INTRODUCTION

In August 2015, John Landgraf, the Chief Executive Officer of FX Networks, stood up before a room full of entertainment reporters at FX's semiannual presentation to the Television Critics Association and declared: "There is simply too much television."

The audience could be forgiven its surprise to hear the well-respected CEO of one of television's biggest success stories of the past decade make such a pronouncement. After all, since taking over the network in 2004, Landgraf had focused FX (a network whose early years were characterized primarily by reruns of *Married . . . With Children* and basic cable exhibition of major theatrical action films) on developing daring new original content, in substantial volume, and with great success. Bold shows like *The Shield*, *Nip/Tuck*, and *Justified*—characterized by high production values, edgy themes, flawed and complicated protagonists, and complex serialized storylines—helped define the prevailing style of premium television programming throughout the late 2000s and early 2010s. Landgraf had guided FX from relying primarily on outside suppliers to fill its programming hours to an integrated network/studio operation through which FX developed and produced much of its own best content (thereby reaping even greater financial rewards from its shows' success). He even helped launch a companion network, FXX, as a home for some of FX's more off-beat shows (and a means of expanding the network's available inventory of prime timeslots to bring new shows to market). At the time of Landgraf's 2015 speech, FX's brand was one of the strongest in television, and its approach to programming had proven highly influential on both traditional basic cable rivals such as AMC and upstart digital platforms like Netflix and Amazon.

And yet here Landgraf stood, warning an audience of expert entertainment journalists and other key industry figures of impending doom (or at least an impending slog through a painful period of slow deflation). By Landgraf's estimates, in 2015, the number of scripted original television series on the air in the United States would "easily blow through the 400 series mark," compared to a bit over 200 original series in 2009. The staggering supply of television options, Landgraf predicted, would overwhelm audiences, diminish quality control in series production, and lead to an eventual "messy, inelegant process" of Wall Street overreaction and industry weaning, in which only the largest companies with the most-watched shows, strongest brands, and deepest pockets could continue to thrive. (To be clear, Landgraf identified his own FX as one of a small number of players with enough high-quality series, brand equity, and financial wherewithal to weather the coming storm.)

Landgraf's August 2015 TCA is remembered today for one key phrase that the executive coined to describe the current era of overwhelming options: "Peak TV."

In the years since then, Landgraf's semiannual TCA address has become a highlight for its regular "Peak TV" updates, and Landgraf has continually updated and refined his data. According to estimates he presented during FX's December 2017 presentation, between 2002 (when FX launched *The Shield*) and 2010, the number of scripted original television series on the air in the United States had grown relatively modestly, from 182 to 216. By 2017, that figure had ballooned to 487 series.[2] Strikingly, these data exclude unscripted series such as documentary, game, and reality competition shows, which have not enjoyed FX's careful regular tracking, but have certainly also expanded over the last ten years as basic cable networks such as Bravo, E!, A&E, and TLC have invested heavily in the genre.

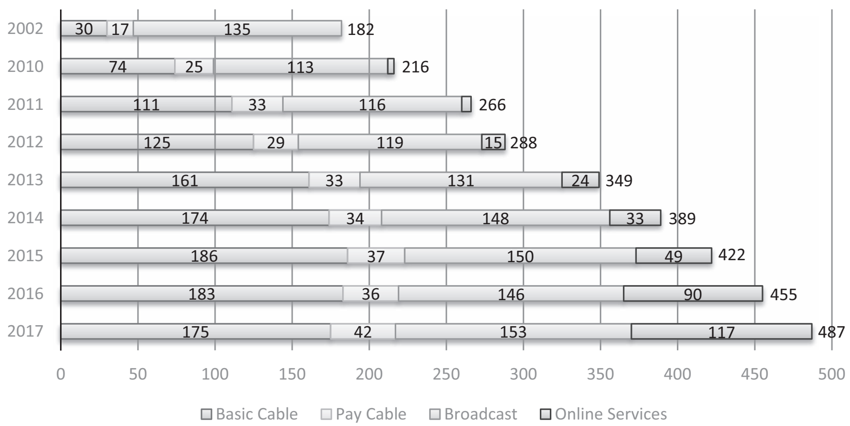

CHART 1 Volume of Original Scripted Television Series Production

2 That 2017 count also included exactly zero series from Apple, which declared its own entry into the market with a bang in June 2017, by hiring well-regarded executives Zack Van Amburg and Jamie Erlicht away from Sony Pictures Television to launch its new original content division. Apple is expected to start distributing new original series sometime in early to mid-2019.

In a May 2016 article clearly inspired by Landgraf's "Peak TV" addresses, entitled "The Business of Too Much Television," Vulture's Josef Adalian and Maria Elena Fernandez described the new normal in Hollywood as follows:

> As so many networks and producers scramble again and again to make television that's great, finding standout ideas and then turning them into actual shows has perhaps never been more difficult. The effort that goes into securing top writers, actors, crew members, and soundstages these days is almost as challenging as coming up with the idea for the next *Mr. Robot*. Overall spending is way up, but like the broader national economy, the wealth isn't being distributed equally. Movie stars are getting offered $5 million to do a single ten-episode season of a show, even as studios slash budgets for lower-level actors. Writers have plenty of job opportunities, but shorter seasons has meant more career volatility. Experienced showrunners are in high demand, yet they're unlikely to ever become as rich as a Dick Wolf or Norman Lear. Then there is the lingering fear, heard frequently in Hollywood conversations, that it could all go away at any moment.

Adalian and Fernandez provided a compelling on-the-ground account of how the "Peak TV" era was impacting talent, creators, and crew throughout the industry. Taking a broader birds-eye view, the era of "Peak TV" has a few key hallmarks worth expanding upon further here:

The first hallmark, emphasized by Landgraf and others, is volume. There have never been more television series being produced and exhibited in the United States (or, likely, the world) as in this moment. This is a function of having more platforms and networks producing original content than ever before, and also of having more original series per network or platform than ever before. This extreme volume directly informs many of Peak TV's other key characteristics.

The second hallmark is fragmentation. Simply put, the rate at which the supply of new television series has grown over the last decade—125% growth between 2010 and 2017, by Landgraf's estimates—has far outpaced population growth in the United States over the same period (about 5%, according to U.S. Census Bureau projections). And there certainly are not any more hours in a day than there used to be. The emergence of streaming platforms as major original content destinations (which happen not to publish their viewership data) has pulled eyeballs away from traditional broadcast and cable television series. The result, at least for those traditional series for which data are publicly available from Nielsen, has been shrinking audiences on a per-show basis, including among the most-watched programs. For the 2009–10 broadcast season, television's top series was Fox's *American Idol*, with 22.97 million average total weekly viewers, and an 8.35 average Nielsen rating (Live + SD) in the coveted adults 18-to-49 ("A 18–49") demographic (the most valuable demographic for advertisers). For the 2016–17 broadcast season, that title was held by CBS's *The Big Bang Theory*, with 14.03 million total viewers and a

3.10 rating in the A 18–49 demographic—a roughly 39% drop in total viewers, and 63% drop in the key ratings measure, compared to just seven years prior. For further comparison, for the 1996–97 broadcast season (before HBO premiered *The Sopranos*; before Netflix, Amazon Prime Video, or Hulu existed; and before basic cable networks began investing heavily in original series), television's top series was NBC's *ER*, with 33.91 million viewers and an 18.13 rating in the A 18–49 demographic. To explain these figures another way, the types of viewer counts and ratings that would put a show in first place in 2017 would have left the show at great risk of cancellation in 1997.

The third hallmark has been the emergence of the television blockbuster. In order to break through the clutter, networks and studios have continually sought to deliver more and more premium programming experiences. In practice, this has meant embracing higher budgets and production values, more beloved underlying source material, flashier talent in front of the camera, and more acclaimed writers and directors behind the camera. When Netflix debuted the first season of *House of Cards* in February 2013, its all-star offering of Academy Award winning actor Kevin Spacey (well before his subsequent fall from grace in the wake of serious sexual misconduct allegations in 2017) and A+ list writer/director/producer David Fincher was one-of-a-kind in television, and the show's reported estimated budget of $100 million over twenty-six episodes (about $4 million per episode) turned heads. By the time the series premiered its fifth season in May 2017, Spacey had been joined on the small screen by Hollywood luminaries such as Woody Harrelson, Matthew McConaughey, Nicole Kidman, Reese Witherspoon, Dwayne "The Rock" Johnson, Tom Hardy, and Susan Sarandon; prominent theatrical writer/directors such as Guillermo Del Toro, Steven Soderbergh, and Baz Luhrmann had followed Fincher to television; and $4 million per episode sounded like a steal next to the reported $10 million per episode spent on new series on Netflix and HBO. When the first *Lord of the Rings* film, based on the beloved series of fantasy novels by J.R.R. Tolkien, premiered in 2001, the idea of seeing such an iconic (not to mention visually extravagant, world-building-intensive) property on television might have been laughable; by 2017, Amazon was reported to have paid in excess of $200 million just for the right to produce a television series set in Tolkien's Middle Earth (excluding the further costs of actually producing that series). Television may have once been perceived as film's dorky younger brother industry, a less glamorous waypoint for theatrical stars and creators on the upslope or downslope of their careers, but certainly not a home for them in their primes. No longer.

This arms race has played out most starkly and dramatically among subscription-based services, such as Netflix, Amazon, Hulu, HBO, and (most recently) Apple. And one key factor driving their activity has been "cord cutting," the phenomenon of consumers canceling their traditional cable and satellite subscriptions in favor of consuming content through a variety of free over-the-air and Internet-based subscription services. While cord cutting continues to accelerate, the prevailing assumption is that consumers will only be willing to bear so many monthly subscriptions. These services are therefore rushing to amass as many subscribers as possible while there are still open subscribers in play. And their ongoing competition to secure the best projects and lure the most desirable talent has, in turn, driven up budgets and fees across the industry.

The fourth hallmark is essentially the inverse of the third, in the form of low-budget production and growing nichification. Not every player in the market has the resources to compete with the blockbuster strategy embraced by networks such as HBO, Netflix, and Amazon. And in a world where, as discussed above, the market is more fragmented (and amassing a huge and diverse audience is more difficult) than ever, some networks and producers have instead opted for a "moneyball" approach, favoring smaller production budgets and creative content which is meant to, and only needs to, appeal to more limited, specific audiences. As comedian and TruTV's *Billy on the Street* host Billy Eichner warned in a January 2018 Tweet ironically (and fictionally) quoting Dr. Martin Luther King, Jr.: "There are too many shows now. Your streaming or cable show, while critically well received, is ultimately too niche to sustain." "Unless," he might have added, "you can make it for really cheap." Any breakout hits from this category, such as unscripted television phenomena like *Shark Tank* (ABC), *Top Chef* (Bravo), *Duck Dynasty* (A&E), and *Toddlers and Tiaras* and its spinoff *Here Comes Honey Boo Boo* (TLC), can be regarded as windfalls.

Finally, the Peak TV era has been one of significant disruption and innovation in business and exhibition models. Technology companies with overwhelming financial resources, such as Google, Amazon, Apple, and Facebook, have sought to establish themselves as content companies, using television as their primary medium of choice. Advertising's long-time power as the dominant economic driver of the television industry has eroded, as technology has enabled many viewers to limit their exposure to ads, while other viewers have embraced the commercial-free environments of streaming and premium cable services. Netflix has built itself on the open infrastructure of the Internet, creating a subscription-based business while avoiding entanglements with traditional cable and satellite providers that other networks had historically relied upon to reach consumers. Amazon followed a similar route, but bundled its video subscription as part of a broader package of its retail, publishing, music, and other services. HBO, a more entrenched player that had long served a key role in the traditional cable and satellite television ecosystem, sought its own disintermediated relationships with consumers through its HBO Now offering. Netflix introduced the concept of the "binge viewing" experience, releasing all episodes of each new season of its original series at once rather than staggering their releases on a weekly, episodic basis. Amazon and Hulu experimented with hybrids of the new binge and traditional weekly episodic model. This experimentation has, in turn, impacted production schedules, as they evolve to meet new exhibition patterns that eschew traditional broadcast calendars. Exposure to streaming offerings has instilled in viewers a taste for on-demand viewing (in lieu of the traditional "appointment viewing" of linear network broadcast calendars), and traditional platforms have sought to develop technological solutions and business partnerships to respond to these evolving consumer preferences. And all of this experimentation has fundamentally challenged the traditional ways companies measure their return on investment in this space.

