

**THE INEVITABLE TELEVISION REVOLUTION:
THE TECHNOLOGY IS READY, THE BUSINESS IS LAGGING,
AND THE LAW CAN HELP**

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I. Introduction:

A Revolution Is Happening

SPOILER ALERT: A revolution is transpiring that will leave television so changed twenty years in the future as to make it unrecognizable to viewers from twenty years in the past. What is more, this proposition is hardly controversial. The ubiquity of the phrase “SPOILER ALERT” itself—now commonly applied in reference to scripted television shows,¹ reality shows,² sports contests,³ and other television programs⁴ to warn those who have not yet watched

1 See, e.g., Shawna Malcom, *SPOILER ALERT: All About Lost’s Number Game*, PEOPLE.COM TV WATCH (Feb. 17, 2010, 12:00 AM), <http://www.people.com/people/article/0,,20421411,00.html> (employing the “spoiler alert” phrase to warn users that had not yet seen particular episodes of the popular television drama *Lost* that the article would disclose details surrounding key plot elements of the show); Dean Bexter, *Spoiler Alert: The Office Spoilers*, BUDDYTV (Oct. 6, 2011), <http://www.buddytv.com/articles/the-office/spoiler-alert-the-office-spoil-42083.aspx> (employing the “spoiler alert” phrase prior to disclosing details about a new season of popular sitcom *The Office* to fans who had not yet watched the episodes).

2 See, e.g., Jennifer Bowen, *Spoiler Alert: And the Next American Idol Is...*, MYFOXAL.COM (May 23, 2012, 7:35 PM), <http://www.myfoxal.com/story/18610168/spoiler-alert-and-the-next-american-idol-is-> (employing the “spoiler alert” phrase before announcing the season’s winner of popular singing reality show *American Idol* for users who had not yet viewed the finale).

3 See, e.g., Mike Gruss, *Olympics are Fair Game for Spoiler Alerts*, THE VIRGINIAN-PILOT (Aug. 1, 2012), available at <http://hamptonroads.com/2012/07/olympics-are-fair-game-spoiler-alerts> (arguing that the “spoiler alert” phrase is applicable to the outcome of Olympics contests).

the referenced program that possibly unwanted plot disclosures are to follow⁵—illustrates the reality of the television revolution as well as anything. When people limited their television viewing to live television programs on the days and times scheduled by television stations, there was no need for such a phrase in the television context. But “SPOILER ALERT” is seen everywhere today because, to exaggerate only slightly, “the nation’s greatest secrets no longer are housed in military installations. They exist in the last seven minutes of . . . television shows. The country’s greatest fear is . . . accidentally hearing what happened 20 minutes into your third-favorite television show on Wednesday nights, the ending everyone else watched two days ago.”⁶

The television revolution may be alarming to the “Big Media” establishment who has controlled the television industry for decades,⁷ but no one can seriously dispute that it is occurring. Television viewers today demand to watch television on their terms in a way that they

4 The “spoiler alert” phrase has even been used in the context of television commercials. Caffeinegoddess, **Spoiler Alert* Super Bowl 2013 Ads*, ADLAND.TV ADNEWS (Feb. 3, 2013, 5:47 PM), <http://adland.tv/adnews/spoiler-alert-super-bowl-2013-ads-watch-them-now-and-know-what-will-air/1359910076>. Additionally, some websites have been devoted exclusively to divulging information from recent and future episodes of popular television shows. *See, e.g.*, TVLINE.COM SPOILER ALERT, <http://tvline.com/tag/spoiler-alert/> (last visited Mar. 1, 2013).

5 Wikipedia explains that “[a] spoiler is any element of any summary or description of any piece of fiction that reveals any plot element which will give away the outcome of a dramatic episode within the work of fiction or the conclusion of the entire work. . . . The words ‘spoiler alert’ in all capitals are usually used to warn readers of a spoiler.” WIKIPEDIA, [http://en.wikipedia.org/wiki/Spoiler_\(media\)](http://en.wikipedia.org/wiki/Spoiler_(media)) (last visited Mar. 1, 2013).

6 Gruss, *supra* note 3.

7 Throughout this Comment, the phrase “Big Media” will be used to refer collectively to the powerful networks, corporations, agencies, and other entities that have traditionally controlled the television industry. For example, Big Media may refer to major television networks (e.g., ABC, CBS, NBC, Fox, etc.), cable companies and others controlling the distribution of television content (e.g., Dish Network, Verizon, Comcast, etc.), government agencies (e.g., the Federal Communications Commission (“FCC”)), major advertisers, and others who significantly influence the industry.

did not demand twenty years ago. As this demand for control swells in the viewers, television becomes less and less recognizable as an extension of the “boob tube” of the Twentieth Century.

The ongoing television revolution is not the first media revolution that mankind has experienced.⁸ Experience shows that, while people want to believe that they have a grasp on where things are going during a revolution, no one actually does.⁹ Revolutions are inherently unpredictable. As Clay Shirky—a “prominent thinker on the social and economic effects of Internet technologies”¹⁰—describes it, revolutions distort the perceived reality of the people living through them, particularly those who stand to lose the most as the revolution transpires.¹¹ Such people tend to be willing to look at any and every prediction of the future other than “the unthinkable one”—the one where the old model is not only broken, but where nothing will work to fix it.¹² Analyzing the newspaper industry in light of the revolution it is now going through, Shirky explained:

8 For example, the technological revolution brought about by the advent of the printing press was truly world changing. See ELIZABETH EISENSTEIN, *THE PRINTING PRESS AS AN AGENT OF CHANGE* (1980).

9 In an article outlining an ongoing revolution occurring in the printed newspaper industry, Clay Shirky refers to Eisenstein’s *THE PRINTING PRESS AS AN AGENT OF CHANGE* as a “magisterial treatment of Gutenberg’s invention.” Discussing the famous revolution from hand-copied texts to printed books, Shirky explains that the revolution progressed in a particularly unpredictable way: “As novelty spread, old institutions seemed exhausted while new ones seemed untrustworthy; as a result, people almost literally didn’t know what to think [and] experiments were only revealed *in retrospect* to be turning points.” Clay Shirky, *Newspapers and Thinking the Unthinkable*, SHIRKY BLOG (Mar. 13, 2009, 9:22 PM), <http://www.shirky.com/weblog/2009/03/newspapers-and-thinking-the-unthinkable> (emphasis added).

10 Chris Anderson, himself a prominent influence in the world of technology and the Internet as editor-in-chief of *Wired* magazine from 2001-2012 and as a popular author and speaker, used these words to describe Clay Shirky. CHRIS ANDERSON, *THE LONG TAIL* 158 (2006).

11 Shirky, *supra* note 9.

12 Shirky, *supra* note 9.

That is what real revolutions are like. The old stuff gets broken faster than the new stuff is put in its place. . . . [B]ig changes stall, small changes spread. Even the revolutionaries can't predict what will happen. Agreements on all sides that core institutions must be protected are rendered meaningless by the very people doing the agreeing. . . . Ancient social bargains, once disrupted, can neither be mended nor quickly replaced, since any such bargain takes decades to solidify.

And so it is today. When someone demands to know how we are going to replace newspapers, they are really demanding to be told that we are not living through a revolution. They are demanding to be told that old systems won't break before new systems are in place. They are demanding to be told that ancient social bargains aren't in peril, that core institutions will be spared, that new methods of spreading information will improve previous practice rather than upending it. They are demanding to be lied to.

There are fewer and fewer people who can convincingly tell such a lie.¹³

And so it is with the television industry. I will show that television technology has been revolutionized already, that television business models drastically lag the technology, and that the law can help resynchronize the technology and the business models into a revolutionized new form. What is more, I will show that the television revolution is a good thing for television viewers, that it is inevitable, and that the law *should* encourage and facilitate the revolution whenever possible.

¹³ Shirky, *supra* note 9.

To this end, I proceed in three parts. First, I examine television technology—where it began and how it has evolved—to show that it is revolutionized already. Starting with the early days of television, where all content was broadcast over the air by a small handful of powerful media companies,¹⁴ I continue through various stages of the technology evolution such as cable and satellite signals and networks, videocassette recorders, and digital video recorders.¹⁵ I finish surveying the technology with an examination of Internet streaming technology today and its ability to deliver limitless on-demand content choices with nearly unlimited flexibility.¹⁶ I conclude that the technology is “there”—the technology is revolutionized already.

Second, I explore the business side of television to determine that it is arbitrarily inhibiting the technology and thereby slowing the revolution. In particular, I examine the traditional model of television to discover three major assumptions on which the industry has been built: 1) Big Media alone is capable of producing quality content, 2) Big Media alone is capable of suitably distributing that content, and 3) Big Media can guarantee advertisers that the “eyeballs”¹⁷ they pay for are actually watching.¹⁸ I analyze advantages and disadvantages of this traditional model.¹⁹ Then, in light of these advantages and disadvantages, I scrutinize modern

14 See *infra* Part II.A.

15 See *infra* Part II.B.

16 See *infra* Part II.C.

17 The term “eyeballs” is commonly used in the vernacular of the advertising industry to refer to the attention of viewers within a desired demographic. See, e.g., Steve Janke, *TV Advertising Primer*, ANGRY IN THE GREAT WHITE NORTH (Mar. 23, 2009, 3:45 PM), <http://stevejanke.com/archives/284761.php> (“[A]dvertisers pay the TV broadcasters for eyeballs. We, the television viewing audience, are the product being bought and sold. The television programming content is not the product. . . . Content is the lure to get those eyeballs.”).

18 See *infra* Part III.A.

19 See *infra* Part III.B.

television business models and show that they are significantly lagging the technology and inhibiting the revolution.²⁰ The business is not revolutionized yet.

Third, I explore how the law can promote policy to facilitate the revolution and explain why the law should do so. I identify possible business models for the future of television, recognize that no one knows which ones will prove to be viable, and assert that the best policy is for the law to “shake up” the industry to encourage experimentation.²¹ I illustrate how the law may accomplish this “shaking up” using *Fox v. Dish Network*—a case currently before the Ninth Circuit—as a vehicle.²² Finally, I summarize and conclude.²³

II. Awaiting A Chance to Shine:

The Technology Is Revolutionized Already

A. The Early Days—The Advent of Television and Over-the-Air Broadcasting

To appreciate the complexities of the television industry today, it is helpful to first understand something about the history of television and the underpinning technology that has largely defined its development. Beginning with reports of the first, crude electronic television transmission in 1927 by Philo T. Farnsworth,²⁴ the public imagination was ignited by the idea of

²⁰ See *infra* Part III.C.

²¹ See *infra* Part IV(A).

²² See *infra* Part IV(B).

²³ See *infra* Part V.

²⁴ As described in the biographical note accompanying the *Philo T. and Elma G. Farnsworth Papers*: “On 7 September 1927, [Farnsworth’s employer] watched with staff members as Farnsworth slowly turned on the controls. An unmistakable line appeared across the small bluish square of light on the end of the Oscillite tube. Although fuzzy at first, it became distinct with adjustment, and through the visual static each could see the side of a black triangle previously inserted by [Farnsworth’s brother-in-law], Cliff Gardner.” Biographical Note, *Philo T. and Elma*

television.²⁵ A 1928 article in *Popular Mechanics* magazine posed a question “asked by untold millions” of people of the day: “When will radio television and radio movies be available to the average radio fan for home reception?”²⁶ The answer, as it turned out, was “not long.” The first television drama was broadcast in 1928,²⁷ several experimental broadcast stations appeared between 1928 and the early 1930s,²⁸ and the first regular “seven-days-a-week” broadcasts began in 1931.²⁹ The industry was stifled significantly by the Great Depression in the 1930s and World War II in the 1940s, but it grew exponentially thereafter—by 1950, there were 3.8 million households in America with television.³⁰ By 1951, there were 10.3 million.³¹

G. Farnsworth Papers, SPECIAL COLLECTIONS,
http://content.lib.utah.edu/cdm/ref/collection/UU_EAD/id/2160 (last visited Mar. 8, 2013).

25 See *What Television Offers You*, POPULAR MECHANICS, November 1, 1928, at 820 (available at <http://books.google.com/books?id=wd4DAAAAMBAJ&pg=PA820#v=onepage&q&f=false>).

