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Topic 2

Competition and consumer protection issues in communication, information, and media technology networks

Comment

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In response to topic #2, this comment is divided into three parts:

- The FTC's continuing leadership in consumer protection for Internet access
- Competition and consumer protection in a changing communications industry
- Competition and consumer protection in a changing media industry

The FTC's continuing leadership in consumer protection for Internet access

In its clairvoyant report on Broadband Connectivity Competition Policy, the Federal Trade Commission in 2007 predicted precisely how the agency could and would use its authority over the Open Internet to best protect consumers in the coming decade:

The FTC has been involved in the Internet access area for over a decade and will continue to be involved in the evolving area of broadband access. The FTC Act is

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sufficiently flexible to allow the FTC to enforce the antitrust and consumer protection laws in most industries, including those involving new and ever-changing technologies. The fundamental principles of antitrust and consumer protection law and economics that we have applied for years are as relevant to the broadband industry as they are to other industries in our economy.²

The 2007 report reviewed in detail concerns by advocates for new Internet access regulation, often characterized as “net neutrality rules.” While neither rejecting nor endorsing the idea of Open Internet legislation or regulation by either the FTC or the FCC, the report cautioned against a wide range of potential unintended consequences from regulating in areas where both technology and the competitive landscape were changing rapidly and, indeed, chaotically.

The Commission’s wisdom is as valuable today as it was in 2007. Despite a lack of enforceable net neutrality rules during almost the entirety of the last decade, the kinds of theoretical harms advocates warned of in 2007 never materialized,³ though both the urgency in warnings of their imminent arrival and the extent of proposed prophylactic remedies increased in intensity all along.

By 2014, those who advocated for basic net neutrality regulation in the 2007 report were now insisting that nothing short of reclassifying broadband Internet as a common carrier subject to the FCC’s Bell Telephone-era public utility rules could save the Internet from imminent destruction. At the urging of the White House, former FCC Chairman Tom Wheeler obliged, ushering in the short but damaging reign of the FCC as sole regulator of the Open Internet, with the full suite of 1930’s public utility regulations at its increasingly ready disposal.⁴

² Federal Trade Commission Staff, BROADBAND CONNECTIVITY COMPETITION POLICY (2007), at p.11, *available at* <https://www.ftc.gov/sites/default/files/documents/reports/broadbandconnectivity-competition-policy/v070000report.pdf> (hereinafter “The 2007 Report”).

³ Larry Downes, UNSCRAMBLING THE FCC’S NET NEUTRALITY ORDER: PRESERVING THE OPEN INTERNET, BUT WHICH ONE? 20 Comm Law Conspectus 83 (2011), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2164985; see also *idem.*, “The True Fate of Net Neutrality in a Trump FCC,” FORBES, Nov. 15, 2016, *available at* <https://www.forbes.com/sites/larrydownes/2016/11/15/the-true-fate-of-net-neutrality-in-a-trump-fcc/#52534cd4f705>; “Get Ready for Net Neutrality’s Ugly Return,” FORBES, April 20, 2017, *available at* <https://www.forbes.com/sites/larrydownes/2017/04/20/get-ready-for-net-neutralitys-ugly-return/#76853b7b650a>; “Dear Aunt Sadie: Please Step Back from the Net Neutrality Ledge,” FORBES, Nov. 27, 2017, *available at* <https://www.forbes.com/sites/larrydownes/2017/11/27/dear-aunt-sadie-please-step-back-from-the-ledge-on-net-neutrality/#52e595bb7d6c>; “With More Net Neutrality Stunts, Broadband Becomes a Political Football,” FORBES, May 24, 2018, *available at* <https://www.forbes.com/sites/larrydownes/2018/05/24/with-the-latest-net-neutrality-stunts-broadband-has-become-a-political-football/#3ff558dd59ae>

⁴ Written testimony of Larry Downes, Project Director, Georgetown Center for Business and Public Policy, HEARING ON THE UNCERTAIN FUTURE OF THE INTERNET, Subcommittee on Communications and Technology, U.S. House of Representatives, Feb. 25, 2015, *available at* <http://cbpp.georgetown.edu/sites/cbpp.georgetown.edu/files/Downes-Hearing-Uncertain-Future-Internet.pdf>;

Of course the Open Internet abides, orders of magnitude more impactful on any possible metric than it was in 2007. As I have repeatedly argued, that reality can largely be attributed to the unsung policing of the FTC, which continued to assert its consumer protection authority over all participants in the broadband ecosystem—that is, except during the period when, as a direct result of the 2015 decision to reclassify broadband Internet access providers as common carriers, the agency was legally barred from doing so.⁵ By 2016, as Commissioner Ohlhausen noted, the agency had already brought 150 enforcement actions involving just privacy and data security enforcement alone.⁶

The more things change, the more they stay the same. Since the publication of the 2007 Report, as predicted, there is more competition in broadband throughout most of the country, including growing inter-modal competition between wired and wireless access, fiber and next-generation copper/fiber and cable/fiber hybrids, and, soon, satellite-based access.⁷

And despite the fact that more vertical integration of content and access has occurred in recent years—in response, I believe, to new competition from unregulated over-the-top providers⁸—

see also, Larry Downes, “Why the Public Utility Model is the Wrong Approach for Internet Regulation, HARVARD BUSINESS REVIEW, Nov, 2014, available at <https://hbr.org/2014/11/why-the-public-utility-model-is-the-wrong-approach-for-internet-regulation>; *idem.*, “The Tangled Web of Net Neutrality and Regulation,” HARVARD BUSINESS REVIEW, March, 2017, available at <https://hbr.org/2017/03/the-tangled-web-of-net-neutrality-and-regulation>; “On Internet Regulation, the FCC Goes Back to the Future,” FORBES, March 12, 2018, available at <https://www.forbes.com/sites/larrydownes/2018/03/12/the-fcc-goes-back-to-the-future/#3342a31d5b2e>.