It is in this context of growth, disruption, peril, and opportunity that this book seeks to offer some measure of insight and clarity. Television may play a central role in millions of Americans' lives, but to the average viewer—and even to many professionals working within it—the industry's inner workings are obscure and opaque. This book seeks to demystify those inner workings by providing a clear understanding of the roles of the industry's key players; the life cycle of a television series; the key intellectual property issues impacting television development and production; and the essential deal structures that glue the industry's key players together. It may, at times, provide a handy "how to" guide for practitioners in the field. But more than that, it is meant to be a deep and broad resource to students and academics, current and aspiring professionals, and curious observers who want to better understand how the shows we love get made, and how they make money for the people and companies that create them.

1

A BEGINNER'S GUIDE TO THE TELEVISION INDUSTRY

A. What Is Television?

What is television?

As a threshold matter, understanding the business and law of television requires a working definition of the term. And while the general notion of "television" is no doubt familiar to everybody, a functional definition can prove surprisingly elusive.

Is television a technological medium? In its earliest iteration, television could be understood in essentially technological terms—a telecommunications medium for transmitting audiovisual information via radio frequency electromagnetic waves, typically in the "very high frequency" (VHF) or "ultra high frequency" (UHF) spectrum ranges. Yet from very early in the history of the television industry, alternative transmission media, starting with "community access television" (CATV) systems and later developing into cable and satellite systems (which rely on coaxial cable and microwave transmissions, respectively), challenged the completeness of this purely technical understanding of the term.

Is television definable as a creative medium with certain specific, consistent elements? Certainly, there are creative and production trends which are common to television programming, yet these trends vary and evolve across television platforms and over time, with lines that tend to blur. Program lengths vary. The line between comedy and drama is fluid. Shows may be serialized or episodic. Unscripted television both adopts and challenges traditional notions of television storytelling. "Second screen" experiences delivered via modern consumer electronics now do the same. Television has proven unsusceptible to an all-encompassing creative definition that is responsive to the medium's evolution over the years. At the same time, the rise of online video distribution, encompassing programming of all types and lengths, generated by a mix of established entertainment powers and individual upstarts, has further challenged any effective effort to contain "television" in a single box.

When commercial television broadcasting began in the early to mid-twentieth century, it was an ephemeral, unrecordable experience; broadcast over the airwaves; covered only a few hours a day (remember test patterns?); featured three principal sources of original content; displayed low-resolution, black-and-white images; and relied on boxes half the size of a refrigerator with screens barely larger than an iPad boasts today. Today, consumers take for granted virtually unlimited viewing options from virtually unlimited sources of content; recording, time shifting, and on-demand consumption; high-definition images sharp enough to see the pores on an actor's nose; and viewing devices ranging from pocket-sized smartphones to 75-inch high-definition screens with theater-quality sound. How does one unify these wildly different experiences in a single working definition?

This book will use, as its foundation, a brief but expansive definition of "television": the distribution of audiovisual content to individual consumers, at times and locations and on devices of their own choosing.

This vitally distinguishes television from, for example, theatrical feature film distribution, which essentially requires viewers to go from where they are to the content, rather than the other way around. Yet by this definition (and intentionally so), a YouTube video viewed on a smartphone and a Netflix original series viewed on a computer are no less television than a traditional one-hour drama broadcast on CBS and viewed on a television hooked up to a rooftop antenna.

Beyond the foregoing definition, there are three key consistent characteristics of television programming which are essential to understanding the web of deal structures that bind the television industry together.

First, television is a writer-driven medium. To understand the meaning of this statement, it is helpful to compare the role of the writer in television to that of the writer in the theatrical feature film industry. In television, in the vast majority of cases, the lead creative force behind a series (the "showrunner") is a writer. This is in contrast to feature films, where the director is typically the "auteur" creative force behind a production. In television, most of the credited producers of a series are writers, who shepherd the project throughout its life-cycle. In feature films, on the other hand, the writer's role is generally performed entirely during the pre-production phase, and writers have little or no ongoing role in the actual production of their scripts. In television, a pilot script is usually (though not always) written by a single individual or writing team, who conceptualizes the world of the series and takes the studio and network's notes throughout the series development process. This, too, is at odds with the feature world, particularly that of big-budget studio films, where writing is often effectively done by committee, with new writers commonly being hired to rewrite the work of previous writers, without working in direct collaboration with one another. Finally, in television, a pilot[1]—and sometimes even a series—is typically greenlit to production on the strength of a pilot script and the reliability of the writers and producers, with actors and directors being hired after the threshold decision to proceed to production has been made. This is also a major difference from feature films, where the attachment of one or more key actors (and typically a director, as well) is virtually always the necessary component that pushes a film project from development into production. The dominant role played by writers in the television industry manifests itself in the process, and the deals, that bring a series to life.

Second, television is a serialized medium. This may or may not be the case in a creative sense—some dramas, such as AMC's *Breaking Bad* or HBO's *Game of Thrones*, involve complex, arced storylines which unfurl over a period of years (and require that the viewer watch from the beginning of the series to truly follow along), while other types of shows, such as game shows, talk shows, multi-camera comedies (e.g., *Two and a Half Men*), and procedural dramas (e.g., "cop shows" such as *Law and Order*) integrate some serialized character or situational development, but can generally be understood and enjoyed in single-episode viewings. But from a production perspective, a successful television series is always an ongoing project, which requires creative and production continuity over a period of years (as distinct from a theatrical feature film, in which cast and crew together come together once, usually over a continuous or semi-continuous period of time, to produce a single closed-ended project). Consequently, the dealmaking framework of television protects the ability of parties to maintain continuity of production and distribution over a period of years.

Third, television as a business relies on a dual revenue model. In general, entertainment economics can be divided into two categories—"direct pay" and "advertiser-supported." The classic "direct pay" system is the theatrical feature film, in which viewers go to a movie theater and pay for a ticket in order to gain access to the product, with a one-to-one relationship between viewers and tickets. The classic "advertiser-supported" model is exemplified by terrestrial radio, in which entertainment is made freely available over the airwaves and collecting user fees is virtually impossible, so the money that makes the industry run comes from advertisers, who pay for the opportunity to convey their messages to customers.[2] The modern television ecosystem, however, features a combination of "direct pay" (in the form of transaction and subscription fees from viewers) and "ad support" (with advertising remaining a dominant presence on most

1 For the avoidance of doubt, a "pilot" (sometimes also referred to as a "prototype") is a standalone episode of a television series that is used to establish and demonstrate the style and content of a proposed television series, and to persuade a network to order production of a full season's worth of episodes for that series.

2 The classic, pre-cable broadcast television industry of the mid-twentieth century United States was similarly a fully advertiser-supported business. An alternative model can be found in the United Kingdom, where the government taxes television owners to support public broadcasting services. However, this public taxation system does not amount to a traditional "direct pay" system, in that television owners are taxed equally based on television ownership, without regard for the specific programming (or volume of programming) those device owners actually consume.

television platforms). In the long term (and as explained in greater detail in the chapters that follow), regardless of its initial distribution platform, virtually every piece of television content produced today is made viable through a combination of "direct pay" and "ad-supported" revenues.

B. Who Are the Players (and How Do They Interact)?

Who made the successful television series, *House of Cards*?

If you answered "Netflix," you would be wrong. Netflix exhibits *House of Cards* throughout most of the world, but the show was actually produced (and owned) by a company called Media Rights Capital, which is known primarily for its feature films such as the raunchy talking-bear comedy *Ted* (2012) and science fiction epic *Elysium* (2013). For *House of Cards*, Netflix acts in the role of a "network," while Media Rights Capital functions as a "studio" and "production company." This distinction is one of the centerpieces to understanding how television is created and monetized.

Like many other industries, the television industry is comprised of a series of independent actors with specialized roles who engage in transactions by which, collectively, they develop, produce, market, and distribute a product to consumers around the world. And, as in many other industries, the precise role played by all of the players is sometimes opaque to the consuming public. The following chart visualizes the major categories of entities in the television industry and the essential types of agreements that bind them to one another:

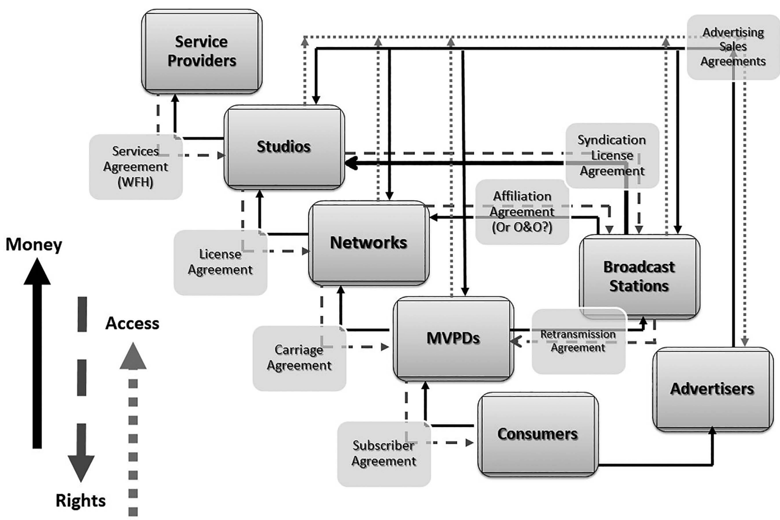

CHART 2 Structure of the Television Industry

(Note: All aspects of this chart will be explained in the sections that follow.)

In Chart 2, money generally flows upwards (via the solid black lines); intellectual property rights generally flow downwards (via the dark grey dashed lines); and access to the consumer (both via traditional advertising and more contemporary methods, such as product integration) is provided to advertisers (via the light grey dotted lines).

While the television industry (and its product) is certainly unique in many vital respects, it can also be substantially understood by analogy to the development, production, and distribution of traditional manufactured goods—for instance, a smartphone.

i. Service Providers (Talent)

Actors, writers, directors, producers, and other service providers—which, for purposes of this book, will be referred to collectively as "talent"[3]—are the day-to-day workers of the television industry. While the names and/or faces of the most prominent of these individuals may be familiar to viewers at home, most of these individuals are largely unknown to the general public (though, of course, many aspire to greater recognition and acclaim). In the smartphone analogy, they are the workers on the factory line.

The day-to-day work of developing and producing television content is generally performed by dozens or hundreds of freelance workers who are engaged to lend their expertise and labor to the production process. The most recognizable among these "workers" are so-called "above-the-line" talent—actors, writers, directors, and producers who centrally influence and guide the creative process, and whose names and images may be central to the public's interest in and recognition of a piece of content.[4] In broad, structural terms, however, these high-profile individuals occupy the same type of role as that played by editors, camera operators, electricians, carpenters, and the dozens of other types of crew members who participate in production (generally known as "below-the-line" crew). They are hired and paid for their creative and physical labor, generally on a show-by-show (or even episode-by-episode) basis. They primarily contribute their effort (and the creative fruits of that effort) to a project without making any direct personal financial investment. Consequently, while they may enjoy a

3 In the entertainment industry, the term "talent" is sometimes used to refer more narrowly to actors, and "talent agents and managers" to refer to agents or managers who specialize in representing actors, as distinguished from "literary agents and managers," who specialize in representing writers and directors. Unless specifically noted, this book will use "talent" to refer more broadly to any high-level creative service provider, including writer/producers, non-writing producers, directors, and actors.

4 The term "above-the-line" refers to the traditional format of budget "top sheets," which are summary pages outlining the major categories of expenditure and total costs of a production budget. Historically, costs associated with these high-level individuals, as well as writing and underlying rights fees, were displayed above a literal line on the budget top sheet, with the balance of physical production costs being displayed below that line.

financial interest in the success of a project (i.e., "backend") via a defined "contingent compensation" or "profit participation" formula (discussed in detail in Chapter 6), they generally have no ownership interest in the final product (even if they personally came up with the idea for it).

This category includes not only individual service providers, but also a variety of corporate actors, from physical asset vendors (such as caterers and equipment rental companies) to creative services vendors (such as visual effects companies) to so-called "production companies." Within this last category, companies may focus primarily on physical production (meaning the day-to-day management of all of the human and physical resources that go into the production process) or creative development (identifying, developing, and selling ideas or intellectual property as the basis for production). In many instances, such creative production companies are closely aligned with, or may even be a mere "vanity shingle" for, prominent individual members of the talent community. For instance, Amblin Entertainment is the production company founded and controlled by director Steven Spielberg, Smokehouse Productions by multi-hyphenate George Clooney, and Appian Way by actor Leonardo DiCaprio. Other prominent production companies such as Anonymous Content, 3Arts, and Brillstein Entertainment Partners are primarily talent management companies with deep rosters of successful writers as clients, which often results in these companies (and/or their principals) becoming attached as producers to their clients' projects. Although these companies may invest a limited amount of capital in their own salaries/overhead, or in preliminary development activity, they seldom provide direct at-risk production financing for projects, and often lay off their overhead costs onto studio partners[5] while recouping development costs from production budgets when projects actually proceed to production.[6]

These parties are generally in direct contractual relationships with studios, and although the details of these deals vary depending on the role these parties play in the development and production process (with some examples discussed in detail in Chapter 5), the unifying thread is that the studio that engages and pays a service provider is the owner of the results and proceeds of the service provider's efforts, as a work-made-for-hire under copyright law.[7] This status effectively empowers the studio to do whatever it wants with the product, in perpetuity.