26 *Id.* Notably, the fact that the question existed in the public consciousness did not mean that there was an easy answer available at the time. The experts of the day apparently could not agree on what was necessary for television to be sold to the mainstream, nor on the timeline it might take: “There are five different views [for how long television will take to become mainstream], ranging from right now up to ten years—and probably every one of them is correct—a paradox that arises not through disagreement, but through different interpretations.” *Id.*

27 The first televised drama—“The Queen’s Messenger,” by J. Harley Manners—was broadcast by W2XB in New York in September 1928. *The Queen’s Messenger*, EARLY TELEVISION MUSEUM, http://www.earlytelevision.org/queens_messenger.html (last visited Mar. 8, 2013). “The Queen’s Messenger” was “a blood and thunder play with guns, daggers, and poison,” and was such a technical challenge that more technicians were required for the production and its rudimentary special effects than actors, and only one actor’s face or hands could be displayed at a time on the small television screens of the day. *Id.*

28 One early experimental broadcaster was W2XBX, the predecessor to WNBC. WIKIPEDIA, http://en.wikipedia.org/wiki/History_of_television (last visited Mar. 8, 2013).

29 *Id.*

30 Robert Shagawat, *Television Recording – The Origins and Earliest Surviving Live TV Broadcast Recordings* at 12, EARLY TELEVISION MUSEUM, http://www.earlytelevision.org/pdf/Television_Recording_Origins.pdf (last visited Mar. 8, 2013).

In these early days, a very limited amount of television content was available. NBC, CBS, ABC, and DuMont broadcast over the air for most of the nation during limited hours each day.³² Color television followed closely behind, and further increased the demand for television sets, television broadcasts, and programming content.³³ By the end of the 1950s, the dream of the 1928 *Popular Mechanics* article was a reality: “Average” people across the nation enjoyed television on a daily basis. Television was here to stay.

B. Continuing Evolution—Technology Paradigm Shifts Over the Decades

No sooner had these millions of average people experienced television technology than they began to develop an appetite for technologies that would give them more of what they wanted when they wanted it. The evolution of television technologies that more flexibly catered to viewers began with the advent of cable and satellite television, and continued with videocassette recorders, on-demand services, and digital video recorders.

Cable television was first developed in 1948 as a method for providing television signals to users in remote areas with poor over-the-air reception.³⁴ Within a decade, nascent cable companies began offering cable as a vehicle for accessing new programming choices.³⁵ Satellite distribution of cable network signals followed another decade and a half after that in the 1960s.³⁶

31 *Id.*

32 WIKIPEDIA, *supra* note 28.

33 *Id.*

34 National Cable & Telecommunications Association, *History of Cable Television*, <http://www.ncta.com/About/About/HistoryofCableTelevision.aspx> (last visited Mar. 5, 2013).

35 At first, cable broadcasters offered content only from over-the-air television stations in other cities; “cable networks” as they are today appeared later. *Id.* For example, “the first pay-TV network, Home Box Office (HBO)” was launched in 1972. *Id.*

36 *Id.*

Sixteen million households were cable subscribers by the end of the 1970s and, in response, the industry spent \$15 billion between 1984 and 1992 to thoroughly “wire” America in the largest private construction project since World War II.³⁷ By the end of the 1980s, fifty-three million American households subscribed to cable and the number of cable networks had increased to seventy-nine.³⁸ Americans had spoken—they wanted more television content and they were willing to pay for it.

As cable grew in the late 1970s and the 1980s, a second trend began to develop that established Americans’ hunger not only for more content on their television sets, but for more control over that content. While devices capable of recording television broadcasts had existed since the 1950s, it was during the late 1970s and early 1980s that electronics manufacturers began to mass-produce videocassette recorders (“VCRs”) at a price point³⁹ that allowed a few consumers to begin purchasing them.⁴⁰ As VCR prices fell during the 1980s, adoption of VCRs

37 *Id.*

38 *Id.*

39 “When the studios first sued Sony in 1979, the company’s Betamax [VCR] cost between \$875 and \$1000.” Maribel Rose Hilo, Note, *TiVo and the Incentive/Dissemination Conflict: The Economics of Extending Betamax to Personal Video Recorders*, 81 WASH. U. L.Q. 1043 (2003) (citing *Universal City Studios, Inc. v. Sony Corp. of America*, 480 F. Supp. 429, 435 (C.D. Cal. 1979), *rev’d*, 659 F.2d 963 (9th Cir. 1981), *reaff’d*, 464 U.S. 417 (1984)). Granted, this high price was surely still prohibitive to many and may seem exorbitantly high to modern readers (especially when considering that \$1000 was worth much more in 1979 than it is today, due to inflation). That demand grew while VCRs still commanded such high prices, however, only illustrates further the demand that people had for more flexible television.

40 The People History, *The Changes To Video Recorders And VCR Technology Over The Last 50 Years*, <http://www.thepeoplehistory.com/vcr.html> (last visited Mar. 7, 2013). The simple explanation in the text regarding the advent of VCR technology is, of course, a simplification of the actual tumult that occurred in the industry before the market selected a single technology. See *id.* For many years, various electronics companies competed for market share with VCRs (or, in many cases, machines they referred to as videotape recorders or “VTRs”) utilizing different technologies, features, and tape formats. *Id.* Ultimately the “Home Video System” (“VHS”)

grew rapidly because the technology offered consumers a number of significant new ways of controlling television content.

First, VCRs added a second tuner to the television cabinet, allowing viewers to record one program while they were watching something else.⁴¹ With the purchase of a single device, the limitations of network scheduling conflicts that viewers had lived with for decades just disappeared. Suddenly, viewers did not have to choose between two prime time shows—they could watch both.⁴²

Second, electronic clocks and timers built into VCRs allowed recording operations to be automated so that viewers could set the VCRs to record television programs that were scheduled for times when the viewers were not home or when the viewers had something better to do.⁴³ The significance of viewer's newfound ability to “time-shift” the viewing experience—to automatically record programming and watch it later—is difficult to overstate. With the same magical device, viewers suddenly became unchained from broadcasters' schedules. Viewers could watch television shows when *they* wanted to watch them.⁴⁴

Finally, VCRs offered navigation features that acted to free viewers from constraints inherent in “live” television, at least when they were watching programming they had previously

format became the standard (winning over major competitors such as Betamax, which was considered by many videophiles to be the higher quality technology). *Id.*

41 Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 422 (1984).

42 As the *Sony* court explains it, viewers could watch two simultaneously broadcast programs “by watching one live and recording the other for later viewing.” *Id.* Significantly, this could be done even with the purchase of only one videocassette tape, since “[t]apes [could] be reused, and programs that [had] been recorded [could] be erased either before or after viewing.” *Id.*

43 *Id.* at 422-23. (“Thus a person may watch a program at home in the evening even though it was broadcast while the viewer was at work during the afternoon.”)

44 *See id.*

recorded. Instead of enduring long commercial breaks and portions of a program not of interest to them, viewers could navigate past unwanted material with the VCR's "fast-forward" feature.⁴⁵ Instead of missing important plot elements of a program when viewers were interrupted or needed a bathroom break, viewers could pause the program.⁴⁶ Like the second tuner and the automated recording capability of VCRs, these navigation features further shifted the paradigm for how people watched and thought about television.

With highly demanded technology in place and popularity among consumers attained, a final crucial element to the VCR's success was the Supreme Court's approval of the industry-changing technology in *Sony v. Universal Studios*.⁴⁷ *Sony* held that recording television programs in order to "time-shift" the viewing of those programs to a time more convenient to the viewer was a copyright fair use, rather than an illegal copyright infringement.⁴⁸ This holding allowed Sony and other manufacturers to continue marketing VCRs and later television-recording devices as long such devices had "substantial non-infringing uses" such as time-shifting.⁴⁹ By extension, the holding also allowed viewers to use technology to make television convenient without fear of legal repercussions.⁵⁰ With traditional limitations out of the way, viewers began getting used to watching exactly what *they* wanted to watch, when *they* wanted to watch it.

45 *Sony*, 464 U.S. at 423.

46 *Id.*

47 *See id.* at 456.

48 *Id.* at 454-55 ("When these factors are all weighed in the 'equitable rule of reason' balance, we must conclude that this record amply supports the District Court's conclusion that home time-shifting is fair use").

49 *Id.* at 454-56.

50 *See id.*

The commercial success and legal viability of VCRs, in combination with an exponential growth of digital computer technology and an increasing quantity of high-quality content from ever more cable networks, led to the creation of digital video recorders (“DVRs”). Introduced in the late 1990s and garnering mainstream adoption in the early 2000s, DVRs were VCRs for the digital age. Referred to as “God’s Machine” by FCC chairman Michael Powell, DVRs contain all the features of VCRs, and they augment those features and add additional ones to make television even more flexible and consumer control even more comprehensive.⁵¹ For example, while VCRs provided consumers with one extra tuner to allow them to watch one show while recording another, some modern DVRs offer three tuners and the capability to watch or record the four major broadcast networks on one tuner, making it possible to record six programs at once.⁵² With all of this built on a two-terabyte hard drive capable of storing 2,000 hours of programming,⁵³ the situation where anyone is “conflicted out” of watching anything he or she wants to watch is becoming increasingly rare.

Further improving on the VCR, DVRs make it trivially simple to schedule recordings. Rather than fussing with setting clocks and navigating complicated interfaces to setup recording

51 See Laura Weinstein, *TiVo: The Rise of God’s Machine*, WIRED, Feb. 3, 2003, <http://www.wired.com/entertainment/music/news/2003/02/57505>. See also Randal C. Picker, *The Digital Video Recorder: Unbundling Advertising and Content*, 71 U. CHI. L. REV. 205, 205-06 (2004) (“The DVR is just one manifestation of the possibilities of adding intelligence and easy storage to a box in your living room. In so doing, we are changing the amount of control that can be exerted over the content on the TV screen. As the tech seers have predicted, television is changing from a synchronous medium—you watch content delivered in real time—to one in which content is captured for viewing at a later time. The VCR hints at all of this, but the DVR, which substantially reduces transaction costs relative to the VCR, may very well realize these changes”).

52 Fox Broadcasting Co. v. Dish Network, L.C.C., No. CV-12-4529 DMG, 2012 WL 5938563 at *3 (C.D. Cal. Nov. 7, 2012).

53 *Id.* See also DISH NETWORK HOPPER FEATURES, <http://www.dish.com/technology/receivers-dvrs/> (last visited Mar. 7, 2013).

times as was required with VCRs, DVRs allow users to easily navigate program guides and select individual programs or even series of programs to record.⁵⁴ Finally, DVRs give users supreme control over what they want to watch. Along with the VCR's capability of pausing and fast-forwarding *pre-recorded* television, DVRs add the capability to pause *live* TV and, in some cases, to skip commercials in more effortless ways than VCR fast-forward buttons ever could.⁵⁵

Additionally, in parallel with the evolving VCR and DVR technologies, which allow viewers to control their television viewing habits with *internal* technology associated with their televisions within their homes, cable and satellite companies began offering viewers similar options to control their television experience with *external* technology.⁵⁶ Specifically, content providers began to offer opportunities for viewers to access private telecasts of premium content via "pay-per-view" events⁵⁷ and to receive "on-demand" access to other premium content or content that was previously-broadcast.⁵⁸ These offerings, growing in popularity in the 1990s and

54 Picker, *supra* note 51 at 205 ("The continuing, dramatic drop in the cost of a gigabyte of storage makes it possible to switch from clunky tapes to smooth digital storage. Plus, the DVR comes with software to make it much easier to record your favorite shows: tell it to record *Friends* forever and it will").

55 *See id.*; Fox, 2012 WL 5938563, at *2-4. The effortlessness of skipping commercials in modern DVRs is an important emphasis of the *Fox* case and will be described in more detail below.

56 *See, e.g.*, XFINITY ON DEMAND, <http://xfinitytv.comcast.net/ondemand> (last visited Mar. 9, 2013); DIRECTTV ON DEMAND, http://www.directv.com/technology/on_demand (last visited Mar. 9, 2013); WIKIPEDIA, http://en.wikipedia.org/wiki/Television_on_demand (last visited Mar. 9, 2013).

57 "Pay-per-view" events include, for example, events such as boxing matches and other fights that occur and are telecast at a particular time, but that are only accessible to those who pay for them. *See* COMCAST PAY-PER-VIEW EVENTS, <http://www.comcast.com/Corporate/Programming/Comingevents.ashx> (last visited Mar. 9, 2013); WIKIPEDIA, <http://en.wikipedia.org/wiki/Pay-per-view> (last visited Mar. 9, 2013).

58 "On demand" programming includes, for example, movies and other content not comprising live events, television programs that were recently televised, and any content that may be telecast

2000s, further illustrate the consumer demand for control and technology's ability to provide that control.