⁵ Larry Downes, *Comment*, “In the Matter of Restoring Internet Freedom,” FCC Docket WC 17-108, July, 2017, available at <https://cbpp.georgetown.edu/sites/cbpp.georgetown.edu/files/Larry%20Downes%20-%20Filing%20in%2017-108%20July%202017.pdf>; *idem.*, “Eight Reasons to Support Congress’s Net Neutrality Bill,” THE WASHINGTON POST, Jan. 20, 2015, available at https://www.washingtonpost.com/news/innovations/wp/2015/01/20/eight-reasons-to-support-congresss-net-neutrality-bill/?utm_term=.ce80529822fc; “Why Treating the Internet as a Public Utility is Bad for Consumers,” THE WASHINGTON POST, July 7, 2016, available at https://www.washingtonpost.com/news/innovations/wp/2016/07/07/why-treating-the-internet-as-a-public-utility-is-bad-for-consumers/?utm_term=.5a36ccad214a .

⁶ Commissioner Maureen Ohlhausen, “Privacy Regulation in the Internet Ecosystem,” Remarks of Maureen K. Ohlhausen, Commissioner, U.S. Federal Trade Commission, Free State Foundation, EIGHTH ANNUAL TELECOM POLICY CONFERENCE at page 3, March 23, 2016 available at https://www.ftc.gov/system/files/documents/public_statements/941643/160323fsf1.pdf; *see also* Larry Downes, “The Downside of the FCC’s New Privacy Rules,” HARVARD BUSINESS REVIEW, May, 2016, available at <https://hbr.org/2016/05/the-downside-of-the-fccs-new-internet-privacy-rules> .

⁷ *See* FCC, 2018 BROADBAND DEPLOYMENT REPORT, GN Docket 17-199, Feb. 2, 2018, available at <https://www.fcc.gov/reports-research/reports/broadband-progress-reports/2018-broadband-deployment-report> ; Larry Downes, “How to Understand the U.S.-EU Digital Divide,” Harvard Business Review, Oct., 2015, available at <https://hbr.org/2015/10/how-to-understand-the-eu-u-s-digital-divide> ; Blair Levin and Larry Downes, “What Hath Google Fiber Wrought?” HARVARD BUSINESS REVIEW (forthcoming).

⁸ Larry Downes, “Why Mergers Like the AT&T Time Warner Deal Should Go Through,” HARVARD BUSINESS REVIEW, Nov, 2017, available at <https://hbr.org/2017/11/why-mergers-like-the-att-time-warner-deal-should-go-through>;

there have been no non-frivolous claims of any of the kinds of discriminatory practices noted as potential concerns in the 2007 report, including content blocking, anti-competitive prioritization or throttling.

The pathology of one notable and frivolous claim is worth reviewing. Just as the FCC was reconsidering its decision not to reclassify in response to its loss in the Verizon case, a TV comedian “discovered” that Comcast was intentionally throttling Netflix traffic bound for its broadband customers. The claim generated significant outcry and led to a flood of astroturfed comments filed in the proceeding. But the host’s allegation was unsupported by any engineering evidence. The charge was immediately, thoroughly, and repeatedly debunked.⁹

In fact, as was belatedly acknowledged by the parties, a noticeable degradation in streaming quality was the fault of Netflix’s own transit provider, Cogent, which had intentionally slowed the traffic of all of its wholesale customers when it found it had underestimated its own capacity requirements. Cogent failed to disclose that decision to anyone, until an analyst presented irrefutable evidence of what was really happening.

When Netflix, as part of its on-going strategy of moving away from third-party transit to its own, proprietary “Open Connect” CDN, the problem disappeared immediately. No complaint was ever filed with the FCC, because no ISP had done anything, let alone violate any version of the Open Internet principles, let alone any legally-enforceable rules.

Nonetheless, pro-utility advocates continue to “cite” the Netflix incident as their prime facie example of the danger of vertical integration and the need for the most onerous micromanagement by the FCC of broadband ISPs.¹⁰

idem., “The AT&T Ruling Shows that U.S. Regulators Don’t Understand Media’s Present—or Future,” HARVARD BUSINESS REVIEW, June, 2018, available at <https://hbr.org/2018/06/the-att-ruling-shows-that-u-s-regulators-dont-understand-medias-present-or-future>.