5 This is often in the context of first look or exclusive overall deals, which are discussed in detail in Chapter 7.

6 The major exception here is Anonymous Content, which has partnered with Paramount Television as a co-producing studio on several projects.

7 The "work-for-hire" or "work-made-for-hire" is a concept arising under U.S. copyright law, which designates the employer of a party or parties creating intellectual property (e.g., writers, directors, and actors) to be the legal author and owner, from inception, of the copyright (and other intellectual property rights) of the employees' work. This concept is sometimes abbreviated as "WFH" (which abbreviation appears in Chart 2).

ii. Studios

Studios may be the most important players in the television industry that consumers know little or nothing about. These companies are at the center of the development and production of television content—sourcing ideas for shows from the talent marketplace, hiring and paying service providers, financing and managing production of shows, and generally owning the resulting intellectual property—but cultivate little relationship directly with consumers. In the smartphone analogy, they are the Chinese factories/manufacturers of the smartphone (e.g., Foxconn, the Taiwan-based manufacturing company which owns and operates the factories that produce Apple's iPhone).[8]

Studios operate a high-risk/high-reward business. Although much of the labor of production is outsourced to service providers who are engaged for active projects, rather than retained on salary, studios nevertheless operate a high-overhead business, employing significant numbers of full-time executives and support staff. Studios finance or co-finance development expenses for a large volume of projects, only a small percentage of which are ever likely to make it to production of a pilot, let alone a series. This is, in part, because studios depend on networks to order projects to production, and the vast majority of development projects will never cross that hurdle (and therefore never see a return on the studio's investments). Even projects that make it to production may cause the studio millions or even tens of millions of dollars in losses if they fail to find an audience and are quickly canceled by the commissioning network. But with a major hit such as *Friends*, *Seinfeld*, or the *CSI* franchise, the studio's profits can easily reach hundreds of millions of dollars—and these major successes are necessary to subsidize the higher volume of projects that fail while the studio is in search of that next big hit.

Studios are an essentially "B2B" (or "business-to-business") business, engaging in numerous vital transactions with more visible players in the television industry (such as talent, on the one hand, and networks, on the other hand), while often operating more or less invisibly to the general public. For most television series, the only outward identification of the studio is a two- to five-second logo at the conclusion of the end credits. Few television viewers could likely identify the studios behind hits such as *House of Cards*, *Breaking Bad*, or *The Big Bang Theory* (Media Rights Capital, Sony Pictures Television, and Warner Bros. Television, respectively), yet it is the studios that, in the long-term, will likely reap the greatest economic rewards of their shows' successes. Because most studios have little branding relationship with the general public, they will often seek to develop and produce a wide variety of very diverse shows, across a variety of networks/platforms, without necessarily forming a "house brand."[9]

8 This comparison is perhaps the most strained in the "television series as smartphone" analogy because in general, factories/physical manufacturers do not own or control the intellectual property of the products they produce. In the television industry, studios are the IP owners.

9 It is important to note that, just because a studio may not have a "house brand" from the perspective of the viewing public, it probably has a reputation within the industry itself—generated by the studio's

The aforementioned Media Rights Capital, Sony Pictures Television, and Warner Bros. Television are representative of "independent" studios, i.e., television studios that have no corporate relationship, or only a highly attenuated corporate affiliation,[10] with a network. Other prominent examples of independent studios include Paramount Television[11] (*13 Reasons Why*), Legendary Television (*The Expanse*), and Skydance Television (*Grace and Frankie*). The market is largely dominated, however, by studios that are directly affiliated and operated in conjunction with sister networks, who have a corporate mandate to supply programming to their sister networks (and whose sister networks have a corporate mandate to purchase programming largely from their affiliated studios). Such studios exist in connection with all types of networks, including broadcast (e.g., ABC Studios for ABC, CBS Television Studios for CBS), basic cable (e.g., FX Productions for FX, AMC Studios for AMC), premium cable (e.g., Showtime and HBO's studio arms), and streaming (e.g., Amazon Studios for Amazon Prime Video). Although television studios that are directly affiliated with a network typically develop and produce content substantially exclusively for their sister networks, such studios do occasionally produce for third-party networks, particularly where they have developed a series that is incompatible with the brand or broadcast standards of their affiliate. For example, all four studios affiliated with the four major broadcast networks have produced at least one series for Netflix.

The precise elements of the contractual relationship between a studio and a network for a given television series will vary depending on a number of factors, including the type of network involved (e.g., broadcast vs. cable vs. digital), the type of show (e.g., thirty-minute comedy vs. sixty-minute drama), and the relationship between the studio and network (e.g., independent third-party studio vs. affiliated company). In general, however, the relationship between studio and network is based on a license agreement, by which the studio grants the network specified, limited rights in the series.

iii. Networks

Networks are the first players in the television industry's chain of rights transfers who tend to maintain a direct relationship with the consumer. They function as aggregators and distributors, collecting a variety of television series produced

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own history of successes and failures in various formats and genres—as an effective/reliable or ineffective/unreliable producer of specific types of television programming.

10 For instance, Warner Bros. Television is part of a large corporate family that includes TNT, TBS, and a stake in The CW, but it is nevertheless generally managed within that conglomerate, and regarded by the broader television community, as an "independent."

11 Paramount Television is a division of Paramount Pictures, which is itself a subsidiary of Viacom. Viacom owns several cable networks (such as MTV), but the Paramount Television organization operates independently from the Viacom Media Networks.

by different studios but generally consistent with a network "brand," and then marketing—and, in some cases, directly delivering—that content to consumers. In the smartphone analogy, they are the consumer-facing brand and product wholesaler (e.g., Samsung, Apple, or Nokia).

Networks work hard (and spend heavily on marketing) to create a "brand" and to market that brand to viewers as a signifier of a certain style or quality of content, often embodied in a pithy advertising slogan, such as HBO's "It's not TV. It's HBO." Although consumers may not be able to put the perception into words, they generally associate networks with a specific type or style of series. A network's slate is, in the current television environment, generally a mix of content that it has acquired via license agreements with third-party studios/content owners, and content that it has generated in-house through a subsidiary studio or acquired via license from an affiliated studio entity.

The business models of networks have historically emphasized either the "direct pay" or the "ad-supported" revenue model, although modern trends have pushed networks to embrace a hybrid of the two. On one end of the spectrum are the broadcast networks (i.e., ABC, CBS, Fox, and NBC), which are freely accessible by customers across the country through their over-the-air broadcast signals. These networks primarily support themselves financially by selling advertising against their content, the value of which is tied to the volume and demographics of the network's viewership. Roughly speaking, the difference between the network's total advertising revenue, on the one hand, and the network's total content licensing costs, marketing expenses, and operational overhead, on the other hand, traditionally constituted the network's profits.[12] On the other end of the spectrum are "premium pay networks" such as Showtime and Starz, which generate 100% of their revenue from customer subscription fees, and promote their lack of advertising as a major attractive feature of their services. In between are conventional cable networks, such as FX and AMC, which generate revenue through a combination of advertising sold against their programming and carriage fees received from cable and satellite providers

12 Even broadcast networks, however, have begun to hybridize their business model. Broadcast networks generate ever increasing portions of their aggregate revenue through "retransmission consent fees" paid by cable and satellite providers (and financed by those providers through subscriber fees) in exchange for the right to carry and reproduce local broadcast stations' signals as part of the cable/satellite providers' subscription packages. In addition, all of the broadcast networks have either flirted with or actively launched Internet-based services, such as CBS's All Access, by which customers can access both local broadcast station streams and network library content over the Internet, through dedicated apps, by paying subscription fees directly to the network. In 2016, CBS made headlines when it announced that its new *Star Trek* television series (*Star Trek: Discovery*) would premiere on the CBS broadcast network, but thereafter be available exclusively through the CBS All Access subscription service. (However, CBS's focus on CBS All Access can be best understood not as a diversification of revenue streams, but a reaction to evolving consumer habits, which, in the twenty-first century, have moved away from traditional in-home, subscription-driven viewing experiences [a shift often referred to as "cord cutting"], and toward mobile and digital viewing experiences.)

(which are themselves driven by the overall level of viewership of and consumer demand for the network).

The particular revenue model of a network substantially affects how it evaluates its own return on investment and makes decisions about the shows it commissions and renews. For a traditional network that relies, at least in part, on advertising, the network's revenue is directly proportionate to the number of viewers that tune in to each show. This direct relationship between ratings and revenue makes viewership the essential measure of success for any given series. As a result, traditional broadcast networks, in particular, tend to commission "broad" programming that they hope will have wide, if potentially casual, appeal to viewers. On the other hand, for networks like HBO or Netflix, which eschew advertising and generate their revenue from monthly subscriptions, the goal of programming is not necessarily to attract as many viewers as possible, but rather, to attract new paying subscribers and to retain existing subscribers. As a result, such networks tend to prioritize exclusivity in their deals (in order to make their subscription services essential), and to look for a mix of larger series that achieve cultural ubiquity and must-see status (such as *Game of Thrones* or *House of Cards*) and smaller series that may not boast huge audiences but have dedicated followings (as when Netflix revived or rescued from cancellation series that had completed their runs on traditional networks, such as *Arrested Development* and *The Killing*). For these networks, show-by-show ratings may be less significant than overall brand-building across a portfolio, and there is greater reason to invest in arguably niche programs that command substantial loyalty from smaller groups of viewers. In any event, the performance that a network demands of one of its series is determined, in part, by the network's level of actual financial investment in that series. In other words, expensive shows may be required to demonstrate better and more immediate results than inexpensive series that the network can more easily afford time and opportunity to develop an audience.

New networks tend to follow a similar life cycle. They launch by offering a relatively low-cost mix of second-run content, filling their broadcast hours primarily with somewhat older theatrical motion pictures and/or reruns of preexisting television series from other networks. They eventually move into original series production but rely primarily on outside providers with established studio capabilities. Relying on outside studios reduces the need for costly overhead and infrastructure investments that come with building a studio, and gives the network superior access to the best show ideas, wherever they may come from. Once these networks have built an audience and a brand for their original content through their partnerships with outside studios, they tend to build their own studio operations, and shift toward ordering new shows primarily from their own in-house/affiliated studio arms. Two of the best known basic cable networks exemplify this process of evolution. In its early days, when "AMC" stood for "American Movie Classics," AMC was known for airing classic Hollywood films. It broke into original programming with shows like Sony Pictures

Television's *Breaking Bad* and Lionsgate Television's *Mad Men*. The more recent megafranchise *The Walking Dead* and its spinoff *Fear the Walking Dead* are produced by the affiliated AMC Studios (although, on balance, AMC Studios has struggled to generate other hits). Similarly, for years, FX's programming day was comprised primarily of reruns of broadcast network shows, such as *Dharma & Greg*, *Married . . . with Children*, and *Fear Factor*, and cable exhibition of major theatrical films (often those produced and distributed by the affiliated 20th Century Fox motion picture studio). It moved into original programming with shows like Sony Pictures Television's *The Shield* and Warner Bros. Television's *Nip/Tuck*. More recent hits like *American Crime Story* and *The League* have come from studio arm FX Productions, and the network has continued to lean heavily on studio affiliates 20th Century Fox Television (*American Horror Story*) and Fox 21 Studios (*Tyrant*), which also absorbed one-time sister studio Fox Television Studios.[13]

While all networks maintain a branding relationship with their customers, not all networks maintain a direct economic relationship with their customers. Just as Apple takes advantage of its status as a powerhouse consumer brand to operate its own Apple retail stores, certain networks maintain disintermediated subscription relationships directly with their customers. Netflix has done this since its creation. HBO began to do so only relatively recently, with the 2015 debut of HBO Now, a direct-to-consumer HBO subscription service that did not rely on cable or satellite television providers to offer customers access to the network.

However, operating its own stores makes Apple an outlier in the retail world. More often, brands market to consumers but do not sell to them directly; instead, they actually act as wholesalers, selling their products to retailers (who, in turn, sell those products through to the actual consumers). So, while Apple sells many of its smartphones at its Apple stores, its competitors like Samsung sell exclusively through third-party retailers like Best Buy.