C. Today's Technology—Revolutionary and Awaiting a Chance to Shine

Finally, the advent of the Internet, with its virtually limitless capability to distribute television offerings, completes the revolution of television technology. All broadcast networks and practically all cable networks today make at least some of their content available for online streaming. This may be through their own websites,⁵⁹ through an aggregator site such as Hulu.com, or both.⁶⁰ While online streaming may be less than ideal for live and time sensitive content,⁶¹ and while difficulty in acquiring distribution rights to demanded content has so far prevented it from reaching its full potential,⁶² Internet-streamed television otherwise seems to

individually at any time to a particular viewer willing to pay for it. See XFINITY ON DEMAND, *supra* note 56; DIRECTTV ON DEMAND, *supra* note 56.

59 For example, official content-streaming websites can be found for ABC, CBS, Fox, and NBC at, respectively, <http://abc.go.com/watch>, <http://www.cbs.com/video>, <http://www.fox.com/full-episodes>, <http://www.nbc.com/video>. Many cable networks similarly provide content streaming of their programs. For example, <http://tbs.com/shows> provides a portal for TBS programming and <http://www.usanetwork.com/fullepisodes> allows content streaming from the USA Network.

60 Fully-ad-supported Hulu and its for-pay counterpart Hulu Plus, for example, together provide content from all four major networks and from many cable networks. Ryan Lawler, *CBS Finally Does a Deal with Hulu*, TECHCRUNCH (Nov. 5, 2012), <http://techcrunch.com/2012/11/05/cbs-hulu/>.

61 Public service, emergency, and localized content, for example, are largely absent from online streaming offerings like Hulu at present. Indeed, the on-demand, non-live nature of streaming services itself may presently inhibit such content from comprising a significant part of online streaming services. This is not to say, however, that Internet-streaming technology could not ever respond to a demand for live or local content—it is just not a current focus of the most popular streaming sites today.

62 Services such as Netflix, Amazon Instant Video, Hulu Plus, and YouTube nicely supplement the recently broadcast programs typically available on network websites and through Hulu. However, while these services provide some older television content (e.g., all episodes from all

approach a perfect model of television.⁶³ It is able to support any business model that enterprising businesspeople may want to attempt.⁶⁴ It promises ultimate flexibility with its potential to make available unlimited content choices.⁶⁵ And it facilitates not only limitless time-shifting,⁶⁶ but also boundless space-shifting.⁶⁷

past seasons of a series) and other content (e.g., movies, user-made content, etc.), few would argue that they sufficiently provide access to everything anyone would ever want to watch. These services are making an increasingly significant dent in the content for which there is consumer demand, but there remains much room to grow as rights are acquired for movies, television back catalogs, and other content not currently available.

63 The fact that online streaming has only been available on small computer screens in the past may be another limitation that many would point to. However, this problem has also been solved with the advent of “smart TVs” and “set top boxes” which act to stream content from the Internet onto a big screen in the living room.

64 Specifically, the distribution infrastructure made possible by the Internet allows for commercial interruptions reminiscent of the traditional ad-based television model discussed in Part III *infra*, other ad-based methodologies (see, for example, some of the methods discussed in notes 77 and 94, *infra*), subscriber-based or pay-per-view models (since, unlike over-the-air broadcasting, streaming allows for convenient tracking of who is watching what), or other new models that clever entrepreneurs may dream up.

65 As discussed in note 62, *supra*, the distribution infrastructure of the Internet provides an avenue for all content to be distributed, even if much content is, for business and licensing reasons, not currently available. In other words, the technology has the potential to distribute any content to anyone at any time. The limitation is that not all content is legally available to be sent to anyone at any time.

66 The nature of web streaming is time-flexible at its core. Everything is streamed when a viewer indicates that it should be. In fact, if there is any weak spot in the streaming business model, it is that such extreme catering to viewers’ schedules makes live and time-sensitive content less natural candidates for streaming distribution.

67 A huge trend toward portable viewing on shrinking screens of computers, smart phones, and tablet computers has arisen as these devices have gained prominence. Space-shifting, or “place-shifting,” as it is sometimes called, refers to the ability of users to watch television anywhere that they can appropriately use these devices. This is just one more way that consumers are demanding flexibility and receiving it from technology advances. See PLACESHIFTING, <http://www.slingbox.com/get/placeshifting> (last visited Dec. 12, 2013) (providing information about place-shifting technology and how place-shifting relates to time-shifting).

The technology is revolutionized. The limits and disadvantages that came along with television in its early days have been thoroughly exterminated from the medium. But the technology is only the first part of the story, the first obstacle the revolution faces en route to a better future. Spurred by consumer demand and the conspicuous existence of the sufficient technology, the television revolution will not spare the laws and the outdated business models that still stand in its way. I now examine these next obstacles the revolution faces and speculate on their fate.

III. Preparing For Revolution:

The Business is Lagging the Technology

A. Traditional Ad-Based Television—The “Stool” Model and Three Assumptions on Which it is Built

In the early days of television, a small handful of television networks controlled both the creation of all program content as well as its distribution.⁶⁸ However, the networks could not profit from television the same way they had profited from visual entertainment in years past—by charging viewers directly for the content the viewers consumed.⁶⁹ The nature of early television—electronic boxes in millions of homes undetectably receiving over-the-air broadcast signals—precluded such a direct-billed model. As much demand as existed for the content they

68 Lisa Lapan, Note, *Network Television and the Digital Threat*, 16 UCLA ENT. L. REV. 343, 345 (2009). Today, as in the early days, the “Big Four” networks that rule the airwaves and enjoy the most influence in the industry are ABC, CBS, Fox, and NBC. *Id.*

69 Jesse Haskins, *Commercial Skipping Technology and the New Market Dynamic: The Relevance of Antitrust Law to an Emerging Technology*, 2009 DUKE L. & TECH. REV. 6 (2009).

controlled,⁷⁰ the networks seemingly had no way at all to charge viewers for only the content the viewers watched, or indeed to charge *directly* for anything at all.⁷¹ Instead, the networks were forced to employ an advertisement-based (“ad-based”) model relying on at least three principal assumptions that supported and stabilized the model like the three legs of a stool: 1) Big Media produces all content, 2) Big Media distributes all content, and 3) Big Media’s stranglehold on production and distribution allows it to guarantee sponsors that viewers are watching the sponsor’s advertisements.

This traditional model (the “stool model”⁷²) worked well for decades. As imperceptible as they were irreplaceable, the assumptions upheld the stool model and provided avenues for the

⁷⁰ See, *Television in the 50s and 60s*, RETROWOW, <http://www.retrowow.co.uk/television/television.html> (last visited Mar. 1, 2013). Today, the Bureau of Labor Statistics reports that the average television viewer watches 3.51 hours of television per day. *American Time Use Survey—2011 Results* (June 22, 2012, 10:00 AM), <http://www.bls.gov/news.release/atus.t01.htm>. Indeed, it is easy to understand how television advertising has grown into a nearly \$70 billion industry. Meg James, *TV’s ad revenue stream faces crosscurrents*, L.A. TIMES (Nov. 15, 2011), <http://articles.latimes.com/2011/nov/15/business/fi-ct-tv-advertising-20111115>.

⁷¹ While the government may be able to tax the entire population for a common good that it provides, private interests like this burgeoning television industry enjoy no such right. Being unable to meter the usage of the millions of individual citizens, including some that did not take advantage of the invisible broadcast signals at all, the industry had to find another way to bring in revenue.

⁷² Throughout this Comment, I will refer to the traditional model that requires the three assumptions described herein as the “stool model” to evoke the three legs, or assumptions, on which the model stands. While other names might have been more descriptive, I steered away from them because the names might have been misleading or unhelpful. For example, an “ad-based” model, while accurate, seemed to imply that advertisements were the problem, and they certainly are not. As I will discuss, advertisements may well play an important part in the television business models of the future. Likewise, the “traditional model” or the “old model” seemed too vague. I thus settled on the “stool model” because the three assumptions—the three “legs” on which the industry has traditionally rested—are precisely what define the problematic business model that I am referring to.

television industry to evolve and grow even in the face of tumultuous cultural,⁷³ technological,⁷⁴ economic,⁷⁵ political, and demographic shifts in the lives of its customers.⁷⁶ The networks were happy to create content and broadcast it free-of-charge for everyone to consume. Viewers were happy to receive entertainment that only cost them their initial investment in the television equipment and the electricity to run it. Advertisers were happy to act as the glue between the networks and the consumers, making television commercially possible by paying networks to broadcast the advertisers' commercials⁷⁷ and by receiving compensatory revenue from

73 For example, the culture has shifted from earlier generations of children who had just four channels of television broadcasts available only during particular parts of the day, to the "Baby Einstein" generation of today growing up from infancy in front of all types of screens (e.g., high-definition televisions, computers, tablets, mobile phones, digital readers, portable music players, etc.) and learning to do all types of activities on them (e.g., television, movies, video games, texting, social networking, web-surfing, etc.). *See supra* note 70 and accompanying text.

74 For example, the technology has shifted from the Big Four networks being all that was available in the early days to cable, VCRs, DVRs, on-demand programming, and the web-based content of today. *See infra* Part II(B).

75 For example, economics have shifted from a world where significant portions of the population could not afford any television set and practically no one was willing to pay for more than one, *see supra* note 70, to a world where each individual in a house may be able to afford multiple different screens packed with multiple content options.

76 In spite of all of the changes discussed *supra* in notes 73-75, television has continued to grow and now offers more options in more ways to more people than it ever has. *See supra* note 70.

77 It may be noted that advertising, at times, may comprise something more than watching a traditional 30-second spot. In the early days, "consumers had little choice but to watch advertisements, each lasting sixty seconds in length. Advertisers could also pay to place their name on the title of the television program, as was the case with NBC's 'Colgate Theatre' and 'Texaco Star Theater.'" *Id.* Further, advertising has become even more creative and subtle since then with the advent of "branded entertainment" or "product placement," wherein advertisers pay to have their products conspicuously displayed and used by characters in the programming the advertisers sponsor. WIKIPEDIA, http://en.wikipedia.org/wiki/Product_placement (last visited Mar. 1, 2013).

consumers who watched those commercials and consequently bought the advertised products.⁷⁸

The model was synergy at its best—networks, advertisers, and consumers all won.

Taking a closer look at the stool model, the first leg of the stool is the assumption that Big Media alone is capable of producing quality content.⁷⁹ As with all the assumptions, this first assumption was true for decades.⁸⁰ The phrase “content is king” became a mantra in Hollywood because, while content creation is the most difficult and unpredictable aspect of television, it is simultaneously the most valuable aspect, and the aspect most immune to technological change.⁸¹ While millions of viewers in their living rooms at home may have had ideas for the next great television concept or innovative story arc for the characters in their favorite show, the cost of production equipment was prohibitive. Professional video cameras have always been well outside of the reach of average individuals,⁸² while personal video recorders only appeared in the late 1970s and began to enjoy mainstream market penetration in the 1990s and 2000s. This is not to mention the high degree of experience and expertise that were required to make any type of video until the advent of mass market movie-making software in the 2000s.

⁷⁸ Haskins, *supra* note 69 at *6.

⁷⁹ As used herein, “content” or “programming” may refer to any creative product in which media companies traffic, including television shows and movies, as well as other types of media for which there is a demand such as music, video games, books and other textual materials, computer programs, and so forth.

⁸⁰ Lapan, *supra* note 68 at 346-47.

⁸¹ *Id.*

⁸² Even today, professional video cameras continue to be so expensive that it rarely makes sense for anyone but a major movie or television studio to own one rather than rent it. For example, high-end, high-definition cameras may cost well over \$1000/day to rent and even lower-end, standard-definition video cameras cost several hundred per day. See BUDGET VIDEO RENTALS, <http://www.budgetvideo.com> (last visited March 1, 2013).

The assumption rang true and, for decades, stabilized the industry.⁸³ Whatever competition the networks faced from each other and from all the other activities their viewers could spend time on other than watching television, the networks never had to face competition from the millions of viewers in their living rooms with the great ideas.⁸⁴ With this monopoly on content, the industry thrived and the networks grew as they reaped the benefits of increasingly high quality, diverse, and targeted content that delivered the attention of specific groups of people, effectively if imprecisely.⁸⁵

The second leg of the stool model that has upheld the television industry is the assumption that Big Media alone is capable of suitably distributing the content that it creates. This second assumption has also served the industry well, though it has come into question more readily than the content assumption.⁸⁶ In this case, the model relied on the fact that television could exist only insofar as it could be broadcast by powerful transmitters and large antennas affordable only to major networks and their local affiliates.⁸⁷ Or, to put it more succinctly: “[Y]ou can make the most wonderful content in the world, [but] without a commitment from a distribution outlet, you have an audience of one.”⁸⁸

83 See Lapan, *supra* note 68 at 346-47.

84 See *Id.*

85 Picker, *supra* note 51 at 205.

86 See Lapan, *supra* note 68 at 346-47.

87 See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.* 380 F.3d 1154, 1167 (9th Cir. 2004), *rev'd*, 545 U.S. 913 (2005) (“The introduction of new technology is always disruptive to old markets, and particularly to those copyright owners whose works are sold through well-established distribution mechanisms”).

