emphasis added).

significantly anticompetitive behavior would be inadequate to establish liability for monopolization.<sup>43</sup>

### *E. Determining the Legality of Anticompetitive Conduct*

In determining whether conduct is exclusionary or anticompetitive, it is necessary to consider “its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way.”<sup>44</sup> A firm’s intent to defeat a competitor in an honest competitive struggle is not considered a violation of the Sherman Act.<sup>45</sup> The true test of legality is whether the firm’s conduct promotes or destroys competition.<sup>46</sup>

Courts are required to consider the facts as they relate to the injured firm, the state of the firm before and after the allegedly anticompetitive conduct, as well as the actual or probable effects of that conduct.<sup>47</sup> While it would certainly violate the Act to actually foreclose competitors from a market,<sup>48</sup> an antitrust injury cannot be established by showing an *eventual* reduction in competition due to the long-term effect of the allegedly anticompetitive conduct.<sup>49</sup> Nor can a showing that a firm charged monopoly prices be found to be *conclusively* anticompetitive, as the opportunity to charge such prices, over the short term, “induces risk taking that produces innovation and economic growth,” which in turn leads to enhanced competition.<sup>50</sup>

## II. ALTERNATIVES TO THE PRIMA FACIE CASE

### *A. The Duty to Deal*

A firm with monopoly power has no general duty to deal with a competitor.<sup>51</sup> However, “the high value that [has been]

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43. *Id.* at 1427.

44. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985).

45. *William Inglis & Sons Baking Co. v. ITT Cont’l Baking Co.*, 668 F.2d 1014, 1028 (9th Cir. 1981).

46. *du Pont*, 351 U.S. at 413–14 (Frankfurter, J., concurring).

47. *Id.*

48. *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 61 (1911).

49. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 337 n.7 (1990).

50. *Verizon Comm’n Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

51. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601

placed on the right to refuse to deal . . . *does not mean the right is unqualified.*"<sup>52</sup> The Sherman Act prohibits the exercise of the right to refuse to deal when it is used as a "purposeful means" of monopolization.<sup>53</sup> For example, the Supreme Court has imposed a duty to deal on monopolists whose conduct made an important change to the character of the market, and where that change altered a facet of the market during a time when the market was competitive.<sup>54</sup> Forced sharing and cooperation in the above circumstance has been found to be "at or near the outer boundary of section 2 liability."<sup>55</sup> Should there be a need to expand this doctrine in the future, the Court fears that the judiciary is ill-equipped to explain or adequately supervise the manner in which firms should cooperate.<sup>56</sup> The Sherman Act should not be used as a tool to create competition, but rather, to protect it.<sup>57</sup> Put simply, "[i]n absence of any purpose to create or maintain a monopoly, the [A]ct does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, to freely exercise his independent discretion as to parties with whom he will deal."<sup>58</sup>

### *B. Attempted Monopolization*

In addition to prohibiting anticompetitive behavior by existing monopolists, the Sherman Act also covers the preliminary steps that would lead to monopolization.<sup>59</sup> Attempted monopolization requires a showing that "(1) [the firm] has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power."<sup>60</sup> Further, this attempt must happen in the defined, relevant market.<sup>61</sup>

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(1985).

52. *Id.*; see *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

53. *Aspen*, 472 U.S. at 601.

54. *Id.* at 603–04.

55. *Trinko*, 540 U.S. at 408.

56. *Id.* at 415.

57. *Id.* at 415–16.

58. *Colgate*, 250 U.S. at 307 (1919).

59. *ALCOA*, 148 F.2d at 431.

60. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993).

61. *T. Harris Young & Assoc., Inc. v. Marquette Elec., Inc.*, 931 F.2d 816, 823 (11th Cir. 1991).

*C. Illegal Tying*

Tying arrangements exist where a seller conditions the sale of one product on the purchase of a second product.<sup>62</sup> The Supreme Court has held that tying arrangements are per se illegal as they rarely serve any purpose beyond “the suppression of competition.”<sup>63</sup> Although still per se invalid, the Court has nevertheless recognized that tying arrangements could exist for legitimate business reasons.<sup>64</sup> Liability for tying thus rests on whether a firm used its market share in the tying product to impair competition in the market for the tied product.<sup>65</sup> This can be demonstrated by a tying arrangement which forces a buyer into “the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.”<sup>66</sup> The origin of the firm’s market power in the tying product, legally or illegally obtained, is not relevant in establishing the unlawfulness of a tying arrangement, as liability will be imposed whenever a seller “exploits his dominant position in one market to expand his empire into the next.”<sup>67</sup>

## III. IDENTIFICATION OF THE LEGAL PROBLEM

It is far from certain that OVDs or the Government are able to satisfy the requirements for a prima facie case of monopolization under section 2 of the Sherman Act. However, given the large size of the top MVPDs, as well as their control over not only video content but also much of the nation’s broadband internet access, the repercussions that would stem from a successful antitrust suit against the use of internet data caps and traffic prioritization may change the manner in which ISPs can regulate their own infrastructures. This change, in turn, would affect not only general consumer use of the Internet, but the future viability of third party OVDs. Therefore, the strength of the prima facie case will be

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62. *Ill. Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28, 31 (2006).

63. *Standard Oil Co. of Cal. v. United States*, 337 U.S. 293, 305–06 (1949).

64. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 29 (1984).

65. *Ill. Tool Works*, 547 U.S. at 34.

66. *Jefferson Parish*, 466 U.S. at 12.

67. *In re Indep. Serv. Org. Antitrust Litig.*, 203 F.3d 1322, 1327 (Fed. Cir. 2000) (internal quotation marks omitted).

discussed below,<sup>68</sup> along with possible alternative courses of action for the OVDs or Government.<sup>69</sup>

#### IV. ANALYSIS OF THE PRIMA FACIE CASE

##### A. *The Relevant Market for OVDs and MVPDs*

Pursuant to the “reasonably interchangeable” standard, it is highly likely MVPDs and OVDs compete in the same product market—video content distribution. While the products are not perfectly fungible on their face, there is very little differentiation between MVPDs and OVDs. Both products provide consumers with video content, be it movies or television shows, and both permit that content to be viewed on televisions, computers, tablets, and smartphones.

A closer look reveals that the services’ similarities are more than just superficial. The largest MVPDs, including cable- and telephone-based systems, offer hundreds of video channels, as well as thousands of hours of video-on-demand.<sup>70</sup> While a majority of OVDs do not operate using linear channels, the on-demand libraries of many of the larger OVDs are comparable to, and sometimes exceed, the leading MVPDs’ on-demand libraries.<sup>71</sup> Also, much like many of the larger, vertically integrated MVPDs, the leading OVDs have begun to create their own original, serialized programming.<sup>72</sup> Furthermore, both distribution methods are starting to be similarly regulated. For example, in January 2012, the FCC adopted rules that obligated owners, providers, and distributors of Internet video programming to provide closed captioning services,<sup>73</sup> demonstrating the continuing, yet subtle, attenuation of product differentiation between MVPDs and OVDs.

The strongest product similarity between MVPDs and OVDs ironically stems from MVPDs’ attempt to differentiate their products amongst themselves.<sup>74</sup> The recent introduction

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68. *See infra* Part IV.

69. *See infra* Part V.