The same concept holds true for most networks, which do not maintain one-on-one subscription relationships with their viewers. Instead, most networks enter into carriage agreements with multichannel video primary distributors, or MVPDs, such as cable and satellite television providers, who in turn bundle

13 It bears noting that, over the years, the broadcast networks have developed a similar preference for content that they (or their affiliated sister studios) own in whole or in part. In the case of the broadcast networks, however, this shift in business practice emerged as a result of significant regulatory change. In 1970, the FCC adopted a set of rules known as the "Financial Interest and Syndication Rules," or "fin-syn rules," which effectively prohibited the broadcast networks from owning the programming that they broadcast. These rules were somewhat relaxed during the 1980s, before being abolished entirely in 1993. The repeal of the fin-syn regulatory scheme precipitated a major shift by the broadcast networks toward ownership of their own programming, and with it, a substantial contraction in the marketplace of independent television studios (which found it increasingly difficult to compete with network-affiliated studios for scarce broadcast time, in light of the networks' significant financial incentives to favor their affiliated studios).

and actually deliver these networks into viewers' homes. Although the details of such carriage agreements are extremely complex and generally beyond the scope of this book, in general, these agreements provide for the MVPD to pay the network some portion of its collected subscriber fees in exchange for the MVPD's right to include the network as part of its channel offering to customers.

iv. Broadcast Stations

Broadcast stations occupy an unusual middle ground in the television industry landscape, one that does not neatly correspond to any analog in the world of physical goods.

Broadcast stations are usually closely affiliated with broadcast networks (i.e., ABC, CBS, Fox, and NBC) but are technically separate entities. Each broadcast station is an essentially local business, serving a defined geographic market that is usually based around a single major metropolitan area.[14] This distinguishes the individual stations from their affiliated networks, which are national in scope.

Every broadcast station in every geographic market—e.g., KABC7 in Los Angeles, CA, or WNBC4 in New York, NY—is a distinct business and a distinct corporate entity. In many major media markets, such as Los Angeles and New York, the broadcast networks actually own the local stations that carry their programming. Such stations are known as "owned and operated" or "O&O" stations. Other broadcast stations, particularly in smaller markets, may be owned and operated independently of the major networks and enter into "affiliation agreements" to gain access to such networks' programming. Many of these "independent" stations, however, are still parts of large "station groups" collectively owned by major media companies such as Tribune Broadcasting and Sinclair Communications (two companies which, as of early 2018, are seeking regulatory approval to merge).

Network-affiliated broadcast stations are generally provided with programming by their affiliated network for broadcast during morning and evening primetime hours. They fill the rest of the broadcast day (and unaffiliated stations fill the entire broadcast day) with a combination of original self-produced programming (most commonly local news); licensed reruns of television shows that were previously broadcast by a television network (so-called "second-run syndication licenses," usually for beloved half-hour comedies); licensed broadcasts of movies or other previously exploited programming; and licensed broadcasts of first-run original content produced by third-party studios or production companies ("first-run syndication," typically in connection with daytime talk shows such as *Ellen* [produced by Telepictures, a Warner Bros. Television affiliate] or

14 A few especially prominent stations, such as Atlanta's WTBS and Chicago's WGN, started out as traditional local broadcast stations but achieved "superstation" status by eschewing any affiliation with a major national broadcast network and securing nationwide distribution through cable and satellite services.

daytime game shows such as *Jeopardy!* and *Wheel of Fortune* [both produced by Sony Pictures Television]).[15]

Broadcast stations are also subject to an overlapping pair of regulatory structures, administered by the Federal Communications Commission (or FCC),[16] known as "must carry" and "retransmission consent."[17] By virtue of this regulatory framework, smaller broadcast stations (such as public television stations and other stations without a major network affiliation) generally exercise their "must carry rights" and compel MVPDs to offer their channels to local subscribers in their markets for no compensation (based on the premise that the public benefits from the broad availability of such broadcast stations). Larger broadcast stations (in particular, those affiliated with major networks), on the other hand, generally opt to negotiate "retransmission consent agreements," by which they receive significant fees from these MVPDs in exchange for allowing the MVPDs to include their stations in packages for local subscribers. These retransmission fees—which are technically unique to broadcast stations but essentially analogous to the "carriage fees" paid by MVPDs to networks—are typically split between the broadcast station and its affiliated network (an arrangement known as "reverse retransmission"), and represent an increasingly vital source of revenue for both broadcast stations and networks.[18]

v. MVPDs

Multichannel video primary distributors (MVPDs) such as Spectrum (formerly Time Warner Cable), Comcast, DirecTV, and Verizon FIOS are the television

15 The term "cable syndication" may be used to identify the licensing of library episodes of existing television series for reruns on a basic cable network (rather than on a broadcast station).

16 More broadly, broadcast stations are uniquely subject to regulation by the FCC, whose regulatory scheme is generally outside the scope of this book but dramatically impacts all aspects of the operation of these businesses.

17 Historically, prior to the advent of consumer satellite television services in the 1980s and telecommunications-based television services in the 1990s, a handful of cable providers maintained nearly monopolistic control over the market for multichannel television subscriptions, often engaging in minimal (if any) competition with one another on a geographic market-by-market basis. The prohibitively expensive cost of building cable wiring infrastructure posed a significant barrier to entry for would-be market challengers. The FCC's "must carry" and "retransmission consent" system was implemented as part of the 1992 United States Cable Television Consumer Protection and Competition Act, and offered broadcast networks and stations special protection in the face of the superior market power enjoyed by cable providers during this era. These rules are embodied in 7 U.S.C. Part II and were upheld by the U.S. Supreme Court in *Turner Broadcasting v. Federal Communications Commission*, 520 U.S. 180 (1997). In the intervening years, however, the pace of regulatory evolution has been slow, while the cable industry's market power has steadily eroded in the face of challenges from satellite and telecommunications-based television providers.

18 Between 2006 and 2014, aggregate broadcast station retransmission fees grew from $200 million per year to $4.6 billion per year, with analysts estimating that they could grow as high as $10 billion to $20 billion annually in the years ahead.

industry players that maintain the closest economic relationship with the customer, actually representing the point of sale where customers exchange their dollars for access to television programming. In short, they sell to consumers subscriptions for packages of various television networks. In the smartphone analogy, they are the retailer—the Best Buy or Verizon Wireless store that sells a wide array of different (and competing) brands in one convenient place.

Although the technical means they use vary from service to service (e.g., coaxial cable for cable providers; microwave transmissions for satellite providers; fiber-optic cable for telecommunications providers), MVPDs all provide essentially the same service to customers—a bundle of networks, delivered directly into the viewer's home. MVPDs maintain subscription relationships with customers, collecting monthly fees in exchange for access to the MVPDs' services. A substantial portion of these monthly fees are paid by the MVPDs to the networks on the MVPDs' services (in exchange for the MVPDs' right to offer such networks to their customers); in general, these carriage fees are denominated on a dollars-per-subscriber basis, with the most-watched and in-demand networks (led in recent years by ESPN, but also including prominent cable networks such as Comedy Central, MTV, FX, TNT, and AMC) commanding the highest carriage fees. Alongside the advertising revenue infused into the system at multiple levels, these carriage fees represent the essential economic fuel that flows through all of the other participants in the chain of television production and distribution.

Like brick-and-mortar retailers, who have to spend heavily on real estate or other physical overhead expenses, MVPDs invest significantly in the costly infrastructure needed to actually deliver access to television programming in viewers' homes. Like many retailers, they generally provide customers with access to very similar collections of products (i.e., networks) but compete with one another based on price, reliability, customer service, and overall customer experience. In marketing to consumers, they advertise both themselves and the products (i.e., networks) that they offer.

vi. Advertisers

a. Traditional Advertising

As described in Section A above, the television industry relies on a dual revenue model, which combines traditional "direct pay" (best exemplified by theatrical feature film exhibition) and "advertiser-supported" (best exemplified by terrestrial radio) business models. The "direct pay" revenue in this system originates with consumers, who pay subscription fees to MVPDs (such as Comcast, DirecTV, and Verizon FIOS) and direct-to-consumer "over-the-top" subscription services (such as Netflix, Amazon Prime Video, and Hulu, described in further detail in Section C below). These fees filter upward through the television ecosystem through the series of intermediary contractual relationships described above (in the form of per-subscriber fees paid by MVPDs to the networks they carry and license fees paid by networks to the studios that provide their content).

Advertisers, on the other hand, channel money into the television ecosystem at virtually every stage of the process. On average, approximately 25% of broadcast time on advertiser-supported television networks—eight minutes of each half-hour program, or sixteen minutes of each one-hour program—is dedicated to advertising. Although national networks—which offer the broadest reach to the biggest advertisers—realize much of this revenue, the available advertising inventory (and associated advertising revenue) is allocated amongst all of the players in the system, with MVPDs, networks, and studios all acting as sellers of advertising time.

For instance, carriage agreements divide available advertising minutes between MVPDs (who often sell their available advertising minutes to local advertisers on a market-by-market basis) and networks (who sell their available advertising minutes primarily to national advertisers).[19] Similarly, affiliation agreements between local broadcast stations and national networks allocate available advertising minutes during the day to each of the parties, with the national network controlling most or all of the advertising inventory tied to the network's nationally distributed programming, while the station controls most or all of the advertising presented alongside the station's self-produced or licensed syndicated programming.[20] In the world of first-run syndication (which is dominated by daytime talk shows and daytime game shows), licensee stations typically compensate the studios with a mix of cash license fees and "barter" advertising time—in other words, allowing the studio that produces and distributes a show to sell, for its own benefit, some portion of the available advertising time during the program.

In general, creative and production service providers are effectively shut out of the television advertising sales market, with studios and networks expressly prohibiting writers, producers, and other providers from accepting compensation from advertisers without the studio and/or network's explicit consent or control over the transaction.[21] Often, these last transactions take the form of product integration deals.

19 This allocation of advertising inventory explains why viewers of national cable networks may still be presented with advertisements for local businesses.

20 For this reason, local news programming—for which broadcast stations control the entire available advertising inventory—is especially vital to the economic well-being of broadcast stations. Local stations also make a disproportionate amount of their revenue during election years, when political advertisers—who usually target specific, narrow geographic markets—buy advertising time in great quantities.

21 Federal regulations, particularly in the broadcast television world (which is subject to FCC oversight), also require that broadcasters disclose payments made by advertisers in exchange for having their products used, depicted, or mentioned on television.

b. Product Integrations

"Product integration" (or "product placement") is a broad term capturing the paid use, depiction, and/or mention of an advertiser's product within a television show (or other filmed entertainment). Product integration/placement differs from traditional advertising in that it is incorporated—or "integrated"—directly into the television program itself, as opposed to being presented through obvious, separately demarcated advertisements that are broadcast before, after, or during the creative program.[22]

Product integration can take many forms, and many levels of obviousness to the viewer. Some advertisers pay a relatively modest fee just to have their products and logos appear visibly but passively on screen during a program. This is sometimes referred to as a "passive integration." For a higher fee, an advertiser may purchase an "active integration," under which the characters on screen actively touch and use the advertiser's products, typically without any special mentions but with logos that are visible and reasonably conspicuous on screen. (Think of a camera shot of a car approaching the camera, swiftly pulling over, and parking, with the car's front grill and logo prominently coming into focus as the car nears the camera. That car manufacturer probably paid tens or even hundreds of thousands of dollars for that shot.) Other advertisers pay an extra premium for characters to mention their products aloud by name brand, though many networks and studios shy away from such intensive integrations because of their obviousness to the viewer. As a result, in scripted television, such extremely active integrations are seldom seen outside of the context of daytime soap operas.

A related concept is the "commercial tie-in," an arrangement between a show and a brand, by which the brand provides advertising for the show as part of advertising its own products. For example, in the theatrical world, Marvel Studios has a long-standing commercial tie-in relationship with Dr Pepper, by which the soda company has released special edition cans with Marvel characters on them to support the launches of various Marvel Cinematic Universe features. Such "commercial tie-ins" may resemble merchandising, which also involves the incorporation of series intellectual property into unrelated commercial goods or services. Unlike merchandising, however, commercial tie-ins tend to involve changes in packing and/or advertising for existing products rather than the creation of entirely new products and are primarily a marketing-based arrangement. A "commercial tie-in" deal may be made on its own, or as part of a broader product integration and/or advertising relationship.

