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# Streaming Continues to Redefine the Video Landscape: It's Past Time to Eliminate Legacy Regulations

**by**

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Regulations tend to live on long after competition corrects the perceived marketplace shortcomings that gave them birth. Video programming today provides a good example of this phenomenon. While developments in the Streaming Wars dominate the headlines and consumers' purchasing decisions, traditional multichannel video programming distributors (MVPDs) remain saddled with outdated and unwarranted burdens. It is past time for Congress and the FCC to level the playing field by eliminating or reducing regulations currently applicable solely to traditional MVPDs – including, but not limited to, those relating to navigation devices, program access and carriage, and network non-duplication and syndicated exclusivity – so that Americans can enjoy the benefits of unbridled competition among all providers.

A fresh and unbiased view of the video programming marketplace in June 2021 reveals conditions far changed from the bygone era when cable, direct broadcast satellite (DBS), and telco TV were seen as potential gatekeepers. On the streaming front, Netflix and Amazon Prime both have nearly five times as many total subscribers – 200 million and counting – as the top seven cable operators combined (43 million). Disney Plus has over 100 million subscribers. The list goes on: HBO Max (44 million), Hulu (42 million), Paramount+ (36 million), Apple TV+ (34 million), Peacock (33 million).

Content, of course, remains king, but as streaming gains importance, its role has evolved. The May 17, 2021, announcement that AT&T and Discovery will combine their media assets into a new standalone company, to be named Warner Bros. Discovery and whose total value is estimated at $130 billion, underscores this point. AT&T operates two traditional MVPDs, DIRECTV and U-verse, along with the AT&T TV virtual MVPD (vMVPD). Communications Act provisions and FCC rules concern themselves with attempts to leverage affiliated programming to advantage traditional distribution platforms such as these – but AT&T has made the financial decision to redeploy its WarnerMedia holdings in the fight against Netflix, which industry veteran Barry Diller recently declared the victor in the Streaming Wars:

> "Netflix won this several years ago, they're the only ones who have the scale and momentum to keep making these somewhat lunatic investments in programming," Diller, the chairman of IAC, said in an interview with Andrew Ross Sorkin. "You cannot compete with the momentum, the scale, no one will ever be able to do that."

In addition, Amazon is buying the storied MGM studio, home to James Bond, for $8.45 billion. Interestingly, analysts believe that Amazon sees video as a complement to its core ecommerce business, concluding that it is investing in content "[n]ot so much because it wants to own streaming, but because it wants you to keep coming to Amazon."

Meanwhile, streaming platforms – the software and hardware upon which video apps run – quickly are gaining power. At the end of last year, there were 50 million monthly active users of Amazon's Fire TV streaming devices. For a significant period of time during 2020, consumers that utilize Amazon Fire TV hardware could not access AT&T/WarnerMedia's HBO Max app. Comcast/NBCUniversal's Peacock app still is not officially supported. Peacock notes on its website that "some users have been able to sideload Peacock onto their Amazon Fire TV" but emphasizes that "sideloading is not supported by Peacock and is pursued at a user's own risk."

Roku, the top streaming platform with nearly 54 million active users, at present is involved in what I refer to as "app carriage disputes" with Alphabet/Google's YouTube TV, the second-largest vMVPD, and Charter Communications, the second-largest traditional MVPD. These contractual impasses follow on the heels of similar battles in 2020 with AT&T/WarnerMedia over the HBO Max app and Comcast/NBCUniversal regarding the Peacock app.