70. Fed. Comm’n Comm’n, *supra* note 1, at 8619 ¶ 26.

71. Austin Carr, *Amazon Massively Inflates Its Streaming Library Size*, FAST COMPANY (Apr. 11, 2012), <http://www.fastcompany.com/1830524/amazon-massively-inflates-its-streaming-library-size>.

72. Fed. Comm’n Comm’n, *supra* note 1, at 8724–25, 8728 ¶¶ 250, 262.

73. *Id.* at 8670 ¶ 140.

74. *Id.* at 8651 ¶ 96.

of the “TV Everywhere” initiative, which permits consumers to access an MVPD’s linear video channels and various on-demand programming through Internet-connected devices, is, for all intents and purposes, an almost identical product compared to that which is provided by many OVDs.<sup>75</sup> TV Everywhere is the MVPD industry’s direct attempt to compete in the online video market.<sup>76</sup> By taking OVDs head-on in competition, it becomes easier to draw the conclusion that MVPDs and OVDs occupy the same video content distribution market, even if MVPDs argue against being treated similarly elsewhere.<sup>77</sup>

One can also conclude that MVPDs and OVDs are in the same product market through an observation of consumer behavior. Reports illustrate that more and more Americans are watching online video through some form of OVD, with current penetration amongst the adult population surpassing fifty percent.<sup>78</sup> Moreover, while at one time people used to terminate cable subscriptions in favor of free, over-the-air broadcasters, current trends indicate that consumers are now exercising their option to terminate MVPD subscription in favor of OVDs, in what has come to be known as “cutting-the-cord.”<sup>79</sup> Some reports indicate that OVD users who have “cut the cord” now account for nine percent of all OVD users, with another eleven percent considering making the switch.<sup>80</sup>

Finally, the consumer electronic market provides further, albeit minor, validation of this market definition. Television manufacturers have uniformly begun to include Ethernet ports and/or Wi-Fi receivers in their modern television sets, facilitating the consumer’s ability to access OVDs.<sup>81</sup> While Internet-connected televisions provide other benefits to manufacturers, like the ability to quickly update firmware, these “smart” televisions also include applications that allow the direct streaming of Netflix, Hulu, YouTube, and other OVDs, which is strong evidence that manufacturers recognize

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75. *Id.*

76. *Id.*

77. John Eggerton, *Cable Operators: OVDs Are Not MVPDs*, MULTICHANNEL NEWS (Jun. 14, 2012, 4:04pm), <http://www.multichannel.com/content/cable-operators-ovds-are-not-mvpds>.

78. Fed. Comm’n Comm’n, *supra* note 1, at 8748–49 ¶ 318.

79. *Id.* at 8757 ¶ 339.

80. *Id.* at 8758 ¶ 341.

81. *Id.* at 8757–58 ¶ 340.

that a shift in consumer television watching behavior has occurred. Analysts predict that over seventy-five percent of U.S. homes will have an Internet-connected television by 2016.<sup>82</sup> Further, Internet-streaming boxes, such as Roku or Apple TV, have gained popularity as a means for those without Internet-ready televisions to easily access streaming content.<sup>83</sup>

There are indications that OVDs might exist as complimentary rather than substitute goods,<sup>84</sup> which may cause them to hold a market classification separate from MVPDs.<sup>85</sup> Despite the nine percent of viewers that have already cut the cord, termination of MVPD service in favor of OVDs remains relatively infrequent.<sup>86</sup> Quite simply, the recent increases in online video streaming have not necessarily translated into decreased MVPD subscriptions.<sup>87</sup> The average American watches thirty-five hours and eight minutes of traditional television each week (including time-shifted television), but only twenty-seven minutes of Internet video.<sup>88</sup> Moreover, online video viewership is very highly concentrated as compared to traditional television viewership, with “eighty-three percent of all streaming [taking] place among the top fifth of consumers who stream.”<sup>89</sup> Together, this data indicates that only a small percentage of consumers are truly utilizing their OVDs as a substitute good. While there is no hard and fast rule that permits the determination between complimentary/substitute status, OVDs can nonetheless argue that the nine percent of MVPD subscribers who cut the cord is sufficient to demonstrate substitutability, especially given the relative

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82. Dawn C. Chmielewski, *100 million TVs will be Internet-Connected by 2016*, L.A. TIMES (Mar. 20, 2012, 5:20pm), <http://latimesblogs.latimes.com/entertainmentnewsbuzz/2012/03/100-million-tvs-will-be-internet-connected-by-2016.html>.

83. See Will Greenwald, *Best Media Players Compared: Roku vs. Apple TV vs. Google TV*, PC MAG. (Mar. 28, 2012), <http://www.pcmag.com/article2/0,2817,2402133,00.asp>.

84. Paul M. Johnson, *Complementary Goods*, A GLOSSARY OF POLITICAL ECONOMY TERMS, [http://www.auburn.edu/~johnspm/gloss/complementary\\_goods](http://www.auburn.edu/~johnspm/gloss/complementary_goods) (last visited Dec. 19, 2012).

85. Fed. Commc'n Comm'n, *supra* note 1, at 8670–71 ¶ 340.

86. *Id.* at 8721 ¶ 240.

87. *Id.* at 8670–71 ¶ 140.

88. *Id.*

89. *Id.* at 8756 ¶ 337.

youthfulness of the technology, the age demographics of online streamers, and the emerging technologies that will facilitate streaming services in the future.

On the other hand, the FCC found that while a growing number of Americans are cutting-the-cord, another group of television watchers are merely “cord shaving.”<sup>90</sup> That is, they are lowering their MVPD subscription tiers and getting rid of premium MVPD content, like HBO, and replacing it with OVD content.<sup>91</sup> Reports have estimated the number of consumers who cord shaved in 2011 at thirteen percent,<sup>92</sup> surpassing the number of consumers who cut the cord within that same period. Although MVPD subscriptions have been shaved, the fact that they were still retained may lend further weight to the argument that OVDs are merely complimentary goods.

MVPDs may also attempt to classify themselves as being a separate market from OVDs because, in addition to video content, they provide broadband Internet service and voice-over-IP. While each product could conceivably be classified in a separate product market, MVPDs also sell these products together in bundled packages, and consumers are more often than not choosing to purchase bundles from a single MVPD in lieu of separately purchasing the individual products from various competitors.<sup>93</sup> Also noteworthy are indications that consumers are purchasing these bundles with the priority on broadband first, and video content delivery second.<sup>94</sup> Why then, should OVDs be found to compete in the same market when they only provide a fraction of the product (and not even the primary benefit of that product) provided by MVPDs? A court may find the differences between MVPDs and OVDs to be as vast as the differences between the non-automatic and automatic local alarm systems in *Grinnell*,<sup>95</sup> and such a differentiation may permit the determination that MVPDs and OVDs exist in two distinct product markets.

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90. *Id.* at 8670–71 ¶ 140.

91. *Id.*

92. *Id.*

93. *Id.* at 8672–73 ¶ 143; Susan Crawford, *The Cable Monopoly: Very Short Summary of 185 Pages*, SUSAN CRAWFORD BLOG (Oct. 7, 2012), <http://scrawford.net/blog/the-cable-monopoly-very-short-summary-of-185-pages/1631/>.