⁹ See Larry Downes, “How Netflix Poisoned the Net Neutrality Debate,” FORBES, Nov. 25, 2014, available at <https://www.forbes.com/sites/larrydownes/2014/11/25/how-netflix-poisoned-the-net-neutrality-debate/#75e4b34a1c4d>; *idem.*, “Netflix Still Can’t Make Up Its Mind About Net Neutrality,” FORBES, April 17, 2015, available at <https://www.forbes.com/sites/larrydownes/2015/04/17/netflix-still-cant-make-up-its-mind-about-net-neutrality/#2304cd536f70>; “Say it Ain’t So, Netflix (Oh, But it is): More Net Neutrality Hypocrisy,” FORBES, March 28, 2016; available at <https://www.forbes.com/sites/larrydownes/2016/03/28/say-it-aint-so-netflix-but-it-is-still-more-net-neutrality-hypocrisy/#574bff1427ad>

¹⁰ See, e.g., Leon Valsechi, “The Effect of Net Neutrality Change is Unknown,” CENTRE TIMES, Dec. 28, 2017, available at <https://www.centredaily.com/news/local/article191963964.html> (““But the smoking gun, as far as I’m concerned, is the Netflix case.”); Tony Bradley, “Netflix is in the Power Position Now in the War for Net Neutrality,” FORBES, Dec. 12, 2017, available at <https://www.forbes.com/sites/tonybradley/2017/12/12/netflix-is-in-the-power-position-now-in-the-war-for-net-neutrality/#205369ac54d7> (“So, here we are. Back at square one, where Comcast can extort fees from services like Netflix in exchange for allowing their traffic to traverse the network unthrottled.”).

The 2007 Report was both prescient and wise, and should continue to guide the Commission in its reinstated role as co-regulator, with the FCC, of the Open Internet. As the Report promised:

Another significant feature of the FTC Act is its grounding in ex post, fact-and market-specific analysis of conduct and business arrangements, rather than ex ante, industry-wide regulation. In other words, in enforcing the antitrust and consumer protection laws, the FTC generally conducts detailed, after-the-fact analyses of conduct and business arrangements to determine if they harm consumer welfare, rather than issuing broad regulatory directives.¹¹

That was the right approach then, and it is the right approach now. The Commission's forbearance from micromanagement, its targeted interventions in the form of enforcement actions, and its continued presence as a powerful, potential intervenor of both antitrust and consumer protection has provided balanced incentives to all ecosystem participants.

The result has been, as the 2007 Report predicted, increased and increasing competition in Internet access services, the emergence of new access technologies, profound private investment in network deployment, and an Internet ecosystem that is healthy, robust, and improving on nearly every conceivable metric.

At the same time, the Commission's sensible regulatory strategy also succeeded brilliantly in the goal of helping prevent the catalogue of abuses prophesied by supposed Open Internet advocates. As we now know through their own belated acknowledgments, the advocates' agenda all along was never to ensure enforceable net neutrality rules. Rather, it was to strip the FTC of its authority and transfer it to the FCC and state utility commissions in the form of 20th century common carriage regulation, including rate setting.¹²

¹¹ 2007 Report, *supra* note 1 at page 161.

¹² Lori McGlinchey, "A Victory for Net Neutrality: Why the Internet is an Essential Public Utility," THE FORD FOUNDATION, June 15, 2016, *available at* <https://www.fordfoundation.org/ideas/equals-change-blog/posts/a-victory-for-net-neutrality-why-the-internet-is-an-essential-public-utility> ("For more than a decade, the organizations we support have been working tirelessly on what has until recently been a fairly obscure topic, even as the Internet has assumed an increasingly central role in our lives."); John Eggerton, "Schumer: Consumers May Need Internet Affordability Protections," MULTICHANNEL NEWS, May 8, 2018; *available at* <https://www.multichannel.com/news/schumer-consumers-may-need-internet-price-protections> ("FCC chair Tom Wheeler made forbearing from rate regulation one of the elements of the 2015 Open Internet Order, but Schumer talked, in the context of not allowing paid prioritization at least, about internet access as an essential good whose price the government may need to insure is kept within reach of 'average folks,' though he did not say what specific mechanisms should be used to insure affordability.") *See also* Larry Downes, "The True Fate of Net Neutrality in a Trump FCC," FORBES, Nov. 15, 2016, *available at* <https://www.forbes.com/sites/larrydownes/2016/11/15/the-true-fate-of-net-neutrality-in-a-trump-fcc/#669c39e24f70> .

To the extent that specific protections and sui generis enforcement powers are still warranted for lingering Open Internet concerns,¹³ the solution remains, as many commenters on the 2007 Report suggested, highly focused legislation. That legislation would, in essence, codify Chairman Powell's four "Internet Freedoms" and assign enforcement of them to either the FTC, the FCC, or some combination of the two.

Though both Democrats and Republicans have circulated admirable drafts of such legislation since 2010, efforts to negotiate a bi-partisan solution have been effectively blocked at every turn by pro-utility advocates—underscoring the fact that those who call the loudest for enforceable "net neutrality" protections for consumers wanted something very different all along.¹⁴

Competition and consumer protection in a changing communications industry

As noted above, the last decade has seen profound changes in the communications industry, the result of a combination of factors including federal and state deregulation, partial reregulation, and the emergence of new and disruptive technologies that have profoundly transformed the industry's structure, replacing siloed businesses offering access, content, and infrastructure into a single, dynamic ecosystem.