88 Haskins, *supra* note 69 at *27 n.122 (quoting Frank Rose, *The Fast-Forward, On-Demand, Network-Smashing Future of Television*, WIRED, Oct. 2003, <http://www.wired.com/wired/archive/11.10/tv.html>).

The truth embedded in this assumption for so many years likewise served the industry well. The networks and their affiliates not only had the content that people wanted, they had it *exclusively*. Anyone who wanted to see the latest chapter in a favorite serial television show had but one option: to mark the calendar, to get home on time, to tune in to the right network, and to stay tuned throughout the program.

The third leg of the stool is closely related to the first two legs since it arises from them. This is the assumption that Big Media would have the tools and protection it needed to maintain the other assumptions forever. Put another way, the third assumption presumes that legal and technological limits would perpetually allow Big Media to guarantee advertisers the “eyeballs” they pay for without significant adaptation of the stool model.⁸⁹ In many ways, the third leg bears more of the load than any other leg because the assumption connects the business to the bottom line.⁹⁰ At the end of the day, money is at the root of the television industry just as it is at the root of any commercial industry in a free market.⁹¹

89 Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 446 n.28 (1984) (“The traditional method by which copyright owners capitalize upon the television medium—commercially sponsored free public broadcast over the public airwaves—is predicated upon the assumption that compensation for the value of displaying the works will be received in the form of advertising revenues”).

90 Ethan O. Notkin, Note, *Television Remixed: The Controversy over Commercial-Skipping*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 899, 908 (2006) (“Since the networks’ free broadcasts continue today without the collection of subscription fees or other direct charges to viewers, the sale of advertising time has become the essential source of broadcast networks’ revenue”).

91 Randal Picker at the University of Chicago explains that “[w]e know the place of TV in the United States: other than sleep and work, Americans spend more time watching TV than doing anything else. TV is the main source of news and information, which magnifies its importance in a democracy. TV advertising is also a \$54.4 billion-per-year industry, which puts it squarely in the middle of the wheels of commerce.” Picker, *supra* note 51 at 206.

B. Advantages and Disadvantages—Whether the Stool Model is Worth Keeping

The makeup of the television industry and these assumptions on which the stool model is based may have been unavoidable.⁹² Be that as it may, it is worth analyzing the advantages and disadvantages of the model today, even if the limits that necessarily commanded the decisions of the past have disintegrated. Because today there is a choice. Through legal and technological means, society may *choose* to attempt to maintain old business models if old business models are determined to be best. But, if those old models are no longer working, society is not circumstantially bound to them anymore. Today, technology offers the ability to shape the future of television to whatever models are best.⁹³

Accordingly, I start with an examination of some advantages of the stool model. Surely the most obvious advantage is its monetary cost to viewers. The stool model provides premium content of all types—entertainment, news, informational programming, etc.—to *everyone* for *nothing*.⁹⁴ While many people have demonstrated a willingness to pay substantial monthly

92 Indeed, there may have been few other options for television at its advent, making these types of assumptions inevitable. Patrons were easily charged an entrance admission to watch a film or a play in a theater. Music fans paid good money to purchase a record or hear a live concert. But the nature of television and radio technology, where the entirety of the product's value was broadcasted indiscriminately over public airwaves, precluded television viewers and radio listeners from being billed for what they consumed by such simplistic and traditional business models. Short of reliance on the honor system in asking viewers to pay for time they spent watching television, it is difficult to conceive of a direct way that early television broadcasters could have billed viewers directly for the content those viewers consumed. Accordingly, selling advertisers an opportunity to sponsor content and billing them was a natural, seemingly inevitable, choice.

93 Granted, there may not be any one entity with an ability to unilaterally change the model. No individual person, company, court, or even Congress is likely to be able to steer the outcome of the television revolution singlehandedly. But societies have a way of inching towards policy goals that the societies deem best. If everyone—individuals, companies, courts, and Congresses—all agree on an ideal, that ideal will become a reality eventually.

94 An advertising-weary citizen of the modern world may be forgiven for disputing the assertion that the stool model provides content for “nothing.” Though out-of-pocket costs for ad-sponsored

premiums for additional content available via cable, satellite, and Internet streaming services,⁹⁵ free over-the-air television is still vital to tens of millions of Americans.⁹⁶ Even households

goods and services may indeed be zero, that is not to say that intangible costs are not still exacted. As one ad executive explains it: “We never know where the consumer is going to be at any point in time, so we have to be everywhere. Ubiquity is the new exclusivity.” Louise Story, *Anywhere the Eye Can See, It’s Likely to See an Ad*, N.Y. TIMES, Jan. 15, 2007, <http://www.nytimes.com/2007/01/15/business/media/15everywhere.html> (quoting statement from Linda Kaplan Thaler, chief executive of New York ad agency Kaplan Thaler Group). Market research firms have estimated what this ubiquity looks like: while a person in a big city of 30 years ago might come across 2,000 advertisements per day, today that person will see 5,000. *Id.* (citing an estimate by market research firm Yankelovich). In the television ad context, content-creation budgets have grown while consumer attention to ads has diminished (in part because of the technology discussed above). This has forced advertisers to saturate markets with their ads—a tactic that may ensure the message gets across but that takes a toll on the many people forced to wade through those advertisements. This is true on television and off. For example, the New York Times article gives additional examples including school buses playing advertisements aimed at children, advertisements on examination tables in 2,000 pediatricians’ offices, billboards at bus stops emitting odors, billboards large and small being converted to digital screens that can display multiple and more attention-grabbing advertisements, interactive floor displays where lights respond to user movements, images projected onto buildings and sidewalks, airline-sponsored pizza boxes, and ads on dry-cleaning boxes and bags, on pills, on eggs, and the list goes on. *Id.*

95 There are several forms of directly delivered content that consumers have shown a willingness to pay for. *See infra* Part II(B). Much paid content may be subsidized by various types of advertising or, in some cases, may be ad-free. In some cases, freedom from advertising is part of what the consumer is being charged for (e.g., for a consumer upgrading from Hulu to Hulu Plus).

96 The FCC recently noted that “[f]or many people, free, over-the-air television is their primary source of news, information and emergency alerts—not to mention entertainment.” Press Release, FCC, Ten Days and Counting to DTV Transition (June 2, 2009), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-291141A1.pdf. Specifically, there are 20.7 million American households representing 53.8 million Americans that only receive free over-the-air television. Press Release, National Association of Broadcasters, Over-the-air TV Viewership Soars to 54 Million Americans (June 18, 2012), *available at* <http://www.nab.org/documents/newsroom/pressRelease.asp?id=2761>. And this reliance is particularly pronounced among minority and low-income Americans. *Id.* For example, 23 percent of African American households, 26 percent of Hispanic households, and 26 percent of households with incomes under \$30,000 rely on free broadcast television exclusively. *Id.*

relying primarily on paid television often watch programming developed using funding derived from the stool model.⁹⁷

Another advantage enabled by the traditional model of television is the relationship and natural interplay between large, national networks and their local affiliates.⁹⁸ Because different advertisers strive to reach national and local audiences, and because people benefit both from programming aimed at national audiences⁹⁹ as well as programming aimed at local audiences,¹⁰⁰ a model is needed to connect national and local advertisers to national and local audiences and to bring those audiences both national and local programming. The stool model has provided a network-affiliate relationship that has served nicely to meet these goals. Local advertisers sponsor local programming at certain times of the day when people tend to be interested in that local programming, and national advertisers can reach national audiences at times of the day when those same people want to watch national programming. Another significant advantage to

97 Stool-model-derived programming may take many forms including broadcast television stations retransmitted by cable or satellite companies, “re-run” episodes of syndicated television shows on cable networks, streamed television programming from online sources after the programming was broadcast over the air, etc.

98 See generally Brief of the ABC Television Affiliates Ass’n et al. as Amici Curiae in Support of Appellants, *Fox Broadcasting Co. v. Dish Network*, L.C.C., No. CV-12-4529 DMG, 2012 WL 5938563 (C.D. Cal. Nov. 7, 2012) (No. 12-57048), 2012 WL 6803504.

99 For example, sponsors paying for national audiences might be required to fund high-budget entertainment programming such as sitcoms, dramas, and reality shows. Informational programming such as national and world news would also be prohibitively expensive, impractical, and redundant to produce for each small market individually.

100 Localized news, weather, and investigative reporting, might never be produced or distributed if it had to compete with programming having a national appeal. These things bring real value to Americans as studies show that local news is more highly valued and trusted than any other source of news. See, e.g., Pew Research Center for the People & the Press, *Further Decline in Credibility Ratings for Most News Organizations*, at 2 (Aug. 16, 2012), available at <http://www.people-press.org/files/2012/08/8-16-2012-Media-Believability1.pdf> (“Since 2002, every news outlet’s believability rating has suffered a double-digit drop, except for local daily newspapers and local TV news”).

the cooperative relationship between national networks and local affiliates is the ability of the local affiliates to take over the airwaves and reach large majorities of the population during emergency situations.¹⁰¹

While the advantages of the seasoned stool model are numerous and important, the disadvantages are also significant. In a world where saturated marketing exposes people to 150% more advertisements per day than they were exposed to thirty years ago,¹⁰² many people view any institution exposing them to more advertising as a bad thing.¹⁰³ Perhaps even more significant, however, is the lack of control that the stool model provides viewers. Television viewers in the new millennium demand control over their media and they typically get it.¹⁰⁴ While new models of television provide time-shifted, space-shifted, on-demand, and even interactive programming,¹⁰⁵ the stool model requires viewers to be in their seat when broadcasters tell them to be. It requires viewers to watch what broadcasters tell them to watch. It requires¹⁰⁶ viewers to stay put while commercials—in many cases commercials irrelevant to the

101 See Brief of the ABC Television Affiliates Ass'n et al. as Amici Curiae in Support of Appellants, *supra* note 98, at *10-11 (discussing the role played by emergency broadcasts during Hurricane Sandy and quoting the FCC and FEMA's direction to the public to "[tune] into your local television or radio stations . . . for important news alerts").

102 While the average American was exposed to 2,000 advertisements per day thirty years ago, that person is exposed to 5,000 ads per day now. See Story, *supra* note 94.

103 See *id.*

104 Consumer control arises, at least in part, from the advent of computers and the Internet in the last part of the Twentieth Century. Unlike television and technology from its era, the Internet functioned as an individualized, unicast medium from the beginning. The Internet eschews the very concept of "broadcasting" in favor of individual control—users requests information they want on their terms and that information is delivered.

105 See *infra* Part II(C).

106 Technically, users may not be *required* to stay put during commercials, although the networks and advertisers would greatly prefer it. As Jamie Kellner, then head of Turner

viewers or which they have seen so many times as to have practically memorized them¹⁰⁷—are shown. Everything is done on the *broadcaster's* timetable, on the *broadcaster's* terms. The significance of this disadvantage in the modern world is difficult to overstate. As numerous and significant as the advantages of the traditional model are, these disadvantages overshadow and outweigh them significantly for many. Viewers today want TV on *their* terms.

C. The Stool Today—Technology's Devastation of the Three Legs and the Failure of the Business to Innovate

Today, the ground under each of the three traditional assumptions is shaky and getting shakier. Pressure put on the television industry by shifts in consumer demand and advances in technology have stressed each assumption to its limits. Indeed, as stable as the “stool” has been over the decades, today it seems poised to collapse under the weight of the rapidly transforming industry.

The first leg of the stool—the assumption that viewers are only willing to watch content produced with Big Media's resources—has clearly been weakened by the advent of the Internet and social networking. Quality content is cheaper than ever before to produce with today's

Broadcasting Systems, infamously asserted: “Your contract with the network when you get the show is you're going to watch the spots. Otherwise you couldn't get the show on an ad-supported basis. Any time you skip a commercial . . . you're actually *stealing* the programming.” Interview of Jamie Kellner, in Staci D. Kramer, *Content's King*, CABLE WORLD 32 (Apr 29, 2002). To be fair, Kellner did begrudgingly allow, when pressed on the extremeness of this assertion, that “I guess there's a certain amount of tolerance for going to the bathroom.” *Id.* Honest bathroom-goers everywhere may take a sigh of relief.