94. Crawford, *supra* note 93.

95. *United States v. Grinnell Corp.*, 384 U.S. 563, 573 (1966).

Even if MVPDs exist within this bundled product market, OVDs may yet compete in a submarket, thereby qualifying as a distinct product market for antitrust purposes.<sup>96</sup> Under the *Brown Shoe*<sup>97</sup> test, such submarkets can be determined by “industry or public recognition of the submarket as a separate economic entity, the product’s peculiar characteristics and uses, unique production facilities, distinct customer, distinct prices, sensitivity to price changes, and specialized vendors.”<sup>98</sup> The number of distributors that operate solely as OVDs, the unique manner in which OVDs can be viewed, the younger and more tech-savvy customer demographic,<sup>99</sup> and the cheaper subscription fees as compared to normal MVPDs<sup>100</sup> indicate that OVDs may in fact compete in a distinct submarket. Thus, attempts by MVPDs to distance themselves from OVDs to assuage antitrust concerns might be futile if they still compete in the OVD submarket via the TV Everywhere initiative.

As for the geographic market, research indicates that consumers typically shop for MVPD alternatives within the limited geographic region where they live.<sup>101</sup> Quite obviously, one would be hard-pressed to find a consumer willing to relocate his or her home merely because he or she was dissatisfied with the local incumbent cable MVPD operator.<sup>102</sup> At one time, however, relocation may have been the only option, as cable MVPDs had traditionally been allowed to operate their systems as regional monopolies.<sup>103</sup> While competing cable infrastructures did sometimes overlap, it was generally the exception and not the rule.<sup>104</sup> Importantly,

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96. *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962).

97. *Id.*

98. *Id.*

99. Craig Kuhl, *Demographics Shifting to Online Video Content*, CED MAG. (Jul. 28, 2011), <http://www.cedmagazine.com/blogs/2011/07/demographics-shifting-to-online-video-content>.

100. Ryan Lawler, *Over 1 Billion (Hours) Served: Netflix, Big Cable, And The Innovator’s Dilemma*, TECHCRUNCH (Jul. 4, 2012), <http://techcrunch.com/2012/07/04/netflix-youtube-innovators-dilemma/>.

101. Fed. Commc’n Comm’n, *supra* note 1, at 8618–19 ¶ 24.

102. *See In re Echo Star Commc’n Corp.*, 17 FCC RCD. 20559, 20610 ¶ 119 (2002).

103. Fed. Commc’n Comm’n, *supra* note 1, at 8619–20 ¶ 27; *see also* *City of Los Angeles v. Preferred Commc’n*, 754 F.2d 1396, 1404–05 (9th Cir. 1985).

104. Fed. Commc’n Comm’n, *supra* note 1, at 8619–20 ¶ 27 (“Historically, cable companies rarely competed with one another in the same geographic area.”).

until satellite television became available in the early 1990's, the vast majority of U.S. consumers were left with a simple choice between their local cable MVPD and free over-the-air broadcasting.

Starting in the early nineties, with the advent of Direct Broadcast Satellite ("DBS") systems,<sup>105</sup> cable MVPDs were finally faced with a rival that could compete with all land-based MVPDs on a national scale.<sup>106</sup> In comparison to DBS providers, which are able to beam their transmission signals across the country, cable MVPDs operate in discrete geographic areas as they are constrained by the boundaries of their individual infrastructures.<sup>107</sup> Even today, no cable MVPD is able to provide statewide coverage, much less nationwide coverage like DirecTV or Dish Network.<sup>108</sup>

As with the introduction of the DBS systems, incumbent cable MVPDs have recently faced renewed competition from telephone MVPDs such as AT&T U-Verse and Verizon FiOS.<sup>109</sup> These new operators face constraints similar to cable MVPDs, as their range of service is dependent upon the limitations of their telephone infrastructure.<sup>110</sup> The geographic footprints of telephone MVPDs almost always overlap areas already served by incumbent cable MVPDs, but surprisingly, the telephone MVPD service areas never overlap each other.<sup>111</sup>

Unlike the cable and telephone-based MVPD systems discussed above, OVDs are constrained only by the reach of the nation's broadband infrastructure, much of which is provided by MVPDs.<sup>112</sup> The current U.S. broadband penetration is over eighty percent,<sup>113</sup> making OVDs closest to DBS MVPDs in regards to coverage area by a single provider. Because OVDs would likely be found to compete in the same

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105. *Id.*

106. *Id.*

107. *Id.* at 8618–19 ¶ 24.

108. *Id.* at 8620 ¶ 29.

109. *Id.* at 8622 ¶ 32.

110. *Id.*

111. *Id.* The FCC does not expand upon the lack of overlap amongst the telephone-based MVPDs, but it is likely a result of the segregation caused by the 1984 Bell System divestiture.

112. *Id.* at 8721 ¶ 243.

113. Om Malik, *Global Broadband Zooms, U.S. penetration is over 80 percent*, GIGAOM (Jan. 30, 2012, 2:00pm), <http://gigaom.com/2012/01/30/global-broadband-zooms-us-penetration-is-over-80-percent/>.

product market as MVPDs, a situation arises where certain market operators offer their product on a national scale, while others are limited to the specific regions. However, such distinctions bear little relevance in determining the geographic market for monopolization purposes because the test provided by *T. Harris Young*<sup>114</sup> limits the geographic market to areas where reasonably interchangeable substitutes are traded.<sup>115</sup> The reasonable interchangeability of MVPDs must be viewed from the perspective of the consumer. In the FCC's *Echo Star* merger order, it found that, in the case of MVPDs, the relevant market could be limited to a consumer's *household*.<sup>116</sup> The normal consumer is almost always fixed at a specific business or household, and that region in which they work or live will typically have less than a handful of MVPDs. Therefore, any analysis of MVPD monopolization must occur, at a minimum, on a region-by-region basis.<sup>117</sup>

In conclusion of the market analysis, OVDs would likely be found to compete directly with MVPDs in a product market for video content distributors under the "reasonably interchangeable" test, but alternatively may compete directly in an OVD submarket that may exist under a bundled MVPD/ISP/VOIP market. As for the geographic market, the fact that consumers of video content are generally unwilling to relocate for the purpose of changing providers necessitates that the geographic market be narrowly defined; a particularly restrictive application of the geographic market test from *Echo Star* would limit the market to the home of each individual consumer.

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114. *T. Harris Young & Assoc., Inc. v. Marquette Elec., Inc.*, 931 F.2d 816, 823 (11th Cir. 1991).

115. *Id.*

116. *In re Echo Star Commc'n Corp.*, 17 FCC RCD. 20559, 20610 ¶ 119 (2002).

117. The inclusion of mobile phone providers (who often impose their own data caps) and mobile streaming may potentially change the scope of the analysis from regional to something larger. Current data suggests that the average American only consumes seven minutes of mobile streaming video a week. Fed. Commc'n Comm'n, *supra* note 1, at 8670–71 ¶ 140. Despite the potential for mobile streaming to occur nationwide, this overall small amount of streaming usage may be insufficient to necessitate inclusion in the geographic market analysis, especially when there is a lack of information as to the times and locations where such streaming is taking place.