Many of these innovations follow the pattern identified by my co-author Paul Nunes and I in our recent book, "Big Bang Disruption: Strategy in an Age of Devastating Innovation."¹⁵ Big bang disruptors, often introduced by a venture-financed new entrant following a period of failed in-

¹³ See Sarah Gray, "Netflix CEO Reed Hastings: Net Neutrality is a Consumer Expectation," *FORTUNE*, July 17, 2018, available at <http://fortune.com/2018/07/17/netflix-ceo-reed-hastings-net-neutrality-is-a-consumer-expectation/>.

¹⁴ See Larry Downes, "Leaked Net Neutrality Bill Threads the Needle on Mobile," *CNET*, Sept. 28, 2010, available at <https://www.cnet.com/news/leaked-net-neutrality-bill-threads-needle-on-mobile/>; *idem.* "Eight Reasons to Support Congress's Net Neutrality Bill," *THE WASHINGTON POST*, Jan. 20, 2015, available at https://www.washingtonpost.com/news/innovations/wp/2015/01/20/eight-reasons-to-support-congresss-net-neutrality-bill/?utm_term=.d77b00769488; "Pushing the Net Neutrality Rock Back up the Hill," *FORBES*, May 17, 2017, available at <https://www.forbes.com/sites/larrydownes/2017/05/17/pushing-the-net-neutrality-rock-back-up-the-hill/#5d65814a3fe8>; "Dear Aunt Sadie: Please Step Back from the Net Neutrality Ledge," *FORBES*, Nov. 27, 2017, available at <https://www.forbes.com/sites/larrydownes/2017/11/27/dear-aunt-sadie-please-step-back-from-the-ledge-on-net-neutrality/#796d37457d6c>; "A Legislative Solution for Net Neutrality May be Close," *FORBES*, Oct. 23, 2017; available at <https://www.forbes.com/sites/larrydownes/2017/10/23/a-legislative-solution-for-net-neutrality-may-be-close/#18adee163dd8>; "A Legislative Solution for Net Neutrality is at Hand," *FORBES*, Dec. 19, 2017, available at <https://www.forbes.com/sites/larrydownes/2017/12/19/a-legislative-solution-for-net-neutrality-is-at-hand/#21edacbb3ac3>; "With More Net Neutrality Stunts, Broadband Becomes a Political Football," *FORBES*, May 24, 2018, available at <https://www.forbes.com/sites/larrydownes/2018/05/24/with-the-latest-net-neutrality-stunts-broadband-has-become-a-political-football/#61dd266059ae>.

¹⁵ Larry Downes and Paul Nunes, *BIG BANG DISRUPTION: STRATEGY IN AN AGE OF DEVASTATING INNOVATION* (Portfolio 2014); see also *idem.*, "Big-Bang Disruption," *HARVARD BUSINESS REVIEW*, March, 2013 at pp. 44-56, available at <https://hbr.org/2013/03/big-bang-disruption>.

market experiments, enter the market better and cheaper than incumbent products and services, upending traditional approaches to strategic response.

Free navigation software delivered automatically on a growing user base of smartphones, for example, decimated the market for standalone GPS devices (themselves a disruptor of paper-based maps) in a matter of months. The app was better (because automatically and regularly updated and integrated with other apps, including search) and cheaper (the software was free, while the consumer was already paying for the device and network access), catching the standalone GPS manufacturers completely off-guard.

The policy implications of such innovation in historically regulated markets, including the communications industry, are profound. As the pace of change accelerates, the ability of deliberative government to keep pace is further challenged, as is the likelihood that incumbents being disrupted by better and cheaper alternatives will turn to regulators to slow or stop the new entrants as they try to catch up. As I wrote in in 2014:

Innovation policy has reached a critical juncture. The acceleration of disruptive innovations and the dramatic new ways in which breakthrough products and services enter and exit markets are driving deep divisions between, on the one hand, the industrial law of the last century and the regulatory machinery created to enforce it and, on the other hand, the digital economy that now drives economic growth and competitive advantage.¹⁶

A pro-innovation policy, as I described it, is one that begins by assuming fast-changing markets will protect consumers more effectively, efficiently and with fewer unintended side-effects than even well-intended interventions. It supports to the extent possible what Adam Thierer calls “permissionless innovation.”¹⁷

When intervention is unavoidable, regulators should design them with a fact-rich understanding of the dynamics of the emerging ecosystem, target specific practices that have proven harmful to consumers and which are unlikely to resolve themselves with a next generation of technology, and provide reasonable sunset provisions to minimize ossification.

In such markets, as I noted,

Usually the threat of enforcement will suffice to discipline the market long enough for technology to do the rest. Even in the absence of FCC “net neutrality” rules, for example, anti-competitive and discriminatory practices are already subject to general antitrust principles, enforceable by the Federal Trade Commission (FTC)

¹⁶ Larry Downes, “Managing the Big Bang: The Regulator’s Dilemma,” *DEMOCRACY, A JOURNAL OF IDEAS*, Issue 34, Fall, 2014, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2630358.