Product integration represents a balance between art and commerce, and partnerships with brands can be a welcome source of cost savings for television production. Many studios actively solicit "tradeout" deals, by which an advertiser

22 The financial and control issues around such integrations are discussed in greater detail in Section A.xiii of Chapter 8.

provides the production with free products which can be used as wardrobe, set dressing, or props on screen (thereby saving the studio the expense of buying or renting such items), but does not provide any separate compensation to the studio, or receive any separate assurances about the nature and extent of the depiction of the brand's products. Where an advertiser does pay cash compensation for an integration, the more conspicuously a brand is featured, depicted, and/or mentioned on screen, the more money the advertiser is willing to pay for the integration. But at some point, the obvious commerciality of such integrations can prove off-putting to viewers, as well as to writers (who typically don't want their creative work converted into an advertisement) and actors (who may feel that their participation in product integrations effectively converts them into indirect spokespeople for the brands).[23] As a result, most studios and networks seek integrations that are "organic" to the story being told, often favoring deals with everyday lifestyle products (such as cars, consumer electronics, and alcohol brands) that can be integrated seamlessly—and often solely visually—into the world of the television series.[24]

Product integration is often more conspicuous—and therefore more lucrative—in the world of unscripted programming. Because such programs are (ostensibly) "reality"-based and do not require a suspension of disbelief by the viewer, they are more amenable to intensive, conspicuous integrations. Sets can be designed specifically to highlight partner brands, as was the case on Fox's *American Idol*, which prominently featured Coca-Cola logos in set dressing and consistently depicted the series judges with large Coca-Cola logo cups in front of them at the judge's table. Individual segments or challenges of a competition program may be identified with a specific presenting sponsor, while major prizes may be expressly presented and funded by a specific brand. For instance, Glad Products, a company specializing in trash bags and plastic food storage containers, was for many years the presenting sponsor for the grand prize of Bravo's cooking competition series *Top Chef*; more recently, San Pellegrino Sparkling Natural Mineral Water replaced Glad as presenting sponsor for the grand prize.

Some networks have extremely particular policies about product integration, driven by other elements of the networks' business (or that of their parent companies). ABC holds itself to a higher standard of "family friendliness," including

23 Many higher-level actors—particularly those who have extensive branding or commercial endorsement relationships of their own to protect—seek to limit the extent to which a studio may compel them to use, mention, or otherwise participate in "active integrations."

24 An amusing counterexample is *Community* (originally broadcast on NBC and later on Yahoo! for its sixth season), which featured a prominent, multi-season integration program with sandwich chain Subway. Subway is integrated extensively throughout the scripted comedy, featuring prominently in major storylines, with one guest character even being named "Subway" and functioning as an explicit spokesman for the brand. The integration ended up serving as an amusing meta-commentary about product integration and television (while netting meaningful revenue for studio Sony Pictures Television).

with respect to its selection of integration partners, as a result of the network's status as part of the family-oriented Walt Disney Co. Amazon provides studios with a list of product categories that they can never integrate, because those products are competitive with Amazon's other consumer offerings. As a result, one can expect never to see an Amazon show that features an iPad (which competes with Amazon's Kindle tablets) or Google Home device (which competes with Amazon's Alexa-based line of products).

Product integration is particularly significant in digital series production outside of the premium, traditional television-like Netflix/Amazon/Hulu context, on platforms like YouTube, Verizon's Go90, and The CW's Seed. Although the license fees and advertising revenue shares on such platforms may not be sufficient to support larger-scale production, even in the short-form format more typical to such platforms, savvy digital producers have built partnerships with major brands, developing and producing entire series around products. Such arrangements go beyond both traditional advertising and even product integration, and the resulting productions are sometimes referred to as "branded content." In such deals, the brand sponsors can enjoy substantial creative input in exchange for covering most or even all of the branded series's production costs. For example, Funny or Die has produced original branded content in partnership with KFC, while AwesomenessTV has sold numerous brand-oriented or funded series to Go90, including *Royal Crush* (in partnership with Royal Caribbean cruise lines) and *Versus* (in partnership with Gatorade).

vii. Talent Representatives

The era of talent representation arguably began in 1898, when a German-Jewish immigrant named Zelman Moses, having adopted the anglicized name "William Morris," went into business as a "Vaudeville agent," starting the organization that would grow into the venerable William Morris Agency, regarded by many as the first great talent agency in show business. (The William Morris Agency merged with the Endeavor Talent Agency in 2009 to form William Morris Endeavor.) Talent representatives arose in the Wild West of the early twentieth century entertainment industry, when entertainers struggled to find work—and even more often, to get paid for the work they did—in America's emerging creative industries. Since then, agents, managers, and lawyers have played a crucial role throughout all areas of the entertainment industry, but arguably, nowhere is that role more visible—or more economically impactful—than in the television industry, where each of these players has carved out a specific and vital niche for themselves.

In considering the distinct roles played by agents, managers, and lawyers, as described below, it is important to remember that the distinctions among them may sometimes be more theoretical than practical. Every talent representative seeks to develop a trust relationship with his or her client and may be a creative partner, a personal confidante, a business advisor, and a networking resource all at once. While many writers and actors choose to have one of each of these professionals on their teams, some more established and successful individuals are content to have only one or two of the three, and the selection of which one or two depends entirely on the needs and desires of the talent and the nature of their relationships with the members of their team.

a. Agents

The principal job of a talent agent (whether that individual represents a writer, director, producer, or actor) is to find work for his or her client. Agents nurture close relationships with creative executives at various studios and networks, and keep a close watch on the development activities (and hiring needs) of these organizations. Using these relationships and this business intelligence, agents find and create opportunities for their clients, often serving as the client's first line of communication with studios and networks (or "buyers"). In addition, depending on the style and preferences of the individual agent and client, as well as the presence or absence of a lawyer on the team, agents may serve as frontline deal negotiators on their clients' behalf.

In order to act as a talent agent in California, New York, or Tennessee (the three hub states of the American entertainment and media industries)—that is, in order to "procure employment" for an entertainer—an individual must be licensed in accordance with that state's requirements. At the same time, agencies that represent clients who are members of the major entertainment guilds—SAG/AFTRA (Screen Actors Guild/American Federation of Television and Radio Artists), WGA (Writers Guild of America), and DGA (Directors Guild of America)—are also subject to franchise agreements with the unions, which functionally further regulate the agencies' businesses. In California, the governing statute is the Talent Agencies Act, or "TAA," and licensing is administered by the California Labor Commissioner's office. Among other requirements, licensed talent agents must submit their representation agreements for the Labor Commissioner's review and approval, comply with statutorily defined bond requirements, and maintain client funds in dedicated trust accounts.

Agents may play a significant creative role in their clients' careers, counseling them on what jobs to take or decline, advising them on what types of projects to develop based on the appetites of the market, and providing a creative sounding board for their clients' ideas. However, because many agents maintain large stables of clients at any given time, the level of creative attention they provide may be limited (a limitation which creates further opportunity for managers). In addition, franchise agreements with the unions historically prohibited agents from acting as producers on their clients' projects. (In more recent years, however, the breakdown of these restrictions has opened the door to the largest agencies taking more active positions in the financing and production of their clients' projects.)

Most people understand agency economics to be based on percentage commissions—indeed, agencies are sometimes slangily referred to in industry trade publications as "tenpercenteries," referring to the standard 10% commission charged by talent agencies on all revenues earned by their clients.[25] In fact, however, the major Hollywood agencies—currently, William Morris Endeavor ("WME"), Creative Artists Agency ("CAA"), United Talent Agency ("UTA"), and International Creative Management ("ICM"), with a second tier of "mini-major" agencies in Paradigm Talent Agency and The Gersh Agency—make the majority of their money from so-called "agency package commissions" paid directly to the agencies by television studios.[26]

One of the ways the agencies can create opportunities for their clients is by connecting them to one another, putting together compelling groups of talented individuals who can more effectively attract the attention and interest of studios and networks than any one of the clients could alone. Although this type of "packaging" takes place in the feature film industry as well as the television industry, it is especially prominent (and critical) in television. Starting in the early 1990s, agencies began seeking payment from the studios for the services rendered by the agency in effectively doing, on the studio's behalf, the job of putting together (i.e., "packaging") the major creative elements of a project. In exchange for this fee, in addition to having brought together the initial key creative elements, the agency promises to continue servicing the project's future creative needs, providing from its client base a steady pipeline of staffing writers, actors, and other mid-level and lower-level contributors the show will need to thrive in the future. If two major agencies combine to provide the key elements for a series, they may agree with the studio and amongst themselves to split a packaging fee, with each agency receiving a "half package." (Splits in thirds are also sometimes negotiated but are less common.) The agency's entitlement to a package commission on a project, also known as its "package position," is typically negotiated at the time development deals are first entered into between the studio and the major creative elements. These days, nearly every major scripted

25 In California, there is no statutory limit on commissions, beyond the legal requirement that they be reasonable. New York law sets statutory maximums on commissions depending on the nature of the client's work. The 10% benchmark is an enshrined maximum in the agencies' franchise agreements with the guilds.

26 This may also be in the process of changing. In the short term, the rapid proliferation and historically high budgets of digital series for platforms like Netflix and Amazon have generated increasingly lucrative up-front packaging fees to the agencies. As described in Section A of Chapter 8, however, in the long run these shows have lower maximum profitability, which means that the agencies have less and less opportunity to reap extraordinary profits from their backend interests in such productions. The gradual erosion in the value of agency package commission backends also informs the major agencies' shifts toward more direct roles in financing and production. For example, in 2017, WME launched a new studio venture under the banner of Endeavor Content, developing and financing projects with both WME clients and talent represented by other agencies. CAA has been more quietly developing some type of television studio venture with former ABC chief Paul Lee since December 2016.

television series includes at least a partial package commission that has been committed to one or more agencies in connection with the project. Moreover, although the term "package" is universally used to refer to the fees paid to agencies in such circumstances, increasingly, agencies demand and receive partial or even full package positions on the basis of a single major agency-represented element (such as a writer/creator who is qualified to showrun his or her own series, or a particularly prolific and well-established non-writing producer; in either case referred to as a "packageable element").

The particulars of how agency package commissions are calculated and accounted for are described in Section F of Chapter 5. As a courtesy to its clients, and to avoid any appearance of "double dipping," an agency that receives any share of a package on a television project does not collect a 10% commission from any of its clients who are employed on that project. As a result of both the prevalence and the value of these package commissions, they are often the key economic drivers not just for the major agencies' television businesses, but for their entire operations.

b. Managers[27]

The precise role of a manager varies widely depending on the particular relationship he or she shares with his or her client, but in general, compared to agents, managers are distinguished by having fewer clients, more intimate personal relationships with their clients, a more pronounced creative influence on (and creative participation in) their clients' work, and a more significant role in their clients' personal as well as professional lives. Managers may serve as consiglieres, best friends, surrogate parents, or creative partners—sometimes all at once. Compared to agents, managers are much more likely to invest significant time and effort developing young, inexperienced clients who do not yet have significant, obvious, and immediate employment and revenue-generation prospects.

Unlike agents, managers are unlicensed and unregulated. As a technical matter, this means that they are legally precluded from procuring employment opportunities for their clients, an activity which is legally reserved exclusively to licensed agents. In theory, therefore, the role of manager is intended to comprise a mix of personal support and general career advice, without crossing the line into generating work. As a practical matter, few managers would be willing or able to explain to their clients that, in fact, they cannot help their clients find arguably the one thing the clients (especially the young, poor ones) want more than anything: a job. This puts managers at constant risk of running afoul of the

27 For all purposes here, this book refers to "personal managers" as opposed to "business managers," a term that refers to finance/accounting professionals, typically CPAs, who more narrowly help manage their clients' income, savings, investments, and other economic affairs.

agency licensure laws, particularly California's TAA, whose application is determined by conduct (i.e., the act of procuring employment), not titles (i.e., whether an individual refers to him or herself as an "agent" or a "manager"). Managers who cross the line into acting as unlicensed agents by procuring employment for their clients risk not only having their representation agreements prospectively voided, but may be required to disgorge past commissions they have already collected. Where clients and managers find themselves at odds—a fairly common occurrence, given the intense personal elements of the manager-client relationship—these powerful legal remedies almost always give clients a significant upper hand in the dispute.[28]

Like agents, managers are commonly understood to work primarily for a percentage-based commission on their clients' earnings—often 10%, although some managers (who, again, are not subject to state licensure laws or franchise agreements with the entertainment unions) may charge as much as 15%.[29] However, like agents, managers in the television industry actually rely primarily on a different primary source of income: producing fees.