*B. The Market Power of MVPDs*

Cable MVPDs began as regional monopolies,<sup>118</sup> which created an MVPD market that remains both highly concentrated and susceptible to a number of anticompetitive concerns.<sup>119</sup> Although the landscape has shifted over the past few decades, remnants of cable dominance certainly remain. In 2010, cable MVPD service was available to 98.5% of all U.S. homes,<sup>120</sup> and cable distributors managed to retain a nationwide market share of 46.5% amongst all MVPDs as defined by the FCC.<sup>121</sup> Given the lack of overlap in their service areas, cable MVPDs rarely, if ever, compete for the same subscriber.<sup>122</sup> A similar story holds true for telephone MVPDs. In 2010, telephone based video service was available to 32.8% of all U.S. homes,<sup>123</sup> with a market penetration of only 15.2% amongst all MVPDs.<sup>124</sup> Similar to cable providers, the telephone MVPDs also do not compete for the same subscriber.<sup>125</sup>

Accounting for the *theoretical* nationwide coverage of the two DBS MVPDs,<sup>126</sup> as well as their market penetration of 25.5% amongst all MVPDs,<sup>127</sup> it can be determined that 65.7% of the U.S. population has access to only three MVPDs (one cable, two satellite), giving a high Herfindahl-Hirschman Index (“HHI”)<sup>128</sup> roughly equaling 3333.<sup>129</sup> In the 32.8% of the country that has access to four MVPDs (one cable, one

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118. See *City of Los Angeles v. Preferred Commc’n*, 754 F.2d 1396, 1404–05 (9th Cir. 1985).

119. Fed. Commc’n Comm’n, *supra* note 1, at 8626 ¶ 38.

120. *Id.* at 8624 ¶ 37.

121. *Id.* at 8672 ¶ 142 tbl. 6.

122. *Id.* at 8626 ¶ 39.

123. *Id.* at 8624 ¶ 37.

124. *Id.* at 8672 ¶ 142 tbl. 6.

125. *Id.* at 8626 ¶ 39.

126. *Id.* at 8624 ¶ 37. The calculations by the FCC assume that a hundred percent of homes are able to receive DBS, though they admit that environmental factors, such as tall trees, neighboring buildings, and other line-of-sight obstructions cause this figure to be overstated by an unknown amount. *Id.* at 8624, ¶ 37 n. 77.

127. *Id.* at 8672 ¶ 142 tbl. 6.

128. The Herfindahl-Hirschman Index is a calculation of market concentration used by the FTC and DOJ in antitrust inquiries. 2010 GUIDELINES, *supra* note 28, § 5.3. An HHI below 1500 is considered unconcentrated, an HHI between 1500 and 2500 is considered moderately concentrated, and an HHI above 2500 is considered highly concentrated. *Id.*

129. Fed. Commc’n Comm’n, *supra* note 1, at 8627–28 ¶ 41.

telephone, and two satellite), the HHI remains over 2500,<sup>130</sup> still well within the range necessary to raise suspicions about the potential monopoly power of the dominant firms.<sup>131</sup> Despite this high concentration, the FCC lacks the data to calculate each MVPDs' individual market shares, and can only extrapolate an estimated HHI for various regions based on the number of competing MVPDs. This current lack of data permits only speculation about which MVPDs are, or potentially could become, monopolists.

Further, regardless of high HHI scores across the country, the FCC, in reference to the analyses of barriers of entry and MVPD rivalry, has found that the high concentration does not necessarily raise anticompetitive concerns.<sup>132</sup> As stated above, the entry of DBS and telephone MVPDs has reduced *regional* HHIs, one measure of market concentration.<sup>133</sup> Despite the FCC's opinion, an analysis of barriers to entry seems to demonstrate that the MVPD market is noncompetitive. While reports confirm that competition from DBS and telephone MVPDs has eroded cable's subscriber base,<sup>134</sup> it is important to note that cable providers in total still maintain 46.5% of the market, and the realistic best case HHI is still in excess of 2500.

Analyzing the various barriers to entry helps to illuminate the competition concerns in the MVPD market. Economies of scale provide numerous cost advantages to incumbent, large-scale distributors, both in regards to content acquisition and also consumer premise equipment purchases.<sup>135</sup> The capital requirements necessary to overcome such hurdles may play a large role in a firm's decision to enter the MVPD market.<sup>136</sup> Land-based MVPDs would be required to invest heavily in infrastructure to compete with incumbent providers. This is especially true when most consumers who want an MVPD service already subscribe to such a service,<sup>137</sup> and where decades of advertising and customer loyalty provides substantial "first

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130. *Id.*

131. 2010 GUIDELINES, *supra* note 28, § 5.3.

132. Fed. Comm'n Comm'n, *supra* note 1, at 8626 ¶ 38.

133. *Id.* at 8627–28 ¶ 41.

134. *Id.* at 8668 ¶ 138.

135. *Id.* at 8643–44 ¶ 74.

136. *Id.*

137. *Id.* at 8644 ¶ 76.

mover advantages” to the incumbents.<sup>138</sup> New entrants are faced with the reality that they are not in the position to gain new customers, but rather, they must win over customers from the existing MVPDs, which requires not only heavy spending but the likelihood of an extended period of start-up losses.<sup>139</sup>

Furthermore, many of the largest MVPDs are highly vertically integrated, creating a slew of exclusivity arrangements between distributors and affiliated producers.<sup>140</sup> These arrangements are difficult, if not impossible, for an unaffiliated new entrant to overcome.<sup>141</sup> A review of the degree of vertical integration in the industry shows that in early 2012, 127 national networks were affiliated with the top five cable MVPDs.<sup>142</sup> While there have been some regulations put in place to prevent certain exclusivity arrangements between MVPDs and their affiliated content producers,<sup>143</sup> there are no requirements that unaffiliated MVPDs, much less new entrants, be able to acquire that content on reasonable terms.<sup>144</sup> The lack of ability to obtain more content severely limits growth, both in regards to subscriber base and content libraries, of any new entrant to the market.<sup>145</sup>

The current high market concentration, together with significant barriers to entry, suggests that incumbent MVPDs have significant market power, and potentially monopoly power. An additional factor may give some certainty to the determination that land-based MVPDs have monopoly power under the *Grinnell* definition: all MVPDs are in control of the broadband infrastructure upon which OVDs operate.

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138. *Id.* at 8644 ¶ 77.

139. *Id.*

140. *Id.* at 8731 ¶ 270; see *In re Applications of Comcast Corp., Gen. Elec. Co., & NBC Universal, Inc.*, 26 FCC RCD. 4238, 4252–53 ¶ 34 (2011).

141. Fed. Commc’n Comm’n, *supra* note 1, at 8731 ¶ 270.

142. *Id.* at 8629 ¶ 44.

143. See *In re Applications of Comcast Corp., Gen. Elec. Co., & NBC Universal, Inc.*, 26 FCC RCD. 4238, 4259–62 ¶¶ 49–59 (2011) (imposing program access conditions, arbitration remedies, and program pricing limitations on Comcast post-merger).

144. *Cf. United States v. Colgate*, 250 U.S. 300, 305 (1919) (holding that a manufacturer will not be liable under the Sherman Act for exclusive deals with wholesalers and retailers who agree to the manufacturer’s terms, so long as the terms do not amount to fraud, collusion, or an unlawful combination).