¹⁷ Adam Thierer, *PERMISSIONLESS INNOVATION* (Mercatus 2016).

and Department of Justice. That, according to the FCC's own findings, has been sufficient to keep Internet service providers in line up until now.¹⁸

The communications industry very much needs a digital-era regulatory approach. Fortunately for U.S. consumers and U.S. competitiveness, since 1996, it has had precisely that—a bi-partisan policy, no less. Embedded in the 1996 Telecommunications Act, Congress's clear intent, as well as that of the Clinton Administration and independent regulators at the time and since, was to allow Internet access services to evolve at their own pace, "unfettered by Federal or State regulation."¹⁹

That policy translated, at both the FCC and the FTC, to a regime of light-touch regulation and a reliance on private investment to build America's Internet infrastructure from the remains of the increasingly obsolete, highly-regulated analog telephone network.²⁰

The result of that forward-thinking policy choice has been private investment now approaching \$2 trillion, and the development of new Internet businesses which generate trillions more in consumer surplus, providing the U.S. its single-most important form of global competitiveness.²¹

The FTC has, as noted above, been a steadfast partner in the execution of that policy throughout its existence, embracing what Commissioner Ohlhausen refers to as "regulatory humility" in the

¹⁸ Larry Downes, "Managing the Big Bang: The Regulator's Dilemma," *supra* note 16.

¹⁹ "It is the policy of the United States—... to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 USC ¶ 230(b)(2) (1996). *See also* NATIONAL CABLE & TELECOMMUNICATIONS ASSN. v. BRAND X INTERNET SERVICES, 545 U.S. 967 (2005).

²⁰ Committee on Commerce, Science and Transportation, U.S. Senate, INVESTING IN AMERICA'S BROADBAND INFRASTRUCTURE: EXPLORING WAYS TO REDUCE BARRIERS TO DEPLOYMENT, written testimony of Larry Downes, Project Director, Georgetown Center for Business and Public Policy, May 3, 2017, *available at* <http://cbpp.georgetown.edu/sites/cbpp.georgetown.edu/files/Downes%20%5B2017-0503%5D%20Senate%20Testimony%20-%20Broadband%20Infrastructure%20Investment.pdf>; *see also* Larry Downes, "The End of the Line for the Analog Phone Network," HARVARD BUSINESS REVIEW, March 28, 2014, *available at* <https://hbr.org/2014/03/the-end-of-the-line-for-the-analog-phone-network>; S. HRG. 113-265, Subcommittee on Communications, Technology, and the Internet, STATE OF WIRELINES COMMUNICATIONS, United States Senate, Statement of Larry Downes, July 25, 2013, pp. 26-38, *available at* <https://www.hsdl.org/?view&did=757180>

²¹ Larry Downes, "U.S. Digital Infrastructure Needs More Private Investment," HARVARD BUSINESS REVIEW, Oct. 14, 2016, *available at* <https://hbr.org/2016/10/u-s-digital-infrastructure-needs-more-private-investment>; *idem.*, "How to Understand the US-E.U. Digital Divide," HARVARD BUSINESS REVIEW, Oct. 19, 2015, *available at* <https://hbr.org/2015/10/how-to-understand-the-eu-u-s-digital-divide>; "The EU's \$5B Google Fine Escalates an Undeclared Trade War with Silicon Valley," THE WASHINGTON POST, July 25, 2018, *available at* https://www.washingtonpost.com/technology/2018/07/25/eus-b-google-fine-escalates-an-undeclared-trade-war-with-silicon-valley/?utm_term=.2b5cfd47dae1.

face of rapidly-changing business conditions.²² The agency's performance stands in stark contrast to the FCC, which had in recent years wandered far from Congress's clearly-stated policy, both in process and substance.²³

As disruption continues in the communications industry, driven by new better and cheaper innovations including DOCSIS 3.1, 5G networks, low-orbit satellites and advanced fixed wireless networks, the FTC must stay the course on regulatory humility.²⁴ The Commission should continue to encourage maximum private investment based on policies that have worked exceptionally well.²⁵ These include light-touch oversight through targeted consumer protection actions punishing truly bad actors and a willingness to support necessary mergers and acquisitions, both horizontal and vertical, with timely, market-based review.²⁶

²² See Larry Downes, "How Should Donald Trump's Administration Regulate the Internet?" THE WASHINGTON POST, Nov. 30, 2016, available at https://www.washingtonpost.com/news/innovations/wp/2016/11/30/how-should-donald-trumps-administration-regulate-the-internet/?utm_term=.098eb53a760d.

²³ Larry Downes, "On Internet Regulation, the FCC Goes Back to the Future," FORBES, March 12, 2018, available at <https://www.forbes.com/sites/larrydownes/2018/03/12/the-fcc-goes-back-to-the-future/#3342a31d5b2e>; *idem.*, "Get Ready for Net Neutrality's Ugly Return," FORBES, April 4, 2017, available at <https://www.forbes.com/sites/larrydownes/2017/04/20/get-ready-for-net-neutralitys-ugly-return/#7cc82f3e650a>; Subcommittee on Communications and Technology, U.S. House of Representatives, IMPROVING FCC PROCESS, written testimony of Larry Downes, July 11, 2013, available at <https://docs.house.gov/meetings/IF/IF16/20130711/101107/HHRG-113-IF16-Wstate-DownesL-20130711.pdf>; "The Losing Case for Special Access Regulation," GEORGETOWN CENTER FOR BUSINESS AND PUBLIC POLICY, Dec. 15, 2015, available at https://cbpp.georgetown.edu/sites/cbpp.georgetown.edu/files/Larry_Downes_PolicyPaper_SpecialAccess%202012.14.15.pdf.