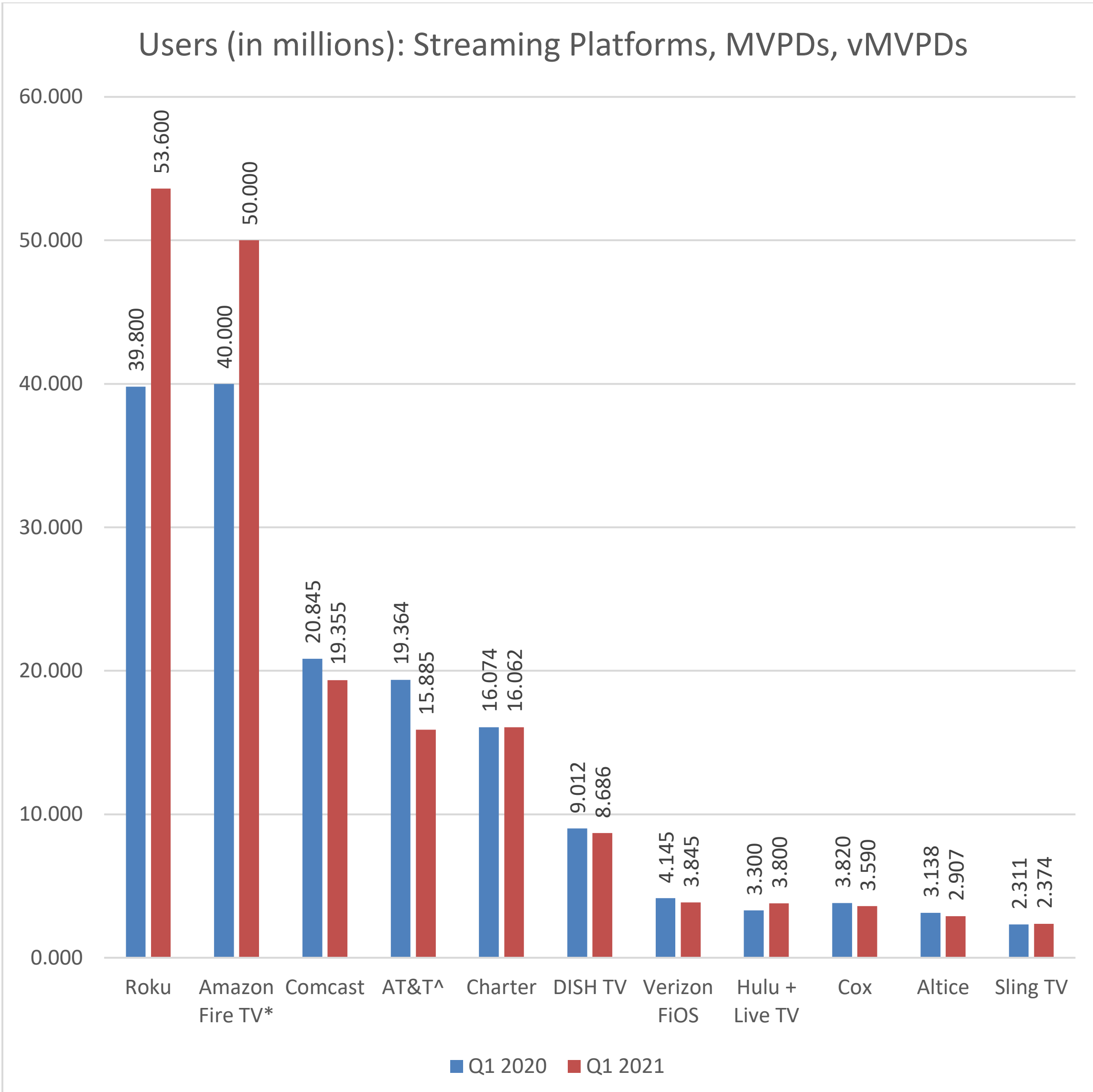
It is the ongoing fracas between Roku and big-tech titan Google, in which the former has gone so far as to label the latter an "unchecked monopolist," that has garnered the most attention, and understandably so. (Keep in mind that Google has its own streaming platform, Android TV, with 80 million monthly active devices – and which recently received a powerful shot in the arm when Walmart, a top-three retailer of streaming hardware, introduced two low-priced Android TV-based devices.) The parties dispute what specific issues serve as sticking points, but it appears that the most contentious topic is whether Roku will support a new, more bandwidth-efficient streaming technology. Development of the AV1 codec began at Google, but it is now managed by the Alliance for Open Media (AOMedia), the members of which include Amazon, Apple, CableLabs, Cisco, Facebook, Google, Hulu, Intel, Microsoft, Netflix, Samsung, and Vimeo.