145. Fed. Commc’n Comm’n, *supra* note 1, at 8730 ¶ 268.

Further, while all MVPDs offer some form of broadband service, the data indicates that *cable* broadband market penetration is incredibly concentrated by itself,<sup>146</sup> not to mention that subscribers who have remained with cable MVPDs despite new market entrants have generally upgraded their subscriptions to bundled packages that include digital video, Internet, and telephone service.<sup>147</sup>

To demonstrate MVPDs' monopoly power via the inclusion of the broadband ISP market, it may be necessary to use a relevant market definition that is based on the MVPDs' bundled packages. Such a market definition, which may or may not include OVDs, has the potential to destroy the *prima facie* case at this stage. However, taking into account the regional cable MVPD's significant share of the broadband ISP market, and still including OVDs in the relevant product market or submarket, the MVPDs may be imbued with the requisite power to exclude OVD competition via anticompetitive conduct.

### *C. The Anticompetitive Actions of MVPDs*

OVDs would argue that the imposition of data caps or a shift towards usage-based billing by a number of major cable MVPDs, is sufficiently anticompetitive as to be proscribed under the Sherman Act. In recent years, most major cable MVPDs have imposed hard data usage caps on their subscribers.<sup>148</sup> There is also a recent trend of imposing soft caps, which allow users to pay extra for additional blocks of data use (known as "usage-based billing").<sup>149</sup> Of the five largest cable providers (Comcast, Time Warner Cable, Cox Communications, Charter Communications, and Cablevision Systems),<sup>150</sup> only Time Warner Cable and Cablevision have not yet imposed these caps.<sup>151</sup> Comcast originally had a 250

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146. Om Malik, *The Continued Decline of DSL*, GIGAOM (Jan. 26, 2012, 8:26 am), <http://gigaom.com/2012/01/26/the-continued-decline-of-dsl/>.

147. Fed. Commc'n Comm'n, *supra* note 1, at 8672-73 ¶ 143.

148. *Id.* at 8732 ¶ 273.

149. Stacy Higginbotham, *Which ISPs are capping your broadband, and why?*, GIGAOM (Oct. 1, 2012, 12:03 PM), <http://gigaom.com/2012/10/01/data-caps-chart/>.

150. Fed. Commc'n Comm'n, *supra* note 1, at 8621 ¶ 30.

151. Stacy Higginbotham, *Which ISPs are capping your broadband, and why?*, GIGAOM (Oct. 1, 2012, 12:03 PM), <http://gigaom.com/2012/10/01/data-caps-chart/>.

GB hard cap, and has recently shifted to a 300 GB soft cap with a ten dollar charge for each additional 50 GB.<sup>152</sup> Cox and Charter, on the other hand, have stuck with hard caps ranging from 30 GB to 500 GB, depending on the speed and tier of the subscriber's Internet service package.<sup>153</sup>

Assuming an OVD user watches streaming content in the same manner as the average American watches traditional television service, it is possible that these caps would deter the consumer's usage of the OVD. For example, if a subscriber streamed the highest quality 1080p video from Netflix, which is comparable (and most often superior) to an MVPD's HD content,<sup>154</sup> he or she would be using data at a rate of 2.3 GB an hour.<sup>155</sup> The average American's television usage of thirty-five hours a week would equate to roughly 322 GB of data usage a month, not including any normal Internet data usage. Including normal Internet data usage, the average user would likely send the monthly usage well above the data caps of most users. For example, the average American watches 8.75 hours of YouTube video a month,<sup>156</sup> leading to anywhere from 0.8 GB to 6.5 GB of data usage from YouTube alone.<sup>157</sup>

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152. Shane McGlaun, *Comcast Moves to Increase Data Caps to 300gb on Home Broadband Service*, DAILYTECH (May 21, 2012, 9:01 AM), <http://www.dailytech.com/Comcast+Moves+to+Increase+Data+Caps+to+300GB+on+Home+Broadband+Service/article24721.htm>.

153. *Speeds and Usage Information for High Speed Internet Service*, COX COMMUNICATIONS, <http://ww2.cox.com/aboutus/policies/speedsusage.cox> (last visited Mar. 21, 2014); *Excessive Use of Bandwidth*, CHARTER COMM'NS, <http://www.myaccount.charter.com/customers/support.aspx?supportarticleid=2124#normalusage> (last visited Dec. 3, 2012).

154. See Benny Goldman, *Dish Network will Broadcast in 1080p, Streaming Blu-ray Quality Video Now Possible (But Unlikely)*, GIZMODO (Jul. 31, 2008, 12:00 PM), <http://gizmodo.com/5031461/dish-network-will-broadcast-in-1080p-streaming-blu-ray-quality-video-now-possible-but-unlikely> (indicating that amongst MVPDs, only DBS providers have, to date, transmitted video at greater than 720p/1080i).

155. *Netflix Viewing and Data Usage*, GCI, <http://www.gci.com/kb/netflix-movie-and-data-usage> (last visited Mar. 21, 2014); see Janko Roettgers, *EyeIO: Netflix's secret weapon against bandwidth caps?*, GIGAOM (Feb 1, 2012, 4:00 AM), <http://gigaom.com/video/eyeio-video-encoding-netflix/>.

156. *comScore Releases July 2012 U.S. Online Video Rankings*, COMSCORE (Aug. 17, 2012), [http://www.comscore.com/Insights/Press\\_Releases/2012/8/comScore\\_Releases\\_July\\_2012\\_US\\_Online\\_Video\\_Rankings](http://www.comscore.com/Insights/Press_Releases/2012/8/comScore_Releases_July_2012_US_Online_Video_Rankings).

157. *Broadband Usage Guide*, WHISTLEOUT, <http://www.whistleout.com.au/Broadband/Broadband-Usage-Guide> (last visited Dec. 3, 2012).

While Cox and Charter both have plans with data caps above this level, those higher caps (400 GB for Cox and 500 GB for Charter) are only available on their highest tier of Internet service, which, by themselves, cost a minimum of \$100 and \$110 a month, respectively. For all other tiers, the cap is 250 GB or less. Consequently, across the three major cable providers, the majority of their customers would hit their data caps upon any attempt to watch content via OVDs, as they would via MVPDs. Worse yet, Cox and Charter subscribers would be completely unable to access over thirty-one hours of content they would otherwise watch, while Comcast subscribers would be forced to pay an additional ten dollar fee. The pure limit on usage via a hard cap, or the fee required for additional usage via a soft cap, has the potential to substantially impact consumer behavior. The limitations imposed on the subscriber by the MVPDs would likely *force* them to use OVDs as a complimentary rather than a substitute service to avoid either termination of their Internet service from providers with hard caps,<sup>158</sup> or overage fees from providers with soft caps.

In response to these obstacles, OVDs should argue that the MVPDs are not competing fairly through lower prices or superior product, but rather, MVPDs are utilizing their broadband ISPs<sup>159</sup> to unfairly burden alternative video content competitors. It is important to note that data caps have spurred certain OVDs to institute changes. Notably, Netflix has invested heavily in compression technology to ensure that the MVPD caps do not limit their users.<sup>160</sup> OVDs could argue that, because these caps are near the upper limit of the average American's television watching habits, they may not be hindering OVDs competition at this very moment, but nevertheless that certainly does not mean that the caps won't be an impediment in the future. For example, while US subscribers have yet to be impacted, Netflix has been forced

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158. *Data Plan FAQs*, COX COMM'NS (Feb. 26, 2014), <http://ww2.cox.com/residential/sandiego/support/internet/article.cox?articleId=%7B2fd6ccb0-b13a-11df-4be3-000000000000%7D>.