²⁴ Larry Downes, "5G: What is it Good For?" THE WASHINGTON POST, June 5, 2018, available at https://www.washingtonpost.com/news/innovations/wp/2018/06/05/5g-what-is-it-good-for/?utm_term=.a223aa0bb4cd; Blair Levin and Larry Downes, "How Some Cities are Attracting 5G Investments Ahead of Others," THE WASHINGTON POST, Feb. 8, 2018, available at https://www.washingtonpost.com/news/innovations/wp/2018/02/08/how-some-cities-are-attracting-5g-investments-ahead-of-others/?utm_term=.c4e9c204de43; *idem.*, "What Hath Google Fiber Wrought?" HARVARD BUSINESS REVIEW (forthcoming).

²⁵ See, e.g., Blair Levin and Larry Downes, "Should Broadband be Included in the Trump Infrastructure Plan?" THE WASHINGTON POST, April 5 2017, available at <https://www.washingtonpost.com/news/the-switch/wp/2017/04/05/should-broadband-be-included-in-the-trump-infrastructure-plan/>.

²⁶ Cf. Larry Downes and Geoff Manne, "The FCC's Unstructured Role in Transaction Reviews," CPI ANTITRUST CHRONICLE Oct. 2012, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2163169; see also Larry Downes, "The Comcast-Time Warner Merger is Not a Sign of Strength," Harvard Business Review, Feb. 18, 2014, available at <https://hbr.org/2014/02/the-comcast-time-warner-merger-is-not-a-sign-of-strength> (vertical); *idem.*, "The AT&T Ruling Shows that U.S. Regulators Don't Understand Media's Present—or Future," Harvard Business Review, June 13, 2018 (horizontal), available at <https://hbr.org/2018/06/the-att-ruling-shows-that-u-s-regulators-dont-understand-medias-present-or-future>.

Competition and consumer protection in a changing media industry

Disruption in the media industry is occurring at similarly dizzying pace, driven by and intertwined with many of the same innovations noted above for communications. Big Bang Disruption in media includes Internet-based technologies such as over-the-top streaming services producing original content and those offering “skinny” channel bundles, self-produced consumer content distributed over platforms including YouTube, Twitch, and Snapchat, and emerging segmentation in the viewing habits of different age cohorts.²⁷

The impact of these trends on traditional PayTV service has been profound. Pressured by dominant content producers including Disney, CBS and Fox to buy increasingly large packages of unrelated channels, bundle prices are going up even as per-channel prices are going down. The results include accelerated cord-cutting and cord-never behavior by consumers, leading to substantial declines in subscribers to traditional PayTV service, especially as alternative business models proliferate.²⁸

As I noted in an analysis of Judge Leon’s recent decision in the AT&T/Time-Warner antitrust case, disruption is rampant in media industries. Consider just a few data points that underscore this reality, current as of June, 2018:

- In 2019 consumers will spend more time on the internet than watching TV.
- Advertisers spend more online than on traditional media — a market where, as Judge Leon noted in his decision, Google and Facebook together capture more than half of all revenue.
- YouTube has more viewing hours than television, with popular self-produced channels boasting tens of millions of eager, interactive subscribers.

²⁷ Larry Downes, Antitrust is Back, But the Media Industry Doesn’t Need it, FORBES, August 28, 2017, *available at* <https://www.forbes.com/sites/larrydownes/2017/08/28/antitrust-is-back-but-the-media-industry-doesnt-need-it/#4c2dbd33c542>.

²⁸ “Hearing on The AT&T/DIRECTV Merger: The Impact on Competition and Consumers in the Video Market and Beyond, Subcommittee on Antitrust, Competition Policy and Consumer Rights, U.S. SENATE, Written Testimony of Larry Downes, June 24, 2014, *available at* <http://cbpp.georgetown.edu/sites/cbpp.georgetown.edu/files/Downes-Hearing-ATTDirectTV-Merger-Impact-Competition-Consumers.pdf>; Benjamin Mullin, “Viewers Cut the Cable TV Cord Faster than Expected,” THE WALL STREET JOURNAL, July 28, 2018, *available at* <https://www.wsj.com/articles/viewers-cut-the-cable-tv-cord-faster-than-expected-1532452053>. One indicator of the leverage still maintained by dominant content providers is the fact that Disney retains the right to withdraw from SlingTV if it signs up too many subscribers, making clear the company’s participation is premised on the assumption that OTT skinny bundles will primarily draw younger consumers who would not otherwise subscribe to traditional PayTV. See Larry Downes, “The Media Revolution that isn’t Being Televised,” THE WASHINGTON POST, Jan. 13, 2015, *available at* https://www.washingtonpost.com/news/innovations/wp/2015/01/13/the-media-revolution-that-isnt-being-televised/?utm_term=.83f0e01ba05c.