107 See Picker, *supra* note 51 at 205 (“Next time you turn on your television, actually watch the commercials and you will quickly see how poorly the economic model of TV is working. They put on a commercial for dog food, but you are allergic to dogs, a commercial for diapers, but, mercifully, your kids are old enough that you no longer need to decide whether Pampers are better than Huggies. Many of the commercials are for product categories that you do not purchase; others are for products, such as cars or computers, that you use constantly but purchase only sporadically. Most ads are targeted at no more than the broad side of the barn: Adults 18-49 or Women 25-54 or some other rough demographic segment”).

technology.¹⁰⁸ Moore's law has provided powerful computers to the masses at prices that everyone can afford.¹⁰⁹ Affordable movie-making software runs on these computers, and inexpensive videography hardware further levels the playing field. Because of technology, average people no longer have to sit on the couch and watch content other people have made. More than ever before, a new option to grab a camera and a couple friends and to make a movie is presenting itself. And people are beginning to choose this option.¹¹⁰ What is more, while most of this user-produced content still falls far short of the production standards that Big Media has consistently used, this content has proven capable of finding audiences,¹¹¹ and, in some cases, very significant audiences.¹¹²

108 For example, while "it wasn't until the late 80's that camcorders dipped below \$1000," bohush, *1980's Toshiba IK-1850 Camera Teaches Today's Camcorders A Thing Or Two*, RETRO THING, <http://www.retrothing.com/2008/11/before-camcorde.html> (last visited Mar. 23, 2013), today, video cameras are available on cellphones, tablets, and other devices that have come to find themselves accompanying most people most of the time. Even if a person did not have access to a video camera on a device he or she already owned, cheap, personal video cameras are available for well under \$50. *E.g.*, Cobra DVC955 Digital Video Camcorder, Black, STAPLES, http://www.staples.com/DVC955/directory_DVC955? (last visited Mar. 23, 2013) (listing portable video camera on a clearance sale for \$19.90).

109 Named after Intel Corporation executive Gordon Moore, Moore's law refers to the observation, first described in a 1965 paper by Moore, that "over the history of computing hardware, the number of transistors on integrated circuits doubles approximately every two years." WIKIPEDIA, http://en.wikipedia.org/wiki/Moore's_law (last visited Mar. 23, 2013). Of course, as the number of transistors on a chip increases, those transistors get smaller, faster, and more tightly packed together. This has led to an exponential growth in computing power since the 1970s even as prices for computers have dramatically dropped. *See id.*

110 *See* Ben Rubenstein, *How to Make a Movie*, WIKIHOW, <http://www.wikihow.com/Make-a-Movie> (last visited Mar. 23, 2013) (presenting how-to steps "liked" and contributed to by hundreds of people for creating a movie aimed at hobbyists with simple equipment). *See also* YOUTUBE, <http://www.youtube.com> (last visited Mar. 23, 2013) (exhibiting millions of examples of such amateur moviemaking).

111 Indeed, the premise of Chris Anderson's book *The Long Tail* is that, while consumer demand has traditionally been for popular "hits" under the middle of a bell curve of popularity, the Internet has greatly enabled exploration of the "long tail" of that bell curve. *See generally*

The second leg of the stool—the assumption that Big Media has to distribute content for it to reach significant audiences—has also been undermined by cheap computers¹¹³ and the advent of widespread broadband Internet access.¹¹⁴ YouTube, in particular, has emerged as an extremely popular vehicle by which user-generated content can be stored and distributed.¹¹⁵ Along with social networking websites, set-top boxes capable of streaming YouTube videos

ANDERSON, *supra* note 10. The Internet allows for easy distribution of content even if that content is only of interest to a very small, disparate audience. *Id.*

112 The number of views on the most popular YouTube videos, in fact, dwarfs the ratings of even the most popular television events. For example, while Nielsen Ratings reports average Super Bowl viewership in recent years to have been slightly above 100 million viewers, *see* NIELSON, *Super Bowl XLVII: How We Watch and Connect Across Screens* (Feb. 5, 2013), <http://www.nielsen.com/us/en/newswire/2013/super-bowl-xlvi-draws-108-7-million-viewers-26-1-tweets.html>, top YouTube videos have received views in the billions. Richard MacManus, *Top 10 YouTube Videos of All Time*, READWRITE (September 2, 2012), http://readwrite.com/2012/09/02/top_10_youtube_videos_of_all_time (recognizing PSY's "Gangnam Style" music video as the top-viewed YouTube video of all time with 1.25 billion views). Indeed, even very amateur videos that strike a strong chord with viewers on YouTube have been rewarded with views in the hundred of millions. *See id.* (recognizing amateur video "Charlie Bit My Finger – Again!" as having over 510 million views).

113 Of course, along with what might be traditionally considered a "computer," I also include here the many new computing devices with which people access the Internet—smart phones, tablets, digital readers, etc.

114 Broadband Internet access has grown rapidly for in the last decade as dial-up Internet has decreased at about the same rate. Lance Whitney, *Broadband Growth Slows in the U.S.*, C|NET (Aug. 12, 2010, 9:13 AM), http://news.cnet.com/8301-1023_3-20013438-93.html. Though it appears that growth may be slowing as a saturation point is approached, over 66% of American adults now have access to broadband Internet, as compared to just 5% who still use dial-up. *Id.*

115 Founded in February 2005 after two founders had trouble sharing a video of themselves a dinner party that the third founder did not believe had occurred, YouTube was later bought by Google and rose to prominence by "allow[ing] billions of people to discover, watch and share originally-created videos. YouTube provides a forum for people to connect, inform, and inspire others across the globe and acts as a distribution platform for original content creators and advertisers large and small." YOUTUBE, *About YouTube*, http://www.youtube.com/t/about_youtube (last visited Mar. 23, 2013); WIKIPEDIA, <http://en.wikipedia.org/wiki/YouTube> (last visited Mar. 23, 2013).

straight to televisions in the living room,¹¹⁶ and online communities fostering “viral videos” and other Internet memes,¹¹⁷ YouTube and similar sites have proven that the Internet is fully capable distributing high-bandwidth content from one ordinary person to any number of other people interested in it.¹¹⁸ Big Media and its networks of television antennas, cables, and satellites are not needed.¹¹⁹

116 Many devices capable of streaming YouTube videos to a big screen are now commonly found in the living room entertainment center: video games systems, DVD and Blu-Ray players, DVRs, other set-top boxes such as Roku and AppleTV, etc.

117 “An Internet meme is a concept that spreads from person to person via the Internet. . . . Fads and sensations tend to grow rapidly on the Internet, because the instant communication facilitates word of mouth transmission.” WIKIPEDIA, http://en.wikipedia.org/wiki/Internet_meme (last visited Mar. 23, 2013). Viral videos such as the “Charlie Bit My Finger” series are one example of an Internet meme. See MacManus, *supra* note 112.

118 This ease of distribution is memorably illustrated by an anecdote given in the Shirky article:

Back in 1993, the Knight-Ridder newspaper chain began investigating piracy of Dave Barry’s popular column, which was published by the Miami Herald and syndicated widely. In the course of tracking down the sources of unlicensed distribution, they found many things, including the copying of his column to alt.fan.dave_barry on usenet; a 2000-person strong mailing list also reading pirated versions; and a teenager in the Midwest who was doing some of the copying himself, because he loved Barry’s work so much he wanted everybody to be able to read it.

One of the people I was hanging around with online back then was Gordy Thompson, who managed internet services at the New York Times. I remember Thompson saying something to the effect of “When a 14 year old kid can blow up your business in his spare time, not because he hates you but because he loves you, then you got a problem.” I think about that conversation a lot these days.

Shirky, *supra* note 9.

119 Admittedly, many companies that fall under the “Big Media” label defined in this Comment are the same companies that provide Internet access. Insofar as that Internet side of its business is implicated, Big Media will of course continue to be very relevant. It is only the legacy, stool-model media channels offered by Big Media companies, not necessarily the companies themselves, that I contend are losing their relevance.

With the impending failure of the first two legs of the stool, the third leg—the assumption that the other legs are stable enough to guarantee eyeballs for advertisers—is failing and doomed to fail as well. As viewers increasingly become siphoned off from watching traditional content through traditional channels, advertisers are forced to follow them—to innovate and move their money to the avenues where viewers are found.¹²⁰ And, what is more, no one seems to care.¹²¹ As the established model that has been relied on for decades crumbles, television viewers are enthusiastically embracing new television models and purveyors of those models are reporting notable profits.¹²² And, perhaps even more telling, a trend to use online-streaming models *exclusively* is growing as well.¹²³ While the advantages of the traditional model are significant,

120 For example, as viewership increases, YouTube is experimenting with new advertising models. See David Hancock, *Google Adds Commercials To YouTube Videos* (Feb. 11, 2009, 4:21 PM) http://www.cbsnews.com/8301-501203_162-3193449.html. See also *supra* text accompanying note 94 (discussing many of the other creative avenues advertisers have taken advantage of in an effort to follow viewers).

121 Surely, a recognition of this instability has caused great concern amongst the Big Media crowd and those financially tied to the success of the stool model, but the growing number of people who are “cutting the cable” and embracing online and other non-traditional televisions business models suggests that television viewers in the population at large stand ready to usher out the old and welcome new models. See, e.g., Paul Bond, *Hulu Reports 65 Percent Revenue Growth in 2012*, THE HOLLYWOOD REPORTER (Dec. 17, 2012, 12:42 PM), <http://www.hollywoodreporter.com/news/hulu-reports-65-percent-revenue-403362> (reporting 2012 year-end figures for Hulu, a company representative of the migration of viewers to online media, including Hulu’s surging revenues—they quadrupled from \$100 million to \$400 million from 2009 to 2011—and the rapid growth of its subscriber base, content library, and advertising partners).

122 *Id.*

123 The trend to reject the stool model is exemplified by a movement to “cut the cord”—that is, to do away with the high fees of cable and satellite providers. According to one survey, nearly one tenth of Americans had “cut the cord” by 2011. Mike Flacy, *Survey: Nearly One Tenth of Americans Have “Cut the Cord” from Premium TV*, DIGITAL TRENDS (January 5, 2012), <http://www.digitaltrends.com/home-theater/survey-nearly-one-tenth-of-americans-have-cut-the-cord-from-premium-tv> (hereinafter “Cut the Cord Survey”). While people cutting the cord may not necessarily cut out all types of television incorporated in the stool model—for example, they may still receive over-the-air broadcasts from the major networks—the emphasis of cutting the

reluctance to lose them has not impeded the growth of the number of people willing to look beyond the traditional model and even desert it completely.¹²⁴

In summary, the traditional stool model was extremely useful, and probably inevitable, for the first several decades of television. But it has served its purpose. While it offers some advantages even to modern viewers, the disadvantages of the model are far too great and the alternatives too enticing. Accordingly, the model is not merely unworthy of continued protection, but it is already on its way out the door. The assumptions that have upheld the model no longer ring true in the world of ubiquitous Internet access and cheap, portable screens. Advertisers are looking for more value than the model can offer them. In short, “the old stuff [is getting] broken faster than the new stuff is put in its place.”¹²⁵ The revolution is happening, and, at least from the point of view of the stool model’s advocates, things are going to get worse before they get better.

IV. Facilitating the Revolution:

The Law Can Help Synchronize the Business and the Technology

A. The “Shake-It-Up Policy”—Rather Than Coddle Outmoded Business Models, the Law Should Encourage Innovation

With the reality of the television revolution as a backdrop, I consider a final question: What can the law do to help?

cord is a reliance on online content and modern technology such as that discussed above. See, Mike Flacy, *Cord Cutting 101: Four Easy Steps to Cut the Cord*, DIGITAL TRENDS (Jan. 2, 2013), <http://www.digitaltrends.com/home-theater/cord-cutting-four-steps-to-cut-the-cord/>.

¹²⁴ See Flacy, *Cut the Cord Survey*, *supra* note 123.

¹²⁵ Shirky, *supra* note 9.

It is not typically the place of the law to dictate or even influence the business models of companies in an industry of free enterprise.¹²⁶ Yet even in a capitalist economy such as that of the United States, nearly all industries are governed to at least some degree by the legal and regulatory environment in which they are built. Thus, even if the television industry has many hallmarks of free enterprise,¹²⁷ it is still driven both directly and indirectly by laws and policies that the government has built around it over the years.