159. While this note seeks to conduct an antitrust analysis solely through the perspective of MVPD monopolization or attempted monopolization, one can make a strong case that it is the broadband ISPs who are instead leveraging their monopolies in order to monopolize the MVPD and OVD markets. Such an argument is beyond the intended scope of this note.

160. Roettgers, *supra* note 155.

to lower the quality of their streams to Canadian customers to avoid their subscribers running afoul of data cap restrictions.<sup>161</sup> The limitations of data compression and the perpetual advancement in video quality may one day make data caps entirely oppressive and thereby relegate the status of OVDs to that of an inferior good.

If an OVD were to sustain a prima facie case against an MVPD regarding data caps usage, the MVPD would bear the burden of proving legitimate business reasons for the data caps.<sup>162</sup> If that burden was met, the OVD would then be required to show that the harm to competition outweighed the pro-competitive benefits of the legitimate business reasons.<sup>163</sup> For example, in the case of Cox and Charter, allowing tiered Internet packages with differing data caps may very well be pro-competitive. This allows for MVPDs to legally engage in price discrimination, allowing less bandwidth-hungry users the ability to afford a cheaper plan with a lower cap, while heavy users could pay proportionally more for their much larger share of usage.<sup>164</sup> Additionally, MVPDs are universally concerned with broadband congestion, and by placing a hard cap on users (or requiring that heavy users pay more), MVPDs may adequately incentivize their customers to limit their broadband consumption for the purpose of allowing all subscribers full access to a quality broadband service.<sup>165</sup> It would be seemingly difficult for OVDs to prove that either of these concerns are illegitimate, aside from the unlikely event wherein a leaked internal memo from a major MVPD blatantly states that these stated goals are not their legitimate business concerns and that the imposition of data caps is purely motivated by animus towards OVDs.

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161. Doug Halonen, *Netflix Turning Up the Heat on AT&T, Comcast and TWC Over Data Caps*, THE WRAP (May 15, 2012, 1:52 PM), <http://www.thewrap.com/media/column-post/netflix-turns-heat-comcast-att-and-twc-discrimination-case-39946>.

162. *United States v. Dentsply Int'l*, 399 F.3d 181, 196 (3d Cir. 2005).

163. *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001).

164. Abby Johnson, *Are Data Caps Bad, Or Are They Justifiable?*, WEBPRONNEWS (May 26, 2012), <http://www.webpronews.com/are-data-caps-bad-or-are-they-justifiable-2012-05>.

165. *See id.*; *see also* Catherine J.K. Sandoval, *Disclosure, Deception, and Deep Packet Inspection: The Role of the Federal Trade Commission Act's Deceptive Conduct Prohibitions in the Net Neutrality Debate*, 78 *FORDHAM L. REV.* 641 (2009).

Extremely unlikely, indeed, though similar instances have occurred.<sup>166</sup> Nonetheless, should the harm to competition outweigh the justification, OVDs will likely overcome an MVPD's legitimate business reason defense.<sup>167</sup>

The MVPD would also attack the OVD's assumptions regarding customers' viewing habits. While it is true that the average American watches thirty-five hours of traditional television a week, it is unlikely that he or she would do the same if he or she watched television solely through an OVD. First, the major OVDs like Netflix, Hulu, and Amazon are all based on an on-demand model, requiring watchers to actively seek out content. The on-demand medium may not permit passive watching, much less channel surfing, which could conceivably result in deflated viewing hours. Second, while the cheaper cost of OVDs may be a partial explanation for switching, subscribers who have been willing to fully cut the cord and view content solely through an OVD may arguably value television watching less than the average American. This notion would permit the inference that these viewers would be unlikely to watch the same amount of television as the average American. The cord-cutter's potential television viewing habits would then arguably equate to data usage far below any cap imposed by the MVPDs, supporting the conclusion the MVPDs have not engaged in anticompetitive conduct. Furthermore, any OVD argument that hinges on the future anticompetitive effects of data caps may be unripe, as it is highly uncertain whether data caps will truly foreclose competition.<sup>168</sup> It is possible that compression technology will further improve, perhaps massively, so that data caps will no longer pose any issues for OVDs. Likewise, it remains to be seen whether broadband ISPs will raise their data caps over time in step with the average American's data usage.

A secondary issue related to data caps is that MVPDs have, in certain instances, discriminated between their own proprietary OVD service and third party OVDs with regards to data usage calculations.<sup>169</sup> A Comcast subscriber who

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166. *Microsoft*, 253 F.3d at 73.

167. *Id.* at 59.

168. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 337 n.7 (1990).

169. Ryan Lawler, *Comcast updates Xbox FAQ, cuts reference to its 'private IP network'*, GIGAOM (Mar. 29, 2012, 5:32pm), <http://gigaom.com/video/comcast->

streams video-on-demand to an Xbox through the Comcast-associated Xfinity application does not have this data usage counted against his or her monthly data allowance.<sup>170</sup> In the initial documentation regarding this service, Comcast explicitly stated that the data was not being counted because it was being transmitted over Comcast's private IP network and not the public Internet.<sup>171</sup> After severe public backlash,<sup>172</sup> the service's FAQ was amended to remove any reference to a private network.<sup>173</sup> Instead, Comcast rationalized its decision to discriminate data by arguing that the Xbox was a proxy for a normal set top box, and thus, the data sent to it should be treated as if it were normal video as opposed to streamed video.<sup>174</sup>

The likely effect of this discrimination is that users may begin to favor Comcast's own service over alternatives like Netflix once they acquire the knowledge that they can stream as much as they like through the use of Comcast-affiliated applications. Fortunately for third party OVDs, the discrimination between proprietary and third party OVDs, unlike the imposition of data caps, may not benefit from having a legitimate business rationale. OVDs would argue that Comcast had the power and ability to create or utilize a private network<sup>175</sup> to freely stream this data, so they did. Comcast's after-the-fact rationalization, in comparing an Xbox to a set top box, may nevertheless pass muster, since there would be no reason for a device that functions as a proxy for a set top box to be subject to data caps. Further, they may present evidence that this private network is

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xbox-faq-update/.

170. *Id.*

171. *Id.*; Brendan Greeley, *Comcast 'Invents' Its Own Private Network*, BUSINESSWEEK (Jun. 21, 2012), <http://www.businessweek.com/articles/2012-06-21/comcast-invents-its-own-private-internet> (indicating that Xbox Xfinity app services were being transmitted over Comcast's private Video-On-Demand network as opposed to the public Internet).

172. Phillip Dempler, *Comcast Changes Language Over Xbox-Usage Cap Spat: Same Story, Different Words*, STOP THE CAP! (Apr. 2, 2012), <http://stopthecap.com/2012/04/02/comcast-changes-language-over-xbox-usage-cap-spat-same-story-different-words/> (noting backlash against the data discrimination by public interest groups and Net Neutrality activists).