Unlike agents, managers are in no way prohibited from serving as producers on their clients' projects; this freedom is one of the major reasons why some experienced talent representatives prefer to function as managers rather than agents, despite the risks posed by the TAA and its remedies for unlicensed procurement of employment. Many managers (particularly "literary managers," who represent writers and directors, as opposed to "talent managers," who represent actors) view themselves primarily, or at least equally, as producers. And for such managers/producers, their primary source of new projects to produce is their own clients—who are often happy to have their trusted confidantes enjoy formal ongoing creative roles on their projects, and even happier to have those

28 For this reason, although the TAA nominally regulates agents, many industry observers regard it as essentially a defensive tool of talent agencies, allowing them to maintain a legal monopoly over the critical service of helping clients find work, and making them effectively essential to clients in a way that managers may not be. This perception is bolstered by provisions of the TAA that allow an individual to procure entertainment employment without an agency license, *if* he or she works alongside a licensed agent. In short, the TAA—which is invoked in roughly thirty lawsuits per year between disgruntled clients and their former managers—is the bane of managers' collective existence and has survived numerous constitutionality challenges brought by spurned managers. See, e.g., *National Conference of Personal Managers, Inc. v. Brown*, Case No. CV 12–09620 (C.D. Cal. Aug. 13, 2015). In 2008, however, the California Supreme Court created some relief for spurned managers through its decision in *Marathon Entertainment, Inc. v. Blasi*, 174 P. 3d 741 (Cal. 2008). In that case, the California Supreme Court held that the legal doctrine of severability could allow terminated managers to retain the right to receive compensation for legally provided non-procurement management services.

29 The scope of this commission may vary between agents and managers as well. Agents generally commission clients only on revenues earned from deals specifically sourced and/or negotiated by the agent, leaving the client's other revenue sources, investments, and business endeavors outside of the scope of the agency's commission. On the other hand, because managers may play a more involved role in all aspects of a client's life, some managers insist on commissioning all of the client's earnings from all sources.

confidantes waive their commissions because they are being separately compensated by the studio with their own producing fees.[30]

As a result, the major literary management companies, such as Anonymous Content (*True Detective*), 3Arts (*It's Always Sunny in Philadelphia*), Principato-Young Entertainment (*Wet Hot American Summer: First Day of Camp*), and Brillstein Entertainment Partners (*The Sopranos*), are also among the most prolific non-writing producing entities in the television industry, although some studio executives tend to regard them (rightly or wrongly) as "baggage" that they must deal with in order to get access to the managers' clients.

c. Lawyers

Finally, many clients retain lawyers as part of their representation teams. As with the other types of representatives, the precise role played by the lawyer varies depending on the preferences of the client, the skills and capacities of the client's other representatives, and the relationship between the lawyer and those other representatives.

In the simplest terms, the lawyer's role on the team is as negotiator and (of course) legal advisor. In some cases, lawyers enter the dealmaking process only after the client's agents have already negotiated the substantive deal terms in full, with the lawyer focusing solely on negotiating the resulting paperwork. Other times, lawyers work side-by-side with agents to negotiate the substantive deal terms, with the lawyer taking over the paperwork on his or her own once that phase of the process is complete. And in other cases, an agent who has sourced an employment opportunity will immediately step aside and allow the lawyer to serve as primary negotiator for all phases of the dealmaking process (although the agent, in such instances, would almost certainly remain engaged with the process behind the scenes). Entertainment lawyers, of course, must be qualified and licensed to practice law in their state and are subject to the same professional responsibility rules and fiduciary duties (including duties of loyalty and confidentiality owed to their clients) as all attorneys.

Although lawyers may enjoy the same type of close personal relationship with their clients as agents and managers, for the most part, the role of the lawyer is narrower than that of the other representatives (and as a result, lawyers may be

30 One of the most acrimonious disputes between client and manager was between the late comedian Garry Shandling and his former manager Brad Grey (who eventually left the management company previously known as Brillstein-Grey Entertainment to become the chairman and CEO of Paramount Pictures). Shandling's primary complaint in the dispute was that Grey received substantial fees and backend as a producer of Shandling's successful *The Larry Sanders Show* on HBO, while simultaneously commissioning Shandling's fees and backend from the series in his capacity as Shandling's manager. Although Shandling and Grey confidentially settled the dispute on the eve of trial in 1999, as a result of this high-profile and nasty litigation, most managers have become extremely scrupulous about eschewing such "double dips."

able to simultaneously represent a larger number of clients). Compared to agents and managers, lawyers typically have a much less significant role in generating employment opportunities[31] or advising on creative matters, although again, it all depends on the specific client and the specific lawyer. For instance, actor Bill Murray famously chooses to operate without an agent or manager, and to conduct all of his business through his attorney.

Unlike agents and managers, entertainment lawyers generally maintain a basic, one-dimensional revenue model—commissioning their clients' earnings from deals negotiated by the attorney, typically at the rate of 5%.[32] Lawyers generally do not enjoy any alternative revenue streams (such as package commissions or producing fees) that they could accept in lieu of commissioning their clients. As a result, some individuals—particularly those represented by major agencies that employ their own lawyers as "business affairs" executives and make these lawyers available to assist the agency's clients as a further courtesy service—prefer to reduce their overall commission obligations by eschewing lawyers and allowing their agencies to handle all aspects of negotiating the clients' deals, without the participation of outside counsel.

C. Online Video Distribution

The emergence of online video distribution—the FCC's preferred regulatory term for the market most people refer to as "streaming" or "digital video"—over the last ten years has presented the television industry with its greatest market challenges and its greatest market opportunities of recent history. Online video distribution represents, all at once, the death of some classic markets (having

31 To the extent that lawyers engage in procurement activity on behalf of their clients, if they do not simultaneously maintain an agency license (which would be unusual), they face the same TAA-related risks as managers. In fact, one 2013 case before the California labor commissioner suggested even greater risks for entertainment lawyers, by ruling that "acts undertaken in the course of negotiating for the employment of an artist"—in other words, the very heart of the service particularly provided by entertainment lawyers to their clients—constitute "procurement" for purposes of the TAA. *Solis v. Blancarte*, TAC-27089 (Cal. Lab. Com. Sept. 30, 2013). This decision would effectively render virtually every practicing entertainment attorney an unlicensed agent, violating the TAA on a daily basis. However, at least thus far, this case has not generated the same wave of TAA-based disputes between disgruntled clients and attorneys as has historically been seen between disgruntled clients and managers.

32 This fee structure is unusual among attorneys, who most commonly work for hourly fees. When considering only the highest-earning clients, it may also seem overcompensatory, especially since lawyers may continue to commission backend payments from successful projects long after the lawyer's active representation of the client has ended, as long as the fee-generating deals were negotiated during the representation. In fact, some higher-earning clients eventually seek to move their attorneys to hourly rates, rather than commission-based fee arrangements. Most lawyers resist this fiercely, however, as the valuable 5% commissions from high-earning clients are necessary to sustain the lawyers' overall businesses, and allow them to invest time and effort in representing less-lucrative, lower-earning clients (who may someday grow into high earners).

largely cannibalized the physical home video business), the birth of a new one (providing a valuable new medium/window for downstream distribution of traditional television programming), and the exciting new frontier in original content (with the major players investing heavily in original programming and emerging as vital buyers for new television content).

The field of online video distribution also exemplifies the growing role of "big data" in entertainment and media business decision-making. Digital platforms can aggregate far more, and far more detailed, data about the viewing habits of their customers than was ever possible for traditional networks. The volume and nuance of data collected by services like Netflix and Amazon dwarfs the information historically gleaned from traditional data companies like Nielsen. The extent to which these companies actually rely on these data, versus on the more traditional human decision-making associated with studios and networks, is unclear to outsiders. At a minimum, however, they certainly have access to insights about their customers that allow them to make smarter and more targeted decisions about which projects they should develop and produce, which stars and creators will resonate with their audiences, and how much money they should dedicate to each project. Some of the major players like Netflix and Amazon tend to be extremely proprietary with their data, being cagey about exactly what data they have and what metrics they rely on. They also tend not to publish detailed information about the number of people who view any given project (which allows them to better control public relations narratives about what shows are a "success"). Others, like Facebook (which has also been deepening its focus on Facebook as a content platform as well as a social media service) and Google aggregate and package the data they glean about their customers, and directly monetize them through their relationships with advertisers.

As these emerging businesses have looked to find their footing in the broader entertainment industry, they have both been heavily influenced by, and heavily influenced, traditional television businesses and structures.

i. Types of Online Video Distribution

Online video distribution can generally be broken down into a series of acronyms, which differentiate among these various business models by their method of monetization. Content licenses often distinguish explicitly among these forms of distribution; services, on the other hand, may expressly rely on a combination of one or more of these means of monetization. Digital buyers of content consider the prior streaming history of a television series in determining that series's market value, and prior exhibition via the same streaming model (e.g., subscription-based, ad-supported, etc.) is generally considered to have a stronger downward impact on the licensing value of content, compared to prior exhibition via a different streaming model. Although ongoing technological change will inevitably force further consideration of these labels in the future, for the time being, the world of online video distribution can be fairly reliably divided as follows:

a. SVOD

"SVOD" refers to "Subscription Video On Demand"—authenticated access for paying subscribers to a library of on-demand streaming content. The most recognizable providers of premium television content online, such as Netflix and Amazon Prime Video, generally follow a primarily SVOD-based model. SVOD constitutes a "direct pay" form of monetization, in that customers must pay for access to content, rather than receiving it for free in exchange for exposure to advertisements. However, it is an attenuated form of direct pay, in that customers pay for blanket access to a library of content, without regard to whether they are watching any specific piece, or any particularly quantity, of content (analogous to a customer paying for a subscription to a traditional pay television network like HBO, even if they may not watch every individual piece of content on that network).

b. AVOD

"AVOD" refers to "Advertising-Supported Video On Demand"—customer access to one or more pieces of on-demand streaming content, which is provided at no charge to the customer but is accompanied by advertisements (which may be "pre-roll" [i.e., before the content itself], "mid-roll" [i.e., in the middle of the content, like a commercial break], and/or "post-roll" [after the content is complete]). The Google-owned YouTube is currently the dominant market examples of a pure AVOD service, although more recently, the company has sought to diversify its business model by offering an SVOD variant called YouTube Red. Until 2016, Hulu also offered a subscription-less AVOD service, sometimes referred to as "Hulu Classic" (as distinguished from the company's subscription-based "Hulu Plus" service), although the company eventually merged its service tiers into a single SVOD/AVOD hybrid (i.e., a subscription-based service that also generates revenue by serving ads with its content).[33]

c. TVOD

"TVOD" refers to "Transactional Video On Demand"—paid access to content online, with purchase and/or rental fees paid on a specific product-by-product basis

33 More recently, in 2017, Hulu preliminarily launched a separate live TV streaming service essentially functions as, and competes with, traditional MVPDs. In putting together the service, Hulu notably reached an agreement with CBS—the only major broadcast network not counted among Hulu's owners—to include CBS-owned networks in its live TV streaming bundle.

(rather than for a blanket subscription to a library of content). TVOD can be further subdivided into "EST" (or "Electronic Sell-Through," referring to permanent downloads of episodes or series, akin to the purchase of a traditional physical DVD or Blu-ray that the customer gets to keep)[34] and "ERT" (or "Electronic Rental," referring to a temporary time-limited download/viewing right, akin to the rental of a traditional physical DVD or Blu-ray), although it bears noting that there is currently little or no active "ERT" market in connection with television (as opposed to theatrical feature film) distribution. Major TVOD services include digital marketplaces such as Apple's iTunes, Google Play, and Amazon Instant Video. TVOD is largely viewed as a successor to, and replacement for, the traditional home video market. Alongside traditional home video, it represents the purest expression of theatrical-style "direct pay" distribution/consumption in the television industry.

d. FVOD

"FVOD" refers to "Free Video On Demand"—access to digital content without a direct charge, subscription charge, or requirement of viewing ads. Because it is essentially a non-monetized business, FVOD has little practical role in the professionalized television industry, and typically appears, if at all, in the context of promotional exhibition of special feature-type secondary content (though even this type of content is often advertising-supported).

e. VOD

"VOD" just stands for "Video On Demand," and although the term is often used, it is essentially ambiguous and should be interpreted with care. VOD may act as a blanket term, which encompasses all of the above forms of Video On Demand exhibition. It may be used as a synonym for ERT, or may refer more narrowly to a free or ad-supported form of ERT that is offered through MVPD set-top boxes in connection with the customer's subscription to a television network included in his or her cable/satellite package. Of all of the acronyms involved in the alphabet soup of online video distribution, "VOD" can be the most ambiguous, particularly when used without a clear context.

f. Other Key Distinctions

In addition to identifying the method of monetization of digital content, licenses for digital exhibition generally must take into account a few other key factors

34 As a technical matter, some companies take the legal position that there is no such thing as a "sale" of digital content, and that even "EST" is merely a perpetual license to the consumer, not a "sale" as such. This fine legal parsing can have consequences for revenue accounting and piracy enforcement, but as a practical matter, is something of a legal fiction.

in defining the scope of such licenses (and therefore defining the scope of rights that are reserved and may be sold to another buyer).