For example, FCC regulations prohibiting obscene and indecent material¹²⁸ directly shape the way broadcast networks do business. The relative success of entertainment content embodying obscene and indecent material produced by entities not governed by these FCC regulations illustrates that there is a tolerance and often a demand for entertainment with such material.¹²⁹ Yet, due to these government regulations, broadcast television directors creatively cut away from obscene or indecent scenes to imply rather than show them while broadcast

126 The essence of the free enterprise characterizing capitalist societies is that business is “governed by the laws of supply and demand, not restrained by government interference, regulation, or subsidy.” INVESTER WORDS, http://www.investorwords.com/2085/free_enterprise.html (last visited Mar. 23, 2013) (giving a dictionary definition of “free enterprise”).

127 Unlike many other countries where governments own and operate television stations (e.g., the largest broadcaster in the world, the British Broadcasting System, is owned by The Crown), the American television industry is characterized by independent networks with independent affiliates all competing for a maximum share of the industry’s currency—viewer attention to sell to advertisers.

128 47 C.F.R. § 73.3999 (2005) (“No licensee of a radio or television broadcast station shall broadcast any material which is obscene. . . . No licensee of a radio or television broadcast station shall broadcast on any day between 6 a.m. and 10 p.m. any material which is indecent”).

129 See Todd Cunningham, *Glut of R-Rated Movies Putting Box Office on Overload*, THE WRAP (Jan. 30, 2013, 4:27 PM), <http://movies.yahoo.com/news/glut-r-rated-movies-putting-box-office-overload-212714468.html>.

television writers stretch their dialog in an attempt to make speech sound natural without the profanity that many of their characters might otherwise be expected to employ.¹³⁰

Additionally, law also affects otherwise-“free” enterprise in less direct ways. For example, federal copyright laws¹³¹ govern content distribution indirectly but to an enormous extent. Indeed, the entire entertainment industry is based on copyright law—if the three assumptions I have identified are the legs of the stool, copyright law might well be the floor on which the stool stands. Without copyright laws dictating that each network only distribute programming that, at great cost, it creates or licenses, every network may be expected to make drastic changes its programming schedule overnight.¹³²

Accordingly, it is clear that law is very capable of *directing* an industry toward desirable behavior even without *forcing* such behavior. Just as copyright law provides an environment wherein a television industry can freely innovate and creatively chase the promise of capitalistic awards while simultaneously being encouraged and empowered to undergo the costly development of original content, the rule of law is similarly capable of directing old business

130 For a discussion among writers of how to deal with this issue, see, e.g., WRITING FORUMS, *Thread: Swearing - can I get away without swearing?*, <http://www.writingforums.org/showthread.php?t=59908> (last visited Mar. 23, 2013).

131 See Title 17 of the United States Code.

132 Of course, while the prospect of high-demand, premium content always being available on 100+ cable channels coming into the house seems like a good thing at the outset, the corollary to it is of course that there would be little incentive or capital with which to continue developing new quality content. As illustrated above in the context of user-generated content on YouTube, this does not necessarily mean that there would be *no* content worth watching. But few would dispute that an absence of copyright law would be accompanied by a significant detrimental effect on available content. See generally Sumner M. Redstone, Chairman and Founder, Viacom Inc. and CBS Corp., Copyright is Even More Right in the Digital Age (Aug. 22, 2006), available at http://www.pff.org/issues-pubs/pops/pop13.21_sumner_speech.pdf (rebutting anti-copyright arguments to show that strong intellectual property laws are more crucial in the digital age than ever).

models out and ushering new ones in. The challenge is in the identification of the new models worthy of encouragement and, then, in maintaining the balance between spurring these policy goals while leaving the business enterprise as “free” as possible.

I do not purport to know which new business models will be ideal in the post-revolution television industry. Indeed, beyond illustrating that other models exist and that they are already arising and starting to attain some degree of success,¹³³ I will not speculate at all on which direction television *should* go in the future or which business models *should* be encouraged. Indeed, my position is that *no one* can purport to know the future from the mid-revolution position vantage of the industry we currently have.¹³⁴ Rather, I merely assert that the traditional business models, and the stool model in particular, have largely reached the end of their usefulness, that new experiments can and are being carried out, and that the law should enable such experimentation.¹³⁵

133 See, e.g., *supra* Part II(C).

134 See Shirky, *supra* note 9 (discussing the arbitrariness of historical revolutions and the unpredictability of which experiments will stick and which will be rendered irrelevant: “During the wrenching transition to print, experiments were only revealed in retrospect to be turning points. . . . The importance of any given experiment isn’t apparent at the moment it appears; big changes stall, small changes spread. Even the revolutionaries can’t predict what will happen”).

135 Though I do not support any single experiment above another or pretend to know which ones will prove successful, I do think it appropriate that I mention a few examples of the types of experimental business models to which I am referring. Some are currently being carried out while others may be carried out in the coming years. These examples include: subscription based models like Netflix and HuluPlus, dual revenue models that couple subscriptions with ad-based sponsorship, inbound advertising models comprising commercials people watch by choice, less disruptive advertising such as banners and product placement, hyper-personalized advertising allowing fewer commercials to be much more effective, state sponsored television like the BBC, donation-based television like PBS, more limited versions of the stool model for areas such as live sports and news where the three assumptions may still stand, any combination of the above, and many other models that neither I nor anyone else have yet thought of. Some of these business models may change the world while others may be complete failures. The point is that the law should help create an environment where all may be tested and tried. The essence of my thesis and the end result of the revolution is that if the law enables these experiments to be

A public policy naturally arises from my assertion that old models have run their course and that new models should be encouraged. I will refer to it as the “shake-it-up” policy. That is, while it would be a mistake for the law to force or even favor a particular business model for the future of television, the law may facilitate the television revolution by encouraging experimentation with new models. The law can help by making it as easy as possible for the industry to “shake it up,” to sort out the disparity between the old business and the new technology, and to find a new status quo that will work for the coming decades. Of course, the policy has boundaries within which it is most likely to succeed. For example, no business model ought to be encouraged until there is good reason to believe that it is actually working,¹³⁶ and even then the law should only favor the merits of the business model insofar as they benefit the public.¹³⁷ But, within these boundaries, the law will best serve the public by helping the industry to shake it up and sort out the business/technology tensions that exist within it.

Make no mistake. The television revolution is unavoidable. Old, ineffective business models will continue to crumble while newer ones continue to encroach and find success no matter what the law does within reason. But the shake-it-up policy will speed the revolution along, and that is a good thing. The wisdom in comedian Jerry Seinfeld’s suggestion for

conducted, something will eventually work. A model that begins as an experiment will ultimately reinvent television and, unlike the stool model, it will do so in a way that does not arbitrarily limit technology.

136 Determining what is “working” is, of course, a challenge in and of itself. Though the details of what might characterize a “working” model fall largely outside the scope of this Comment, a business model may be considered to be “working” if it does at least two things: 1) The business model respects and deals with copyrights so as to promote and enable the development of new, high-quality content, and 2) The business model does this without arbitrarily placing significant limits on what technology is allowed to do.

137 In other words, attainment of enormous financial benefits by leaders of the industry, while acceptable, should not in itself be considered a criterion of the success of the industry. The central question must only be how successful the industry is at serving the needs of the public.

minimizing the awkwardness arising from breaking off a relationship—“[J]ust do it like a Band-Aid. One motion, right off!”¹³⁸—is very applicable to the television revolution. The sooner the television industry is “shaken up”—the sooner that old models lose their stranglehold to allow new experiments to flourish on their merits—the less painful the revolution will be for everyone,¹³⁹ and the sooner everyone will be able to enjoy the revolution’s considerable benefits.¹⁴⁰

B. An Illustrative Example—*Fox v. Dish Network*

Even if the shake-it-up policy makes sense in theory, a practical element remains for our consideration. What should the shake-it-up policy actually look like in practice? To address this, I first note that, while the shake-it-up policy might well be applied by lawmakers and policy-

138 *Seinfeld: The Ex-Girlfriend*, (NBC television broadcast Jan. 23, 1991), available at <http://www.pkmeo.com/seinfeld/exgirl.htm>.

139 Surely many industry leaders relying on the stool model would dispute the overarching term “everyone” as it is used here. However, while a literal interpretation of “everyone” may overstate the case somewhat, there is good historical evidence that even many defenders of the status quo will ultimately benefit from an upending of that status quo if it enables the industry to be restructured more sensibly. Mark A. Lemley, William H. Neukom Professor of Law at Stanford Law School, gives a speech in which he identifies numerous historical instances in which industries seemingly threatened by new technologies actually came away from rough patches stronger than ever, thanks to the technology. Mark A. Lemley, *Is the Sky Falling on the Content Industries?*, 9 J. TELECOMM. & HIGH TECH. L. 125 (2011). Among the examples Lemley includes are the artists threatened by photography which would render painting obsolete, the musicians threatened by the player piano and gramophone which would render live performances of music unnecessary, the music industry threatened by the advent of free radio which would eliminate the public’s willingness to pay for music, the publishing industry threatened by the photocopier which would eliminate any need for published books, and the video content industry threatened by the VCR which would devastate the media content markets. *Id.* Of course, in all of these cases, the “threats” not only turned out to be overrated, but, in many cases, the industries were significantly bolstered by the threats in the end. *Id.* For example, the VCR did not hurt content producers but, rather, made possible the entire video market, which has become an extremely important part of the total content market that these producers serve. *Id.* Thus, it is not always just the consumers who benefit from technological revolutions, but often the companies within the industries as well. *See id.*

140 *See supra* Part II(C).

shapers in all branches of government, the judicial branch seems to be uniquely situated to promote the policy. This is because, of the three branches of government, the judicial branch is uniquely insulated from political concerns¹⁴¹ and dedicated to nonpartisanship.¹⁴² There is no doubt that money talks and that established industries wield influence as to every branch of government, but, while powerful lobbies and “revolving door” politics¹⁴³ may help protect entrenched parties from sweeping statutory and regulatory changes, the judiciary is more insulated from such politics. The judiciary is positioned to promote ideal public policy without regard for the demands of campaign donors, the consequences of upsetting special interest groups, or the threat of unemployment due to the discontentment of a constituency.

141 Unlike the President in the executive branch and members of Congress in the legislative branch, judges are given life terms “during good Behaviour,” U.S. Const. art. III, § 1, and are appointed and confirmed rather than directly elected, *see* U.S. Const. art. II, § 2, cl. 2.

142 Indeed, the Supreme Court’s legitimacy derives primarily through the public’s perception of how well it maintains neutrality and fairly promotes justice. The judicial branch is not constitutionally endowed with power to the same degree that the executive and legislative branches are. In fact, the Court’s most significant power today, “the notion of judicial review[,] was far from resolved during the first years of the republic. . . . [W]ith its undefined powers and lack of real leadership, the judicial branch was largely viewed as the junior partner among the three branches. That would soon change, however, with John Marshall’s appointment by John Adams in 1801 [and Marshall’s subsequent reforming of the way the Court operated and his important *Marbury v. Madison* decision implementing the power of judicial constitutional review].” Scott Regan, *The Great Decision: Jefferson, Adams, Marshall, and the Battle for the Supreme Court* By Cliff Sloan and David McKean, 83-MAY FL. B.J. 62 (2009) (book review). Though the political neutrality of the Supreme Court has increasingly come under scrutiny, the Supreme Court is at least sensitive to this issue. *See* Chief Justice Roberts, *2011 Year-End Report on the Federal Judiciary* (2011), available at <http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf> (discussing the Court’s self-imposed code of conduct and the importance of recusal when an appearance of neutrality is threatened).

143 “Revolving door politics” refers to the tendency for important players in high levels of government and industry to move between the state and private sectors and the problems it can pose for the public as incentives and allegiances become misaligned and “regulatory capture” occurs. WIKIPEDIA, [http://en.wikipedia.org/wiki/Revolving_door_\(politics\)](http://en.wikipedia.org/wiki/Revolving_door_(politics)) (last visited Mar. 25, 2013).

Accordingly, I examine a case currently before the judiciary to illustrate how decisions might immediately be made to further the aims of the shake-it-up policy and to thereby facilitate the television revolution. *Fox v. Dish Network*,¹⁴⁴ a case currently before the Ninth Circuit, serves as an example of a prime opportunity that courts currently have to choose to protect entrenched, ineffective business models, or to choose to “shake it up” and help the accelerate the revolution.