173. Lawler, *supra* note 169.

174. *Id.*

175. Greeley, *supra* note 171.

limited only to the Xbox and Tivo,<sup>176</sup> which are only two of a handful of devices upon which Comcast's service competes. Currently, the devices permit subscribers to access the same content they would receive through a normal set top box. It remains to be seen, however, if Comcast will expand the service to encompass additional content. If Comcast expands, they may have to defend themselves against allegations that they lack a legitimate business reason for the discrimination, because the discrimination may be sufficiently anticompetitive so as to be proscribed under the Sherman Act.

*D. Likelihood of a Successful Prima Facie Case*

The ability to proscribe MVPD conduct under the Sherman Act depends almost entirely on the relevant market definition. The analysis is challenged by the fact that the market at issue is in a state of flux, and it is difficult to fully grasp its boundaries when the landscape is still shifting. MVPDs and OVDs may exist in the same market as substitute goods or OVDs may exist in a submarket to the product bundles offered by MVPDs. Despite the arguable market definition and any MVPD statements to the contrary, the fact that MVPDs have instituted their own streaming services is strong evidence that they are in direct competition with independent OVDs.

Further, the MVPDs who have imposed data caps are undoubtedly the market leaders, and courts would likely find that each MVPD has regional market power sufficient to place any anticompetitive conduct under heavy scrutiny. Unfortunately for OVDs, there are clear and legitimate business reasons for the imposition of data caps, regardless of the massive harm they may cause to the OVD industry in the future. There is, however, some shred of hope. The ability for MVPDs to discriminate streaming video traffic, at least via a private IP network, likely lacks a legitimate business reason and may therefore be proscribed. Nevertheless, verified

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176. Stacey Higginbotham, *He Said, She Said: Is Comcast Prioritizing Traffic or Not?*, GIGAOM (May 15, 2012, 1:17 PM), <http://gigaom.com/2012/05/15/he-said-she-said-is-comcast-prioritizing-traffic-or-not/>; Stacey Higginbotham, *The Technical and Legal Realities of Comcast's Xbox Cap Spat*, GIGAOM (Mar. 27, 2012, 12:53 PM), <http://gigaom.com/2012/03/27/the-technical-and-legal-realities-of-comcasts-xbox-cap-spat/>.

instances of this form of prioritization have been limited solely to Comcast's Xfinity Xbox and Tivo application, and proscribing the actions of one MVPD may be insufficient to ease the large burden caused by data caps in general. Despite the potential for this small (though not insignificant) victory, it remains extraordinarily difficult to argue that OVDs would be able to successfully challenge MVPD actions through a standard Sherman Act analysis.

### III. PROPOSAL

Since OVDs would be unable to prove a prima facie case of MVPD monopolization, there are a number of alternative theories by which OVDs or the Government could seek to proscribe the MVPDs' conduct. These theories include the imposition of a duty to deal,<sup>177</sup> an argument for attempted monopolization,<sup>178</sup> or a demonstration that MVPDs have engaged in illegal tying.<sup>179</sup>

#### A. *Duty to Deal*

The arguments in favor of imposing a duty to deal face a fundamental issue: that MVPDs have not yet refused to deal with OVDs. The MVPDs have unilaterally imposed a set of limitations for business purposes that they contend are legitimate (such as preventing congestion and maximizing subscriber use), which in turn impacts the competitiveness of OVDs. However, there may be a future cause of action for refusal to deal, depending on the development of net neutrality laws<sup>180</sup> and the potential continuation or further creation of private IP networks.<sup>181</sup> If Comcast allowed others to create private IP networks over its infrastructure, yet denied OVDs that same opportunity, a court may infer that

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177. See *infra* Part V.A.

178. See *infra* Part V.B.

179. See *infra* Part V.C.

180. Whitson Gordon, *An Introduction to Net Neutrality: What It Is, What It Means for You, and What You Can Do About It*, LIFEHACKER (Dec. 29, 2012, 9:00 AM), <http://lifehacker.com/5720407/an-introduction-to-net-neutrality-what-it-is-what-it-means-for-you-and-what-you-can-do-about-it>.

181. Matt Peckham, *Netflix CEO Takes Swing at Comcast Xfinity Over Net Neutrality*, TIME (Apr. 16, 2012), <http://techland.time.com/2012/04/16/netflix-ceo-takes-swing-at-comcast-xfinity-over-net-neutrality/>; Matt Wood, *Comcast has Some Xplaining to do*, CNET (Apr. 5, 2012, 11:57 AM), [http://news.cnet.com/8301-1023\\_3-57410030-93/comcast-has-some-xplaining-to-do/](http://news.cnet.com/8301-1023_3-57410030-93/comcast-has-some-xplaining-to-do/).

the MVPD's refusal to deal was being used as a "purposeful means" of monopolization.

Should the OVDs successfully demonstrate that specific MVPDs engaged in a monopolistic refusal to deal, a duty to deal might be imposed either through the *Aspen* theory<sup>182</sup> or the "essential facilities" doctrine.<sup>183</sup> However, due to the history and nature of the Internet, it is more likely that a duty to deal would be imposed under the *Aspen* theory. Under *Aspen*, the actions of a firm with monopoly power may be proscribed where that behavior's aim is to further reduce competition, and where that behavior is contrary to that which was the norm when the market was in a competitive state. Here, data caps may qualify as conduct that fundamentally changed the Internet services market; a change that only occurred after the acting MVPDs had gained monopoly power. OVDs are therefore required to first prove MVPDs' monopoly power before they can analyze the behavior shift in the post-monopolized market. To do so, OVDs would be forced to argue either a bundled MVPD/ISP/VOIP market or a pure broadband ISP market.<sup>184</sup> As current data indicates that a significant amount of DSL subscribers are abandoning DSL in favor of cable ISPs,<sup>185</sup> it is likely that

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182. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 603–04 (1985).

183. In a certain subset of cases, a monopolist's refusal to deal may be unlawful due to the monopolist's control of an "essential facility." *MCI Comm'n Corp. v. Am. Tel. and Tel. Co.*, 708 F.2d 1081, 1132 (7th Cir. 1983). Under this doctrine, unfettered control of the essential facility would permit the monopolist to extend their monopoly power "from one stage of production to another, and from one market to another." *Id.* at 1132. Unfortunately for OVDs, a couple of issues exist in determining whether the abstract concept of bandwidth usage or broadband access would qualify as an essential facility, considering the fact that the broadband infrastructure itself has failed to receive such a classification in the past. *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Serv.*, 545 U.S. 967, 1000–03 (2005). First, courts have typically restricted the designation of "essential facilities" to *physical* facilities like private railroad bridges or power/cable infrastructures. Second, it seems logically inexplicable that courts could or should impose a duty to deal under the essential facility doctrine when the essential facility in question is simply an unrestricted version of a facility to which the OVDs already have access. While there remains the argument that unfettered control of broadband could allow MVPDs the ability to engage in monopolization, thereby fulfilling the rationale of the "essential facilities" doctrine, any anticompetitive actions stemming from an MVPD's ability to restrict broadband use would, nevertheless, likely be resolved without the need to utilize the doctrine.

184. *See supra* Part IV.