First, streaming rights may be granted on a standalone basis, or solely a companion basis. "Standalone" rights are those granted to services that are inherently streaming-based, such as Netflix and Hulu. "Companion" rights are granted to traditional linear network licensees, who want to provide their customers (often subscribers, in the case of basic cable or premium pay television networks) with concurrent web-based access to the shows on their linear streams. These rights may be exploited through directly branded websites (such as ABC.com); directly branded mobile applications (such as HBO Go and FX Now); affiliated streaming services (such as Hulu, which is a joint venture of ABC, Fox, Comcast/NBCUniversal, and—most recently, as of late 2016—Time Warner);[35] or the MVPDs that carry a network (through set-top box on-demand offerings, which are tied to the customer's actual channel subscription package).[36]

Second, the status of "permanent downloads" is an important subject of current negotiation between content owners and digital content platforms. SVOD (as well as AVOD) services have generally been presumed to offer their content on a streaming basis—technically, this means that the customer never permanently downloads the content to the hard drive of one of their own devices, but accesses it through the Internet on a real-time basis (and therefore must be actively connected to the Internet in order to access the content). However, to manage bandwidth usage and improve customer experience, streaming services such as Netflix and Amazon have explored changing their technological model to allow subscribers to download content for permanent or semi-permanent access offline so long as customers maintain active subscriptions (akin to Spotify's strategy in the mobile music marketplace). This is sometimes called a "tethered download." Future generations of licenses will contain explicit terms governing this form of hybrid SVOD/TVOD exploitation. However, existing licenses that did not contemplate such exhibition must now be reinterpreted to account for such a practice, with licensees taking the position that subscription-authentication renders it subject to and included within their SVOD licenses, and licensors taking the position that the move toward downloading rather than streaming is outside the scope of the original licenses, requiring a renegotiation with (and further license fees from) the licensee.

Third, there exists a small marketplace—entirely separate from those introduced above—of linear digital services. "Linear" services are those that provide a continuous pre-programmed stream of content, via one or more channels, which

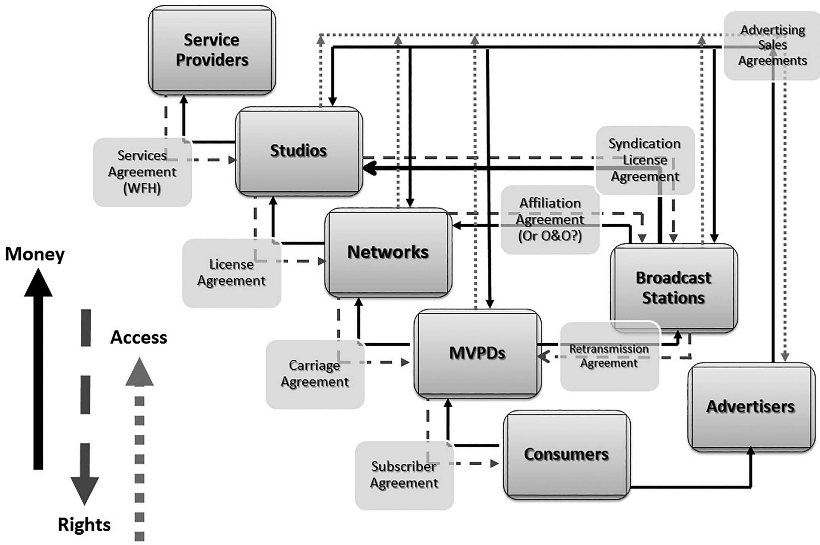
35 This ownership structure helps explain the availability of ABC, NBC, and Fox series—and the unavailability of CBS series—on Hulu in recent years. Instead, CBS has focused on using its CBS-owned and controlled series to develop and support its independent, proprietary CBS All Access platform.

36 These issues are also discussed in greater detail in Sections A.vi.b and c of Chapter 8.

is accessed by the customer by dipping into the stream at any given time. Such video services are digital and streaming, but are not "on demand," in the sense that the customer does not have on-demand control over what he or she watches and when. In other words, they resemble traditional free over-the-air television networks but are delivered over the Internet. To date, there has been limited activity in this space—which also occupies an arguably nebulous legal and regulatory position with respect to elements of copyright and communications law that governs linear broadcasts that are delivered to customers via more traditional technological means.[37] However, as the regulatory landscape clears up in the years ahead, it seems likely that linear (as opposed to on-demand) digital licensing will emerge as another market opportunity for owners of television content.

ii. The Roles of Digital Content Companies

In understanding the role of digital content platforms in the marketplace, it is helpful to refer back to our previous visualization of the television industry, at Chart 2 (repeated below). Most every major digital content company can be understood as occupying a specific position in that chart—and most every position in that chart has been taken up by at least one major digital content company.



37 Litigation involving Aereo, a service that allowed subscribers to view live and time-shifted streams of over-the-air broadcast television stations on Internet-connected devices, reached the U.S. Supreme Court in 2014, challenging the boundaries of copyright and communications law. An adverse Supreme Court ruling led the company to suspend business operations in June 2014 and declare bankruptcy in November 2014. *See American Broadcasting Companies, Inc. v. Aereo*, 134 S.Ct. 2498 (2014).

Most well-known digital platforms function primarily as networks. Netflix, Amazon Prime Video, and Hulu all function essentially as pay television networks in the mold of HBO and Showtime, charging subscription fees for access to their entire range of services (albeit without the intermediation of an MVPD).[38] Streaming service Crackle is the leading fully advertising-supported streaming service, resembling a traditional broadcast network that makes its content available to users at no direct charge and derives its income primarily through advertising revenue.

At the same time, the evolution of Netflix, Amazon Prime Video, and Hulu looks a lot like the evolution, one to two decades before, of prominent basic cable networks such as AMC and FX, which evolved over time from offering only second-run content that had already appeared in theaters or on television, to original content produced by third-party studios, to a mix of content produced by third-party studios and content produced by their own in-house/affiliated studio arms.[39] All three services' streaming offerings began with a focus on second-run licensing of content that had previously appeared on other networks—essentially, cable syndication licenses in a digital context. Netflix and Amazon relied on arms-length licensing deals with outside studios, while Hulu enjoyed a pipeline of content from its owner-affiliates, broadcast networks ABC, Fox, and NBC. In response to increasing competition from one another and rising content licensing costs for second-run programming, all three services eventually expanded into original content. Netflix was first to market with its original content, debuting Norwegian series *Lilyhammer* in 2012 and breakout hit *House of Cards* in 2013, and initially relied entirely on outside studios to provide its content (*House of Cards* from Media Rights Capital; *Hemlock Grove* from Gaumont International Television; *Orange Is the New Black* from Lionsgate Television; *Arrested Development* from 20th Century Fox Television; etc.). More recently, Netflix has moved toward acting as a studio and producing its own content through its studio arm, allowing it to own and control all rights in its programming, such as its daily talk show *Chelsea* and hit dramas *Stranger Things* and *Mindhunter.*[40] Amazon trailed Netflix in entering the market for original content, debuting its series *Alpha House* and *Betas* in 2013; however, unlike Netflix, Amazon embraced a position as a studio as well as a network from inception, with both of its debut series being produced through Amazon Studios. Since then, Amazon's slate has represented a mix of in-house Amazon Studios shows (such as *Transparent* and *Man in the High Castle*) and shows licensed from outside studios (such as Fabrik Entertainment's *Bosch*, Sony Pictures Television's

38 The demands of this subscription-based model help contextualize and explain the strategic decisions of such SVOD services. Operating a subscription-based business means persuading customers to not only initiate a subscription, but just as importantly, to pay out-of-pocket fees, month after month, to maintain their access to the service. This requires the service to offer customers a sufficiently compelling value proposition to justify the monthly expense. One important way to create value for the customer is to offer a wide and diverse selection of content accessible via the subscription. Even more important, however, is offering the customer compelling content that they cannot find/access anywhere else. This premium on exclusivity helps explain the natural trajectory of subscription services toward increasing focuses on exclusive, premium, first-run content.

39 See Section B.iii above.

40 Economic factors driving this move are explored in greater detail in Section A.iv.a of Chapter 8.

Sneaky Pete, and Paramount Television's *Tom Clancy's Jack Ryan*). Among the three major streaming companies, only Hulu has, to date, continued to rely exclusively on original content from outside studios (such as Warner Bros. Television's *11.22.63*, Lionsgate Television's *Casual*, and Universal Television's *The Path*), although in many cases, Hulu's supplying studios (such as Universal Television) are themselves corporate affiliates of Hulu's parent companies. All three services also tend to take co-production positions in programming licensed from third-party studios.

In light of the foregoing, when it comes to original content produced for digital services, these platforms can be understood essentially not as *sui generis* players, but as a subset of networks, albeit with unique licensing requirements specific to the technological and economic models underlying their services.

The market also reflects a number of emerging "virtual" or "digital" MVPDs, such as DirecTV Now, Sony's PlayStation Vue, and Dish Network's Sling TV, all of which provide traditional-looking (if somewhat downsized) packages of linear channels, delivered via broadband Internet rather than through traditional coaxial, fiber-optic, or satellite equipment. These services effectively piggyback on existing Internet and "smart device" infrastructure, offering multi-channel television access through dedicated apps on users' smart televisions, set-top boxes (such as Apple TV or Roku), and/or mobile devices. The long-established YouTube service, in offering a variety of "channels" curated by third parties on its service, also arguably serves as a digital MVPD[41] (though it may alternatively be interpreted as an ad-supported network on its main service, and a subscription-supported network through its curated YouTube Red service). However, in February 2017, Google announced a new "YouTube TV" offering that would specifically serve as a more traditional-feeling virtual MVPD system, offering users access to approximately forty broadcast and cable TV networks (as well as Google's own YouTube Red offering) through users' computers or other Internet-connected devices, without a contract. In 2017, Hulu also launched a beta version of a digital MVPD offering, alongside its long-standing streaming service.

41 In this analogy, multichannel networks (or "MCNs") that have sprung up within the YouTube ecosystem (and primarily target and serve YouTube's millennial audience), such as Fullscreen, Maker Studios, Machinima, and AwesomenessTV, can be understood as the "networks," while the producers and creators they work with function as the "service providers" and "studios," often retaining most or all of the rights in their content. These businesses, however, are undergoing a period of rapid transformation in their business models, looking to reduce their dependence on YouTube as a platform and expand their revenue streams. For instance, in 2015, AwesomenessTV struck a deal with Verizon to provide more than 200 hours of original programming for Verizon's upcoming Go90 streaming service; the next year, Verizon acquired a significant stake in AwesomenessTV, looking to use the company to further bolster its exclusive content offerings on Go90. Around the same time period, in 2014, competing MCN Fullscreen was acquired by a joint venture called Otter Media, which was funded in part by AT&T, and shortly thereafter announced that it would debut its own Fullscreen-branded SVOD service; that service launched in 2016, but by late 2017, Fullscreen announced that it would shutter its SVOD offering, which never attracted a substantial number of subscribers. This ecosystem of short-form content, which was largely born and nurtured on YouTube before expanding to a number of proprietary services with major investment from conglomerates like Verizon, AT&T, and Comcast, may warrant its own book—if it survives at all.

Finally, TVOD retailers, such as Apple's iTunes and Google Play, do not fit neatly into the above chart but occupy a spot traditional held by retailers and renters of physical home video products, such as Target, Best Buy, and now-defunct rental house Blockbuster Video.

D. The Power of Tax Incentives

The rapid growth of the television industry over the last ten years has created significant opportunity for all of the industry's stakeholders. But at the same time, the uniquely competitive marketplace has also put enormous cost pressures on all of the major players, with shows trying to achieve elusive "must watch" status by, among other strategies, courting costly top-tier on-camera talent, attracting and empowering wildly creatively ambitious directors and producers, and offering viewers production values on par with premium theatrical motion pictures.

The primary tool that studios have used to mitigate these ballooning costs is the tax credit. And in turn, the tax credit has turned nontraditional entertainment centers like Vancouver, Toronto, New Orleans, Pittsburgh, Atlanta, and Albuquerque into hotbeds of production, with Vancouver and Toronto even competing for the nickname "Hollywood North." Today, the availability and value of tax credits is arguably the single most impactful factor influencing the essential decisions behind a television production—not only where a show is produced, but how it is produced, for how much money it is produced, and in some cases, whether it makes sense to produce at all.