Fox brought a preliminary injunction action to enjoin Dish Network’s PrimeTime Any Time (“PTAT”) and “Auto Hop” technologies.¹⁴⁵ Fox’s problem with these technologies is simple. The “Hopper”— a special DVR offered by Dish Network which embodies the PTAT and Auto Hop features that Fox opposes—allows users, as do most modern DVRs, to fast forward commercials,¹⁴⁶ to skip predetermined lengths of time, and to effortlessly select programming to record.¹⁴⁷ But the Hopper doesn’t stop there. The Auto Hop feature goes beyond *automatic* commercial removal—the unspoken “line in the sand” that had implicitly existed in the tense

144 *Fox Broadcasting Co. v. Dish Network*, L.C.C., No. CV-12-4529 DMG, 2012 WL 5938563 (C.D. Cal. Nov. 7, 2012).

145 *Id.* at *1.

146 There seems to be little doubt after *Sony Corp. of Am. v. Universal City Studios, Inc.* that recording television broadcasts in order to “time-shift” the programs and watch them later is a copyright fair use. 464 U.S. 417, 447-56 (1984) (“it supports an interpretation of the concept of ‘fair use’ that requires the copyright holder to demonstrate some likelihood of harm before he may condemn a private act of time-shifting as a violation of federal law”). Once time-shifted, broadcasters may prefer that users keep their eyes glued to entire broadcasts, advertisements and all, see Kramer, *supra* note 106, but using the fast forward operation of the VCR has not been considered illegal. See also *infra* text accompanying note 148.

147 See *Fox*, 2012 WL 5938563, at *2-4. See also DISH NETWORK HOPPER FEATURES, *supra* note 53.

industry since the advent of the DVR¹⁴⁸—to essentially provide a *manual* commercial removal service,¹⁴⁹ while the PTAT feature allows effortless recording of both programming *selected* by the user and programming that the user had *not* selected or even necessarily heard of.¹⁵⁰

148 After “the networks’ attempt to thwart the DVR’s cousin, the videocassette recorder (“VCR”),

failed miserably in *Sony*,” the networks proceeded cautiously in their litigation efforts to “curb the outer boundaries of DVR technology.” Ned Snow, *The TiVo Question: Does Skipping Commercials Violate Copyright Law?*, 56 SYRACUSE L. REV. 27, 29 (2005). Specifically, they focused their energy toward defending a new line in the sand—that technology not allow commercials to be removed from recordings completely. Notkin, *supra* note 90 at 913-14. Notkin describes the line in the sand between fast-forwarding and automatically skipping commercials (embodied in a feature called “AutoSkip” that was offered by SONICblue in its ReplayTV DVR in the early 2000s):

One might wonder why the media and broadcast companies sued SONICblue over AutoSkip when [competing DVR, TiVo,] also features a fast-forward button that allows commercials to be skipped over. The difference here was that ReplayTV’s AutoSkip feature automatically deleted the commercials, so that viewers could not scan commercials at high speed like they do with TiVo. As a result, ReplayTV users would not even be aware of who is advertising during a program, preventing them from rewinding and viewing a commercial that might be relevant to them.

In addition, the plaintiffs may also have been taking advantage of an opening proposed by the district court in *Sony*—that commercial-skipping in VCRs was “too tedious” an activity to truly pose a threat. By stressing that AutoSkip was a vastly easier way to allegedly infringe on programs, the plaintiffs sought to further differentiate their claims from the technology in *Sony*.

Id. Further, as it turns out, there is actually empirical evidence supporting this distinction between commercials flashing by and being removed completely. One study goes so far as to suggest that viewers actually get *more* out of advertising when they focus on it flashing by as they attempt to fast-forward through a commercial break without going too far. See Elizabeth A. Thomas, *Pilot Study: Measuring Uses and Gratifications of Digital Video Recorders in Modern Television Viewing*, 2 J. MASS COMM. & JOURNALISM 109 (2012) (“In the process of fast-forwarding, viewers must pay attention to passing images and are capable of not only recognizing advertisements but altering their viewing to incorporate DVR use. . . . Visual cues within advertising are often provocative enough to

The significance of these technological innovations must not be underestimated. While some may argue that Fox's injury is more imagined than real,¹⁵¹ most would agree that Fox's claim for injury is legitimate. This time, it really hurts.¹⁵² First, there is the shift from *automated* commercial removal to the *manual* ad-removal service offered by the Auto Hop feature. While automatic commercial removal has certainly proven to be a thorn in the side of the stool model,

stimulate action – stopping viewers from fast-forwarding through ads. Still, the idea persists that when viewers do fast-forward through television advertisements, the ads have a reduced effectiveness. This broad assumption ignores the fact the DVR owners report watching more television, using their DVRs for the primary benefit of time shifting – and not fast-forwarding through advertising. The central motivation for using DVR technology is the ability to watch programming at convenient times. In attempting to avoid advertising, most viewers do, in fact, pay attention to their TV screens. Doing so may result in viewers inadvertently paying even more attention to advertising messages”).

149 *Fox*, 2012 WL 5938563, at *4 (“A technician views the recording, fast-forwarding through the program itself to the commercial breaks, to ensure that the marking announcement is accurate and no portion of the program is cut-off”).

150 PTAT records what Dish Network configures it to record once the viewer merely turns it on. While users may choose to manually opt out of recording certain programming, “the default settings cause the Hopper to record the *entire primetime window* on all four of the major networks, including Fox, every day of the week.” *Id.* at *3 (emphasis added).

151 *See, e.g.*, Brief of Law Scholars and Professors as Amici Curiae in Support of Defendants-Appellees at 33, *Fox*, WL 5938563 (2012) (No. 12-57048), 2013 WL 431699 (arguing that “[t]he fears raised by the copyright holders in *Sony* and echoed by Fox in this case are as unfounded today as they were then.”); Lemley, *supra* note 139.

152 *See, e.g.*, Brief for Amicus Curiae Nat’l Ass’n of Broadcasters in Support of Appellants at 6, *Fox*, WL 5938563 (2012) (No. 12-57048), 2012 WL 6803505 (arguing that “[i]f not enjoined, the AutoHop service will cause irreparable injury to local broadcasters' ability to continue delivering valuable local and network programming to viewers free of charge. If advertising spots in broadcast programming—particularly the most popular network primetime programming—cannot reach viewers, broadcast programs will lose their value to advertisers, who will move their ads to competing platforms. Broadcasters, in turn, will have fewer financial resources to invest in producing and acquiring expensive local and network programming, including local news and critical emergency information. *Taken to its logical end, ad-stripped television could spell the end of free, over-the-air broadcast television and the important public interests it serves.*”) (emphasis added); Brief of the ABC Television Affiliates Ass’n et al. as Amici Curiae in Support of Appellants, *supra* note 98 (arguing similar themes).

at least it was prone to error and was equally harmful to all of the networks. It had its upsides.¹⁵³

Dish Network's Auto Hop service, on the other hand, works differently. With Auto Hop, commercials from networks that Dish Network selects are manually analyzed by technicians to create a software filter that, uploaded to users' Hopper devices, enables virtually perfect commercial skipping.¹⁵⁴ This threatens both to be more effective¹⁵⁵ and more prone to unfair competition¹⁵⁶ than anything the industry has yet faced.

Next, PTAT effectively offers users a free service that is almost indistinguishable from a service that would otherwise cost money. That is, with a one time flip of a software setting on the Hopper device, users can direct the Hopper to record *all* primetime programming¹⁵⁷ from Dish-

¹⁵³ See Thomas, *supra* note 148 at Abstract.

¹⁵⁴ Fox, 2012 WL 5938563, at *4.

¹⁵⁵ See *supra* text accompanying note 148.

¹⁵⁶ Amici for Fox argue that the unbalanced targeting of the major broadcast networks as the only networks to bear Dish Network's commercial removal creates an anticompetitive scenario. See Brief of the ABC Television Affiliates Ass'n et al. as Amici Curiae in Support of Appellants, *supra* note 98, at *3 ("It inflicts this harm, moreover, on a *discriminatory and anticompetitive* basis, targeting the most popular programming on the channels most dependent on advertising.") (emphasis added); Brief for Amicus Curiae National Association of Broadcasters in Support of Appellants, *supra* note 152, at *3 ("Dish Network's PrimeTime Anytime with AutoHop . . . strips every advertisement from network affiliates' copyrighted primetime programming streams *but, tellingly, not from competing primetime cable programming streams.*") (emphasis added).

¹⁵⁷ See *supra* text accompanying note 150. Importantly, what the Hopper considers "primetime" is also determined solely at Dish Network's discretion. As the case explains, "Dish determines the start- and end-time of the primetime block each night and, for certain types of programming, may alter the total length of the PTAT

recording." Fox, 2012 WL 5938563, at *3. The Court further notes that Dish Network has taken advantage of this sole discretion to ensure that the very best content will be available to its users: "For example, during the Olympics in July and August 2012, Dish altered the PTAT start- and end-times to accommodate certain Olympics programming on NBC. Additionally, Dish designates as primetime any program at least 50% of which falls within the prime time window, and that program is then included in that network's PTAT recording for that evening." *Id.* at *3 n.5 (citation omitted).

selected channels forever.¹⁵⁸ Once that setting is enabled,¹⁵⁹ the Hopper will record all programming that is broadcast from those selected channels during the hours that Dish Network designates. Practically, this provides users with access both to programming that they want to watch and would have selected to record regardless of the DVR they owned, as well as to programming that they did not select. Thus, without trying or even realizing it, the users may record programming that they would never choose to watch. This unrequested programming may likely just be recorded over after months of sitting unwatched on the DVR's hard drive.¹⁶⁰ But unrequested recordings may also comprise programming that the viewer had not heard of at the time of the recording but which he or she finds out about later, or programming that the viewer meant to record but forgot. Even if it can be argued that the never-viewed recordings do not hurt anyone, these latter examples threaten to steal real market share from an actual market important to the networks—video-on-demand.¹⁶¹

158 *Id.* at *3.

159 Notably, it turns out that the actor to configure this setting is of critical importance to the court, as minor an action as the one-time configuration of the setting may seem. *Id.* at *8-11. This is due to the court's reliance on the *Cablevision* case, *Cartoon Network LP, v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008), wherein a "remote storage DVR system" was distinguished from video-on-demand systems, which similarly allow viewers to stream programming held on servers maintained by content providers, based on the fact that viewers had to perform an action prior to the original airing of the programming. *Fox*, 2012 WL 5938563, at *8-11. However, although the *Fox* court finds that "Dish exercises more control over the copies than did the defendant in *Cablevision*," still, "it is not clear to the Court that this control, being exercised after the creation of the copies, is relevant to whether Dish causes the copies to be made in the first place." *Id.* at *10. In other words, Dish Network can modify the "primetime" start- and end-times all it wants without exercising significant control as long as all of it is done after the viewer configures the setting to begin with.

160 *Fox*, *supra* note 151, at *4. This benign case would almost certainly invoke the fair use protections of *Sony*.

161 There is arguably a huge difference in the analysis of the fourth fair use factor between unknowingly recording and later watching (arguably indistinguishable from video-on-demand)

In consideration of these unprecedented injuries to Fox's business, one may almost be tempted to feel sorry for the Big Media giant in light of the district court's ruling. The Central District of California denied Fox's motion for preliminary judgment.¹⁶² Specifically, the court analyzed the four traditional factors of preliminary injunction¹⁶³ to determine that Fox was unlikely to win on the merits of most of its claims,¹⁶⁴ that Fox had not sufficiently established that it would suffer irreparable harm without an injunction related to the claim that it was likely to win on the merits,¹⁶⁵ and that the remaining equitable factors were irrelevant in light of the

and unknowingly recording without ever watching (arguably harmless). *See Id.* at *13-14. Indeed this distinction could even be determinative in the court's overall fair use analysis. *Id.*

162 *Id.* at *19.

163 Specifically, the factors "[a] plaintiff seeking injunctive relief must show [are:] (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in its favor; and (4) that an injunction is in the public interest." *Id.* at *5 (citing *Winter v. Natural Res. Def. Council, Inc.*, 55 U.S. 7, 20 (2008)).

164 Fox, *supra* note 144, at *5-17. As can be inferred from the large number of pages in the range here, a large portion of the opinion focused on the analysis of this first crucial factor. While the court grapples with various unique claims asserted by Fox, duly running each through the intricacies of various important copyright law rules and principles, it suffices for my purposes here to say that the court ultimately concluded that Dish Network was most likely to succeed on the merits of all of the claims Fox could bring except one: Fox was considered likely to succeed on the merits of its claim that Quality Assurance copies of the programming that were created by the technicians as part of the ad-filter-making process were an infringement and not a fair use.