- In 2017 Netflix, Hulu, and Amazon dominated the Emmy awards, scoring 125 nominations. Netflix is now worth more than Comcast or Disney.
- In 2018, Netflix was the leading studio in Emmy nominations, pushing HBO out of the top spot for the first time in nearly two decades.²⁹
- Traditional pay TV services continue to lose subscribers, down nearly 7.5 million viewers since 2012.
- Instagram users under the age of 25 spend more than 32 minutes a day producing and watching each other's video.
- Twitch, the five-year-old startup, has 15 million daily users, and its users watch other people play video games for an average of nearly two hours a day.
- Snapchat boasts 10 billion daily video views, with stories that disappear after 24 hours.
- More than 60% of all video viewing happens over a mobile device.³⁰

As these data make clear, new media technologies and services have placed profound pressure on industry incumbents, including content producers, distributors and advertisers, all of whom continue to operate under a mountain of existing and aging regulations.³¹

Many of these rules—which the FCC has proposed to extend to some new media providers³²—were developed in response to industry disruption caused by earlier technological breakthroughs

²⁹ Joy Press, "2018 Emmy Nominations: Netflix, Hulu and Amazon Hit a TV Tipping Point," VANITY FAIR, July 12, 2018, available at <https://www.vanityfair.com/hollywood/2018/07/2018-emmy-nominations-netflix-nabs-most-nominations-in-tv-streaming-wars>.

³⁰ Larry Downes, The AT&T Ruling Shows that U.S. Regulators Don't Understand Media's Present—or Future, HARVARD BUSINESS REVIEW, June 13, 2018, available at <https://hbr.org/2018/06/the-att-ruling-shows-that-u-s-regulators-dont-understand-medias-present-or-future>; *idem.*, "The Media Revolution that isn't Being Televised," THE WASHINGTON POST, Jan. 13, 2015, available at https://www.washingtonpost.com/news/innovations/wp/2015/01/13/the-media-revolution-that-isnt-being-televised/?utm_term=.b540b8a90ca7. See also Gerry Smith, "Who Killed the Great American Cable TV Bundle?" BLOOMBERG, Aug. 8, 2015, available at <https://www.bloomberg.com/news/features/2018-08-08/who-killed-the-great-american-cable-tv-bundle?mod=djemTECH>.

³¹ Adam Thierer and Brent Skorup, "Video Marketplace Regulation: A Primer on the History of Television Regulation and Current Legislative Proposals." MERCATUS WORKING PAPER, April, 2014, available at <https://www.mercatus.org/publication/video-marketplace-regulation-primer-history-television-regulation-and-current>.

³² Larry Downes, "One Recipe at a Time, YouTube's Binging with Babish is Disrupting the Content Industry," THE WASHINGTON POST, Aug. 4, 2017, available at https://www.washingtonpost.com/news/innovations/wp/2017/08/04/one-recipe-at-a-time-youtubes-binging-with-babish-is-disrupting-the-content-industry/?utm_term=.1cd577906a75; *idem.*, "On Internet Regulation, the FCC Goes Back to the Future," FORBES, March 12, 2018, available at <https://www.forbes.com/sites/larrydownes/2018/03/12/the-fcc-goes-back-to-the-future/#3342a31d5b2e>. See also FCC, In the Matter of Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services, MB Docket No. 14-261. NOTICE OF PROPOSED RULEMAKING, December 19, 2014.

such as cable and satellite TV. The regulatory overhang includes rules governing network nonduplication, retransmission consent, must-carry, compulsory licenses, program access, program carriage, the national TV ownership cap, the dual television network ban, local TV multiple ownership, cross-ownership bans, cable ownership and affiliated channel cap, financial syndication, rate regulations, set-top box regulations, PEG, and network representation rules.

In their time, each was enacted by Congress or the FCC in hopes of protecting consumers—or industry incumbents—from disruption. While some earlier restrictions have since been lifted,³³ those that remain in force impose constraints that have well-outlived their usefulness, and are now the cause of considerable consumer harm.

The FTC's jurisdiction intersects with these historical developments in both its consumer protection and antitrust activities. On the consumer protection front, for example, the collection and use of consumer data is increasingly the subject of agency concern, particularly as media distribution companies acquire or merge with content providers.³⁴

For antitrust, the chaotic nature of a changing media industry is increasingly the cause of mergers and acquisitions among and between incumbent producers, distributors and new media companies, raising the kinds of vertical integration concerns described in the 2007 Report.

As noted above, however, increased merger activity in this sector has not led to consumer harm, largely because new, non-traditional competitors and technological innovations continue to provide more than enough market discipline to check the still-regulated incumbents. As the 2007 Report makes clear, the FTC retains adequate *ex post facto* authority to police any anticompetitive harms should they arise in the future.

Continued “regulatory humility” with regard to the media industry’s technological disruption has served consumers well since the 1980’s. As I wrote last year:

Antitrust law, enforced both by the Department of Justice and the Federal Trade Commission, has for the last several decades rightly focused on the impact of potential mergers and innovative business practices on consumers and prices rather than the falling fortunes of competitors who fail to adapt to change.