At a high level, AV1 uses less bandwidth to stream high-resolution content, including 4K ultra-high-definition (UHD) and high dynamic range (HDR) video, but requires more capable – and expensive – hardware than Roku would prefer to incorporate into its devices. The positions of both Google and Roku have merit: fewer bits mean less data consumption and lower bandwidth requirements, while less-sophisticated hardware needs result in lower device costs. What's significant, however, is the identities of the players fighting to determine the future of video devices: streamers, not traditional MVPDs.

Indeed, many app "blackouts" involve traditional MVPDs – but in their roles as programmers, not distributors: AT&T, owner of DIRECTV and U-verse; Comcast; and Charter. As one journalist cheekily remarked, "Ah, the hunter has become the hunted! The blackout-er has become the blackout-ed! (Yeah, we're playing up the irony here.)"

The larger point, however, is that it appears that what matters to a programmer today is less whether its linear channel is carried by traditional MVPDs, and more whether its app is available on the largest streaming television platforms: "The OTT platforms' leverage is real. Both [Roku and Amazon] say they have more than 40 million active accounts (and growing). 'Amazon and Roku are beginning to play hardball with a lot of these services,' says Parks Associates analyst Kristen Hanich. 'They're a lot more powerful than they were three years ago.'"

As the multiyear downward trend in subscriber numbers for MVPDs continues, user totals for the largest two streaming platforms, Roku and Amazon Fire TV (note how the name "Amazon" once again appears in this discussion), are skyrocketing. The following chart, which depicts user growth (for Roku and Amazon Fire TV) and decline/stagnation (for traditional and virtual MVPDs) over just a twelve-month period, illustrates this well.




Sources: Roku, Amazon Fire TV, Comcast, *et al*. 2020 and 2021.
* Amazon Fire TV totals are from January and December 2020.
^ AT&T's totals include DIRECTV, U-verse, and its AT&T TV vMVPD offerings.

The delivery of video programming steadily migrates to the Internet. So, too, does negotiating leverage. Online video distributors and the developers of streaming platforms today appear to be the ones with the ability to bend others to their will. However, that is not to say that the reach of existing regulations should be expanded, or new ones imposed. As we witness time and again, where competition prevails, new rivals ascend, the once dominant fade, technology transforms, and the marketplace self-corrects.

Rather, the issue most pressing in a competitive environment with numerous heavy hitters and low barriers to entry is that laws and regulations that apply only to traditional MVPDs – cable, DBS, telco TV – make no sense and, more importantly, on balance harm rather than benefit consumers. Yet many remain on the books. Even more bizarrely, states like Maine and New Jersey continue to try to single out cable operators for additional obligations – prorated billing requirements, a la carte mandates – though the courts consistently have come to the rescue.

Certainly, in an environment where Netflix can demand that device manufacturers incorporate dedicated "Netflix" hard buttons into their remote controls and Roku, Amazon, and Google each have sold tens of millions of devices to consumers, Congress and/or the FCC should take the steps necessary to eliminate the ill-fated Section 629 implementing rules targeting the equipment leased by traditional MVPDs – practically speaking, cable operators. Government-led efforts to create out of thin air a retail marketplace for set-top boxes proved unsuccessful just after the turn of the century, yet the underlying congressional mandate lives on.

Likewise, the FCC should (1) terminate officially the long-dormant and misguided effort to expand the definition of an "MVPD" to include those that stream content over the Internet, (2) eliminate its program access and carriage regulations, and (3) repeal its non-duplication and syndicated exclusivity rules. Congress, meanwhile, should pass legislation such as the Modern Television Act of 2019, which, as Representative Steve Scalise (R-LA) noted when he and Representative Anna G. Eshoo (D-CA) introduced it, would "go[] back to basic copyright protection, so that everyone gets paid for their product, and consumers get to choose whatever they want to buy, wherever they want to buy it, whatever device they want to watch their video on."

Vibrant competition pervades the distribution of video content. An updated regulatory environment that reflects that reality would unleash the full power of the marketplace to the betterment of consumers.

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