165 Specifically, the court determined that Fox would not suffer irreparable harm from the court allowing the Quality Assurance infringement referred to *supra* note 164 to continue. Fox, *supra* note 144, at *17-8.

court's conclusions on the first two factors.¹⁶⁶ Fox and Dish emerged from Round One and the Hopper is still on sale.¹⁶⁷

A significant blow to Fox notwithstanding, the district court's ruling is probably a step in the right direction. Allowing the Hopper to exist—to painfully force some of the staunchest defenders of the stool model to rethink that model and to innovate—will surely have the effect of thrusting the industry deeper into the revolution. It is the very essence of “shaking it up.” But, to be sure, while Fox loses this time, neither fairness nor public policy will favor Dish Network's emergence from the battle unscathed. Dish Network's stance may happen to promote innovation and revolution in this particular case, but that does not make Dish Network the “good guy” any more than Fox is a “bad guy.” Indeed, this case is not about good guys and bad guys, but outdated business models and new experiments promising to nudge the industry toward a brighter future.

In this sense, *Fox v. Dish Network* is an ideal case for the illustrative purposes for which I use it. Both parties are significantly coupled with and dependent on the institution that has to go—the stool model. Clearly, Fox is fighting to keep the third leg of the stool alive—to force people to keep watching commercials so that it can keep charging advertisers as it always has. But while Dish Network may be content enough to kick that leg out from under Fox, it, too, continues to rely on that assumption for its own business.¹⁶⁸ The best way forward is not to

¹⁶⁶ *Id.* at *19.

¹⁶⁷ Indeed, it is promoted most prominently on Dish Network's website and may easily be purchased there as of this writing. DISH NETWORK, <http://www.dish.com/> (last visited Mar. 25, 2013).

¹⁶⁸ I argue that Dish Network is every bit the part of the Big Media establishment that would fight to maintain the status quo of the stool model that Fox is. This can be seen in part by Dish Network's failure to create a truly disruptive technology like, for example, the one that SONICblue created, *see supra* text accompanying note 148, but, rather, to create a technology

encourage one embodiment of the stool model to hobble another in an unending struggle to be “king of the mountain.”¹⁶⁹ Rather, the industry will move forward by letting technology and new ideas for fully employing the technology *move* that mountain. Will there be casualties along the way? Will parties that made up an important part of the old establishment fall by the wayside while new parties make a name for themselves in the new establishment? Of course. But that is how it should be. That is business. That is revolution.¹⁷⁰

Of course, Dish Network’s victory of the district court battle for the preliminary injunction does not equate to the end of the war. Fox may be hurting now, but the threat to its business from upcoming appellate decisions far outweigh anything it has yet faced. Should the Ninth Circuit affirm the trial court’s denial of preliminary injunction and if, eventually, the Hopper prevails on the merits against the many challenges it will face, the revolution will move forward significantly. With the legal path cleared, other competing technologies will follow the Hopper’s lead.¹⁷¹ With a solid affirmance of the *Sony* doctrine that has largely governed the

that merely gave it a anticompetitive advantage against other players in the environment of the stool model, *see supra* text accompanying note 156.

169 The childhood game of “King of the Mountain,” wherein “children attempt[] to occupy the highest point on a raised platform or hill, while resisting attempts by other children to knock them off and replace them,” *King of the Mountain*, WIKIPEDIA, http://en.wikipedia.org/wiki/King_of_the_Mountain (last visited Mar. 25, 2013), (last visited Mar. 25, 2013), is an apt analogy for what Dish Network seems to be trying to accomplish with its rollout of the Hopper. Dish Network has seemingly perched itself atop “the mountain” in relation to its competitors at the expense of the advertising ability of major networks such as Fox. Even as it enjoys its reign at the top, however, it is aware that similar technology and other backlash is likely to soon knock it off its perch to continue clawing its way to the top with the rest of the competitors.

170 Or, in Clay Shirky’s words: “That is what real revolutions are like.” Shirky, *supra* note 9.

171 *See, e.g.*, Brief of the ABC Television Affiliates Ass’n et al. as Amici Curiae in Support of Appellants, *supra* note 98, at *18 (“If Dish’s gambit succeeds, its commercial-free television service is likely to be expanded, both to other [multichannel video programming distributors] and

industry for thirty years, technology is sure to advance quickly as the “shaken up” industry scrambles to come up with ways to make money in the brave new world. This scrambling will eventually lead to an industry that works. Some industry power may change hands as companies rise and fall, but, ultimately, the public will win.

C. Finding the Best Way Forward for the Courts

It is easy to make predictions, to paint pictures of a rosy future. It is easy to say what the law *should* do. But, of course, the rule of law demands that courts do much more than make sheer policy judgments. Even if it is good policy for the courts to shake things up and plunge the industry deeper into the revolution, the question remains as to *how* such judgments can legitimately be made. This question is clearly a more difficult one.

For the Ninth Circuit considering the preliminary injunction of *Fox v. Dish Network*, a good way forward has been proposed by the district court’s decision¹⁷² and by some of the amici.¹⁷³ For a future case that actually considers the merits of the Hopper or other similar technology, however, it may be more difficult to “shake it up” while also staying true to statutory mandates of Congress and giving due discretion to regulatory agencies. But, while the courts cannot implement the revolution alone—Congress and the relevant agencies have their parts to

beyond primetime. DIRECTV has already warned that it possesses similar commercial-skipping technology and is watching the outcome of this litigation”).

172 *Fox Broad. Co. v. Dish Network, L.C.C.*, 905 F.Supp.2d 1088 (C.D. Cal. 2012).. Specifically, the court adheres strictly to traditional analyses of copyright fair use, the preliminary injunction factors, and stare decisis to consecutively eliminate the validity of each of Fox’s claims.

173 See, e.g., Brief of Law Scholars and Professors as Amici Curiae in Support of Defendants-Appellees, *supra* note 151 at *28-29 (offering spirited defenses for the traditional, broad application of the *Sony* and *Sega* cases and concluding that: “The *Sony* and *Sega* cases have been a fundamental part of this evolution in television and technology, and this Court should affirm their ongoing viability by rejecting Fox’s attempt to narrow or eliminate their relevance”).

do as well—the judiciary does have tools that it can use. Accordingly, I conclude with a brief look at three possible principles that courts may follow to continue shaking up the television industry and facilitating the revolution.

First, courts should use preliminary injunctions judiciously. That is, when it comes to equitable relief, courts should err on the side of permissiveness. This is typically considered good policy anyway—injunctions should always be reserved for extraordinary cases.¹⁷⁴ In *Fox v. Dish Network*, the Central District employed this principle¹⁷⁵ and the Ninth Circuit should affirm. For this case and cases like it that will arise in the future, this principle will bear great fruit as it is combined with the rapid-moving nature of the industry. As litigation stretches out over months and years and entrenched models become weakened, new, experimental models tend to encroach and force the Big Media establishment to rethink its strategies.¹⁷⁶ This is a good thing. Every little bit helps.

Second, courts should make liberal use of the copyright doctrine of fair use. This doctrine was the key to the Supreme Court's blessing of a similarly disruptive technology—the VCR—in the 1980s,¹⁷⁷ and a broad application of the statutory factors of fair use can go a long way toward encouraging technology and forcing new business models to revolutionize the industry. Along

174 *Winter v. Natural Res. Def. Council, Inc.*, 55 U.S. 7, 24 (2008) (“A preliminary injunction is an extraordinary remedy never awarded as of right. In each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.”) (citation omitted).

175 *Fox*, 905 F.Supp.2d at 1096-97. (“An injunction is an exercise of a court's equitable authority, which should not be invoked as a matter of course, and only after taking into account all of the circumstances that bear on the need for prospective relief.”) (citation omitted).

176 For example, competitors of Dish Network who have watched the litigation closely have used the time to prepare to take advantage of a potential holding that functionality such as Auto Hop is legal. *See supra* text accompanying note 171.

177 *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

these lines, the fair use principles laid out in *Sony* should be strengthened rather than hobbled when they come into play.¹⁷⁸ *Sony*, in many ways, is the seminal case for the “shake-it-up” policy. No doubt, the technology at play today is distinguishable from the technology at play in *Sony*,¹⁷⁹ but the high-level principle embodied by the *Sony* decision is as true today as it was then: Do not artificially stifle technology that improves lives. Disseminate the technology and let enterprising new business models make sense of it in the market place. Things worked out after *Sony*.¹⁸⁰ They will work out again as this principle is followed.

Finally, third, courts should apply *stare decisis* liberally. There is a rich tapestry of case law permissive to new technologies and innovative uses of copyrighted materials.¹⁸¹ These

178 See, e.g., Brief of Law Scholars and Professors as Amici Curiae in Support of Defendants-Appellees, *supra* note 151 at *28-29.

179 Indeed, it might be argued that the Hopper technology is much more threatening to the television industry than the VCR ever was. It should be noted, however, that, in its day, many believed that *Sony* would spell the end of the television industry. See, e.g., *Home Recording of Copyrighted Works: Hearings on H.R. 4783, H.R. 4794, H.R. 4808, H.R. 5250, H.R. 5488, and H.R. 5705 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 97th Cong. 8 (1982) (testimony of Jack Valenti, President, Motion Picture Association of America, Inc.) (“I say to you that the VCR is to the American film producer and the American

public as the Boston strangler is to the woman home alone”). It was only in retrospect that it became obvious how benign and even helpful the *Sony* decision was to the entertainment industry. Lemley, *supra* note 139 at 128-29. While it may be difficult to believe now, history suggests that on the other side of the current revolution, cases like *Fox v. Dish Network* may appear similarly benign or helpful.

180 See Lemley, *supra* note 139 at 128-29.

181 See, e.g., *Sony*, 464 U.S. at 417 (holding that time shifting is usually a fair use); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (holding that parodies are presumptively fair use and that courts are not to consider the artistic merits of such parodies *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1993) (holding that “intermediate” copying as part of a process of reverse engineering may be a fair use if it is the only way that the information can reasonably be obtained); *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991) (holding that fact-intensive, non-creative works are likely to merit a thin copyright at best and only be protectable with very close copying).

permissive principles may be extracted from these cases and applied permissively to new technologies of today. For example, there is a question about how *Sega Enters. Ltd. v. Accolade, Inc.* should apply in *Fox v. Dish Network*.¹⁸² There are good arguments on both sides as to whether and how a case like *Sega* should apply,¹⁸³ and the court might have been justified either in applying *Sega* to the benefit of Dish Network or in declining to find that it was relevant.¹⁸⁴ The court advanced the revolution by construing the *Sega* holding broadly, and following this pattern in the future may go a long way toward further implementing the revolution while appropriately maintaining the strictures of the rule of law.

V. Conclusion

A revolution is happening in the television industry. It is ongoing—it has been building for years as technology has advanced and consumer demand has evolved, and it will continue to build for years to come. At the end of the revolution, television will hardly be recognizable as the institution it once was. The assumptions upon which it was built—that Big Media was needed to

182 *Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992) *Sega* was a case where the court found that intermediate copying of protected works in the process of reverse engineering could be construed as infringing even if the copies were not ultimately incorporated into an end product. However, the court concluded, in that case, that the intermediate copies at issue were a fair use since they were the only reasonable way that the information could be obtained that the defendants needed and the defendants actions were justifiable under public policy.

183 See *Fox Broad. Co. Inc. v. Dish Network, L.C.C.*, 905 F. Supp. 2d 1088, 1102 (C.D. Cal. 2012). (discussing the arguments for how *Sega* might be applied to settle the fair use question without a full-fledged analysis using the four fair use factors); Brief of Law Scholars and Professors as Amici Curiae in Support of Defendants-Appellees, *supra* note 151 at *28-29.

184 The district court ultimately declined to find that *Sega* was relevant, though it still declined to grant the preliminary injunction. *Fox*, 2012 WL 5938563, at *12 (following the discussion referred to *supra* note 183, the court concluded: “Therefore, the Court is not persuaded that *Sega* resolves the fair use inquiry. Accordingly it will examine the four factors set forth in 17 U.S.C. § 107”).

make good content and distribute it, and that doing so would allow Big Media to perpetually expose viewers to commercials that advertisers would be willing to pay for—are crumbling and will continue to crumble until they are another relic of the industry like the cathode ray tube. As technology continues to advance and old business models continue to deteriorate, the law should encourage experimentation in the industry. This may be done simply by declining to protect business models that no longer work—despite the money and power behind those models. Declining such protection will serve to “shake up” the industry in a way that will encourage experimentation, hard trade-offs, and innovation. These are good things. As experiments bear fruit and new business models that actually work emerge, the revolution will transpire more quickly and smoothly. At the end of it all, history suggests that both consumers and the industry will enjoy the benefit of a modern, revolutionized industry.