185. Bill Ray, *America Abandoning DSL in Favour of Faster Cable*, THE

the cable MVPDs, specifically, may find themselves to have sufficient market power to fall under Sherman Act scrutiny. Thus, if Comcast, was found to have monopoly power, it is possible that their imposition of a 250 GB data cap, decades after the Internet was first publicly and freely accessible,<sup>186</sup> will be scrutinized as having created a massive change in a market that was once competitive. Should the OVDs prevail under this scenario, MVPDs may be forced to remove their data caps and restore the market to its previously competitive, unrestricted state.

### *B. Attempted Monopolization*

A specific intent to monopolize may be demonstrated by behavior that, while facially neutral, has no legitimate business reason except to exclude competitors or unnaturally grow market share.<sup>187</sup> While anticompetitive actions are generally frowned upon, the Sherman Act will only impose liability when the anticompetitive actions have a “dangerous probability of actual monopolization.”<sup>188</sup> It is not necessary to demonstrate that the acts resulted in successful monopolization,<sup>189</sup> but rather, that if the acts were carried out, they would likely result in a monopoly.<sup>190</sup> Not every anticompetitive act can qualify as attempted monopolization. “It is a question of proximity and degree.”<sup>191</sup>

Cable MVPDs retain a large market share amongst all MVPDs. Further, their market share in the two-thirds of the country with access to only three MVPDs is likely even higher. Assuming that a large market share is not sufficient to conclude that certain cable MVPDs in specific regions have monopoly power, OVDs may attempt to prove that the MVPDs’ anticompetitive actions make them guilty of attempted monopolization.

Supposing that the imposition of both data caps and data usage discrimination is found to be anticompetitive, OVDs

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REGISTER (Jan. 27, 2012), [http://www.theregister.co.uk/2012/01/27/cable\\_adsl/](http://www.theregister.co.uk/2012/01/27/cable_adsl/).

186. Karl Bode, *Comcast 250GB Cap Goes Live October 1*, BROADBAND DSL REPORTS (Aug. 28, 2008), <http://www.broadbandreports.com/shownews/Comcast-250GB-Monthly-Cap-Goes-Live-October-1-97294>.

187. *ALCOA*, 148 F.2d at 431.

188. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 455 (1993).

189. *Lorain Journal Co. v. United States*, 342 U.S. 143, 153 (1951).

190. *ALCOA*, 148 F.2d at 431.

191. *Swift & Co. v. United States*, 196 U.S. 375, 402 (1905).

would still be required to prove that the cable MVPDs had the specific intent to monopolize. The cable MVPDs likely have a sufficiently legitimate business reason for the implementation of data caps, but the same does not necessarily hold true for their data usage discrimination, particularly if the current manner of data discrimination is expanded either in terms of the scope of devices to which data is freely transmitted or in terms of the type of content being delivered. Given the possible lack of a legitimate business reason, a court may infer that the reason for the data discrimination was to exclude competitors, and thus, such behavior could sufficiently demonstrate the specific intent to monopolize. Nevertheless, a MVPD such as Comcast may argue against allegations of attempted monopolization by demonstrating that their data discrimination currently occurs on only two devices out of the hundreds that can receive Xfinity content, and the two devices function primarily as proxies for set top boxes. There is also insufficient data to determine whether the data discrimination stemming from either of these two devices had any discernable, negative effect on third party OVDs. Without that data, it is unlikely that a court could find meritorious a claim for attempted monopolization.

Non-monopolistic cable MVPDs in regions with high HHIs may be found to hold enough market power so that any anticompetitive conduct would bring them within dangerous probability of achieving monopoly power. If so, their anticompetitive actions would make them liable for attempted monopolization regardless of the effect. There is, however, a lack of information about the actual market shares of various MVPDs beyond general, regional HHIs. Without this specific information, it would be difficult, if not impossible, to show which MVPD would be able to fulfill the dangerous proximity requirement of the offense, thereby allowing them to escape liability regardless of their engagement in anticompetitive acts.

### *C. Monopolization Through Tying*

Assuming that the services provided by MVPDs and OVDs exist in two different markets, it is possible that MVPDs would be found liable for tying their “TV Everywhere” OVD service to their MVPD service. Comcast, for example, grants users authorization to use its TV

Everywhere service on a multitude of devices simply because those users are Comcast MVPD subscribers. The subscribers did not independently and voluntarily choose to subscribe to this additional OVD service. Furthermore, the TV Everywhere access is exclusive to MVPD subscribers. A non-subscriber would be unable to purchase the Comcast OVD service independently of the MVPD subscription.

Finding liability through tying makes the most sense when the argument is framed such that the OVD service is being tied to the MVPD service. Other analysts have come to the opposite conclusion, finding that the MVPD service is the tied product and the OVD service is the tying product.<sup>192</sup> However, there are a number of reasons why such a perspective is likely incorrect. First, the TV Everywhere OVD service cannot be independently purchased from the standard MVPD service. While this rationale can be used just as well to support the alternate viewpoint, it is important to consider that MVPD services were marketed and sold far prior to the introduction of OVDs. Thus, the fact that MVPDs were the original product may lend some weight to the theory that they are the tying product. Second, the companies at issue hold large market power (and potentially monopoly power) in the MVPD market. There is little data regarding the current competitiveness or allocations of market power in the pure OVD market, so it is unclear if the MVPDs have gained any market power with TV Everywhere. This weakens support for the alternative perspective. It therefore seems likely that a court would be inclined to look at the issue from the perspective that cable MVPDs are utilizing their competitive advantage in the MVPD market to leverage power in the OVD market, rather than vice versa.

Unfortunately, due to the relative novelty of OVDs in general, and the TV Everywhere initiative in particular, there is limited data regarding the competitiveness of the market and the impact that these potential tying arrangements have on competition. Nonetheless, if courts find that MVPDs and OVDs are separate markets, the major MVPDs' tying arrangements would be found to be per se invalid. If the tying arrangement were analyzed under a rule of reason test,

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192. Thomas R. Sheran, *Is There Competition Anywhere in TV Everywhere?*, 28 ENT. & SPORTS LAW. 1, 30 (2010).

the MVPDs would be forced to demonstrate both a legitimate business reason for the tying arrangement, and also that the tying arrangements did not have an anticompetitive effect. If they fail to do so, it is likely that the courts would find that these arrangements fail the rule of reason test, and the MVPDs would be found to violate section 2 of the Sherman Act.

#### CONCLUSION

The OVDs and the Government may be unable to proscribe MVPD conduct under a standard *prima facie* case of monopolization under the Sherman Act,<sup>193</sup> allowing MVPDs to continue to act in ways which harm consumers. To prevent this harm from growing and to maintain OVDs' continued viability, a solution may be to proscribe MVPDs' conduct by arguing that the MVPDs are tying their streaming service to their MVPD service. Should the OVDs be successful, MVPDs would either terminate their streaming services, or, more likely, permit users to subscribe to them independently from their MVPD subscriptions. This would be a great victory for consumers and OVDs alike, as a variety of choices in streaming providers would greatly enhance competition. The fact that MVPDs even bothered to set up online distribution indicates their awareness of shifting demographics, and the continuing shift towards online viewing. By having their own independently purchasable OVDs in the market, the MVPDs have a greater stake in the continued growth of the market. In turn, they may be incentivized to raise, or even eliminate, their broadband ISP data caps so as not to hinder their own future viability, leaving OVDs with their continuously coveted unrestricted broadband access.

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193. *See supra* Part IV.D.