Mergers that regulators believed would make markets worse for consumers have been blocked. Meanwhile, an increasingly aggressive FTC has expanded its oversight over “unfair or deceptive” practices so deeply into novel issues including online data collection and use, the Internet of Things, artificial intelligence and

³³ See, e.g., *CAPITAL CITIES/ABC v. FCC*, 29 F.3d 309 (7th Cir. 1994) (Posner) (Fin-Syn)

³⁴ Data collection and use of consumer data is the subject of another of the topics for which the Commission has requested comments, and will be discussed in a separate filing.

spam that the agency is known here in Silicon Valley as the "Federal Technology Commission."

The results of that approach don't suggest the need for a radical expansion of trade law. Just the opposite. Falling prices, new entrants, and the explosion of the kind of better and cheaper new technologies my co-author Paul Nunes and I coined as "Big Bang Disruptors" have, with notable exceptions including education and health care, left consumers better off.³⁵

In the review of pending and future media industry mergers involving the FTC, the Commission should adopt an enlightened and fully-informed view of the dynamic media ecosystem, recognizing both the constraints and challenges for incumbents and the growing market power of new entrants, particularly in markets serving younger consumers.

Unfortunately, this has not been the approach taken by the Department of Justice in its shared authority over merger reviews in recent years. While the Department wisely recognized the powerful market correctives of technology disruption benefiting consumers as recently as its 2008 review of the merger of XM and Sirius satellite radio, it has since adopted a static and unrealistic approach to analyzing the media market. This static view has led the DoJ to challenge media industry transactions outright, or saddle them with conditions largely unrelated to plausible antitrust concerns.³⁶

In the recent example of AT&T's merger with Time Warner, for example, the Department defined the relevant market so narrowly as to dismiss any potential competition from non-incumbent content producers or distributors, leading to the conclusion that vertical integration of non-competing entities would create an unacceptable risk of consumer harm through price increases

³⁵ Larry Downes, "Antitrust is Back—But the Media Industry Doesn't Need it," FORBES, Aug 28, 2017, *available at* <https://www.forbes.com/sites/larrydownes/2017/08/28/antitrust-is-back-but-the-media-industry-doesnt-need-it/#4c2dbd33c542>.

³⁶ Subcommittee on Communications and Technology, U.S. House of Representatives, IMPROVING FCC PROCESS, written Testimony of Larry Downes, July 11, 2013, *available at* <https://docs.house.gov/meetings/IF/IF16/20130711/101107/HHRG-113-IF16-Wstate-DownesL-20130711.pdf>. The FCC has exhibited a similar myopia when it comes to the significant part of the media ecosystem it regulates. See Larry Downes, "Unlocking Pandora's Set Top Box: The FCC Flirts with Disaster, Again," POLICY PAPER, Georgetown Center for Business and Public Policy, April 2016, *available at* <http://cbpp.georgetown.edu/sites/cbpp.georgetown.edu/files/PP-Downes-Unlocking-Pandoras-Set-Top-Box-The-FCC-Flirts-with-Disaster-Again.pdf>; *idem.*, "The Danger the FCC Can't See in its New Video Proposal," THE WASHINGTON POST, Jan 29, 2016, *available at* https://www.washingtonpost.com/news/innovations/wp/2016/01/29/the-danger-the-fcc-cant-see-in-its-new-video-proposal/?utm_term=.eb7617a8d9a7; "The Comcast-Time Warner Merger is Not a sign of Strength," HARVARD BUSINESS REVIEW, Feb 13, 2014, *available at* <https://hbr.org/2014/02/the-comcast-time-warner-merger-is-not-a-sign-of-strength>.

or outright foreclosure of Time Warner content to incumbent distributors competing with DirecTV.

The government's case also conflicted strongly with the Department's own vertical merger review guidelines, largely unchanged since 1984.³⁷ Judge Leon was right to reject this theory and the substantive weakness of the government's economic modeling attempting to prove it.³⁸

In stark contrast to recent actions by both the Department of Justice and the FCC, the Federal Trade Commission has proven a stable, consistent, pro-innovation overseer of three key markets—broadband access, communications, and media. The light-touch philosophy the agency reiterated in the 2007 Report has served consumers well, and encouraged entrepreneurial behavior in some of the fastest-growing and most quickly-changing industries in the U.S. economy, allowing pro-consumer technology-based disruption to play out in the most efficient manner possible.

Though “regulatory humility” may not always be the most popular response to the anxiety generated by big bang disruption, it is, in both the short- and long-term, the best way to protect consumers.

³⁷ Larry Downes, “Why Mergers Like the AT&T-Time Warner Deal Should Go Through,” HARVARD BUSINESS REVIEW, Nov. 16, 2017, available at <https://hbr.org/2017/11/why-mergers-like-the-att-time-warner-deal-should-go-through>.

³⁸ Larry Downes, “The Government’s Unraveling Antitrust Case Against AT&T-Time Warner,” FORBES, Feb. 01, 2018, available at <https://www.forbes.com/sites/larrydownes/2018/02/01/the-governments-unraveling-antitrust-case-against-att-time-warner/#28e2f0971268>; *idem.*, “Is Disney’s Takeover of Fox Moving too Fast? Don’t Ask Antitrust Regulators,” FORBES, July 10, 2018, available at <https://www.forbes.com/sites/larrydownes/2018/07/10/is-disneys-takeover-of-fox-moving-too-fast/#309326e217d6>.