An ongoing television series production is a large business, which employs not only traditional "talents" such as writers, directors, actors, and producers, but also literally hundreds of tradesman and craftspeople, from carpenters to caterers, for months at a time. In addition, beyond the jobs created by the production itself, the cast and crew who descend upon a location to participate in the production of a television series spend significant dollars with local businesses. As a result, in order to incentivize studios to produce television shows (as well as other filmed productions) in their jurisdictions, government authorities at all levels—municipal, state/provincial, and national—employ a variety of incentive programs, usually in the form of tax credits or tax-based benefits, designed to lure producers with the promise of costs savings and economic efficiencies. In turn, such incentive programs dramatically impact studio decision-making with respect to where to produce a series and how much to spend on its production.

Production incentive programs take a variety of forms and vary widely from jurisdiction to jurisdiction (both within the U.S., and, increasingly, around the world). Common incentive programs include:

- **Production rebates**, by which a government authority directly reimburses a studio for some percentage of the studio's production expenditures within the jurisdiction;

- **Tax credits**, by which a government authority credits against a studio's local tax obligations some percentage of the studio's production expenditures within the jurisdiction. These tax credits may be transferrable (meaning that the studio can sell the tax credit to a third party who may be better able realize it) or non-transferrable (meaning that the studio cannot sell the tax credit, and therefore must have enough direct income tax liability in the jurisdiction in order to be able to realize the credit's benefits for itself);
- **Tax rebates**, by which a government authority refunds to a studio some portion of the studio's income, sales, value added, or other taxes, after such taxes have already been paid by the studio;
- **Tax exemptions**, by which a government authority exempts a studio, in advance, from paying taxes (typically sales or value added taxes), which would otherwise be due in connection with the studio's activities in the jurisdiction;
- **Direct government financing**, by which a government authority actually contributes funds toward the production of a series;
- **Subsidized production resources**, such as production stages and warehouses, owned by the government authority and leased to productions at favorable rates; and
- **Film commissions and film offices**, by which a government authority provides logistical support services to studios short of direct economic subsidies (such as assistance with obtaining film permits, scouting locations, and hiring local crew), in order to make it easier for the studios to do business within the jurisdictions.

Such programs are often subject to extremely specific conditions, including:

- Limitations on the types of eligible productions (e.g., theatrical feature films vs. television series; scripted vs. unscripted productions; dramas vs. comedies);
- Budget requirements (both floors and ceilings), which may be designed to appeal particularly to smaller or larger productions, according to the policy goals of the authority operating the program;
- Local expenditure requirements, which have the effect of requiring a production to spend a meaningful portion of its total budget within the local jurisdiction in order to access an incentive program (thereby limiting the value of such credits to productions that make only token investments in the local economy);
- Local content requirements (such as local story, character, and location elements), which are common in direct government financing programs operated at the national level and designed to promote the cultural goals of the authority operating the program;

- Local talent requirements, which require a production to make significant efforts to engage local cast and crew in production, rather than importing cast and crew from outside areas; and
- Local content ownership, in order to promote the further development of meaningful local film and television industries.

Government authorities may offer any one of the above programs, or a combination of multiple such programs, in order to lure studios to produce projects within their jurisdictions. Each program may be subject to specific and varying conditions. Depending on where it is produced, a production may concurrently enjoy access to multiple incentive programs offered at various levels of government—a municipal film commission office, a state or provincial tax credit, and a national production grant. For instance, a television production in Vancouver may simultaneously enjoy benefits from the Vancouver municipal government, the provincial British Columbia government, and the national Canadian government.

Perhaps the most prominent and impactful form of production incentives are tax credits, which are typically valued at between 20% and 35% of the studio's production expenditures within the jurisdiction. The studio is required to maintain exhaustive records of its expenses in order to support the claimed value of its tax credit, and the value of the credit may be capped based on the studio's ingoing production budget, as reflected in the studio's initial application for the credit. Where tax credits are transferable, secondary markets have emerged to facilitate the transfer of tax credits from the originating studios (who often have too little local tax liability to fully realize such credits) to local businesses or high net-worth individuals, who can save thousands or even millions of dollars by purchasing such credits at 85 to 95 cents on the dollar and pocketing the difference. Tax credit agents act as middlemen, connecting buyers and sellers in exchange for a percentage (usually 2%–3%) of the value of the credits. Some jurisdictions, such as Louisiana, offer direct buy-back programs, essentially allowing studios to more quickly and easily monetize their tax credits by selling them back to the state for 88 to 90 cents on the dollar (depending on market conditions). In any event, though, between the application, recordkeeping, and reporting processes, as well as the annualized tax cycle in each jurisdiction, studios must typically wait several months, or sometimes even years, to realize the benefit of these tax credits.[42]

Some jurisdictions offer tax incentives on an unlimited basis, to as many productions as are qualified and willing to avail themselves of the programs. Other programs—particularly those instituted in the states of New York and California

42 Larger producers can cover production expenses from available cash and withstand the wait for these credits to pay off in due course. Smaller producers with more immediate cash flow needs may obtain bank loans, secured against the tax credits (and with value carved out to cover the interest and fees on these loans), to monetize the credits immediately and apply the proceeds against the studio's cost of production in real time.

(traditional centers of entertainment production) in order to staunch the exodus of productions induced by the availability of favorable incentive programs elsewhere—are subject to annual caps that are insufficient to meet the total theoretical demand from producers, and are therefore allocated based on lotteries or other application processes used to distribute these scarce resources.

Successful tax incentive programs in states such as New Mexico, Georgia, Louisiana, Pennsylvania, and Virginia have had the effect of building up meaningful local production economies and resources in areas that were previously devoid of substantial production activity. In addition, significant government subsidies from countries such as Canada and France, in the form of both tax credits and direct government financing, have helped turn these countries into major centers of film and television production.

A key characteristic of these tax incentive programs, however, is their perishability. These programs are very much political questions. They usually come into existence with great fanfare, a substantial commitment of public funds, and promises of major economic stimulus. But the overall value of these programs to the sponsoring jurisdictions—weighing loss of tax revenues against the gains from local economic stimulus and job creation—is hotly debated. After a period of a few years, such programs often meet stiff political resistance from those opposed to "paying Hollywood millionaires with hard earned tax payers' dollars." When this occurs, governments may rescind existing incentive programs with little or no notice, and with few protections for studios that depended on those programs in deciding where to produce a series. (By this time, some other jurisdiction will have likely decided to jump into the game with a new incentive program of its own.) As a result, studios often skeptically consider the long-term stability of tax incentive programs in deciding where to produce their series.

In determining the economic risk and profit potential of a television production, major studios pay close attention to the availability, security, and value of tax credits and other incentive programs. Budgets are typically generated to reflect both "gross" and "net" spends, and these "net budgets" are often the basis of calculating license fees and modeling a series's economic prospects.[43] Based on its business projections, a studio may determine a maximum "net" spend it is willing to commit to a production, and the overall gross cost (and, accordingly, production value) of the series may therefore vary substantially depending on whether or not the studio can obtain a tax credit to offset its production costs. These calculations can prove determinative of not only where a series is physically produced, but also of the creative content of a series, as well as the threshold decision of whether it is produced at all.[44]

43 See Chapter 9.

44 For instance, AMC's *Breaking Bad* was, in its early development, set in California's Inland Empire, east of Los Angeles. When attractive tax incentives lured the production to New Mexico, the show was creatively reset in Albuquerque in order to preserve the verisimilitude of the setting.

CONCLUSION

When FX's John Landgraf gave his well-regarded "Peak TV" talk in August 2015, his diagnosis of "simply too much television" also came with a prediction: "My sense is that 2015 or 2016 will represent peak TV in America, and that we'll begin to see declines coming the year after that and beyond." Yet, based on his own data, Landgraf's projections do not appear to have borne out: the final count of scripted series for 2017 was up over 15% from 2015, and knocking on the door of the stunning "500" milestone. Was Landgraf wrong about "Peak TV?"

First of all, it is important to remember than 500 series on television does not mean 500 *profitable* series on television, either for the studios producing the series or the networks exhibiting them. Market fragmentation reduces viewership, and with it, advertising revenue to networks. Networks with diminishing advertising revenues and increasing corporate pressure to order series from their sister studios seek to limit their license fee commitments. On the other hand, ballooning budgets (including skyrocketing fees for the highest-demand creators, actors, and underlying rightsholders), as series try to distinguish themselves in a crowded marketplace, mean that studios must derive ever-higher revenues just to break even. And all the while, sheer volume makes it harder for even quality shows to find audiences at all. Ultimately, one can reasonably expect that a majority of the roughly 500 series on television will lose money for their studios, networks, or both.

As for Landgraf's predicted deflation in the volume of original series production, a closer look at his seemingly bullish data (from Chart 1 in the Introduction) offers some troubling insights about what the industry may experience in the years ahead:

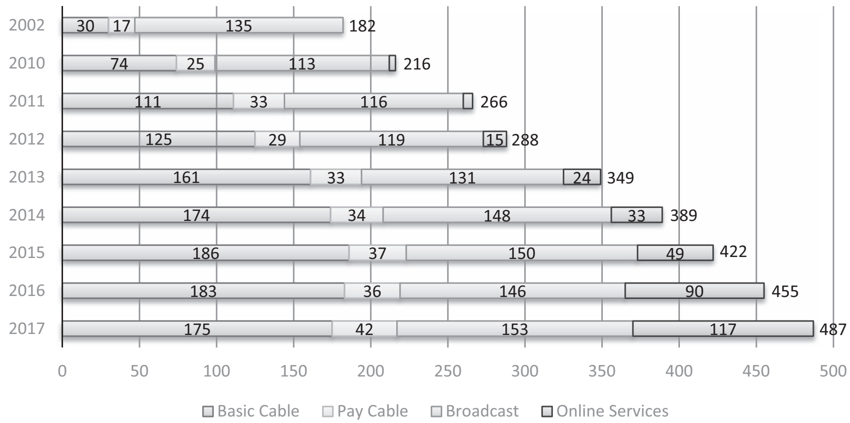


CHART 1 Volume of Original Scripted Television Series Production

Yes, overall scripted series production rose by 15% (or sixty-five series) between 2015 and 2017. And 2019 offers the prospect of Apple's entry into the market as a powerful (and exceedingly well-funded) new player. But 105% of that growth—yes, more than 100%—came from streaming platforms such as Netflix, Amazon, and Hulu, which saw their content offerings increase almost 2.4 times during that time period. Significantly, 2017 in particular was arguably Netflix's breakout year as a studio, rather than a pure network, and so much of the economic opportunity from its series growth has been centralized within Netflix alone (and does not spread wealth to the broader ecosystem of provider studios or MVPDs).

Among all other platforms (broadcast, basic cable, and pay cable) combined, production counts were actually down. Broadcast series counts grew modestly from 150 to 153 (following a dip to 146 in 2016), but this may not provide much reason for optimism: the broadcast television world has, for years, existed in a relatively stable equilibrium with four major national networks (ABC, CBS, Fox, and NBC). The daily primetime hours programmed by the major networks (generally 8 p.m. to 11 p.m.) have also remained consistent over the years. Any float in the number of scripted series is really a matter of the broadcast networks' minor reallocation among their investments in scripted vs. unscripted content (and, with unscripted content on broadcast networks facing ballooning celebrity-driven costs, the small shift toward scripted series comes as little surprise). Moreover, while the number of scripted series on broadcast television has remained relatively constant, the number of *new* series ordered each year has steadily decreased since 2013. Because the cost of launching a new series is particularly high, broadcast networks have been more content to renew somewhat middling performers (especially those from their affiliated studios), rather than to undertake the extraordinary cost of producing and marketing something new.

Basic cable scripted series production, in particular, shrank by 6% between 2015 and 2017 (and was down for each year-over-year period during that span). This may be the most significant statistic of all. While much attention is (and should be) paid to the tremendous impact of the streaming services in driving the evolution of the television business over the last five years, looking at a broader ten-to-fifteen-year time scale, the emergence of networks such as AMC, FX, and USA as high-volume providers of premium content has also been critical in driving the overall content boom in television. While the prospect of more networks joining this caste of premium platforms (e.g., Bravo with *Girlfriends' Guide to Divorce*; Lifetime with *UnREAL*; etc.) offered the opportunity for further sustained growth, these networks' efforts have proven more limited and tentative than the industry's early optimism would have suggested. Bravo's only two other forays into scripted programming, *Imposters* and *Odd Mom Out*, have made little impact critically or commercially, and the network continues to focus its resources on its homegrown stable of unscripted franchises. Lifetime has only released one low-profile original scripted drama as a follow-up to *UnREAL*, called *Mary Kills People*, which was actually an acquisition of a series initially produced for the Global network in Canada. (Two more scripted series are currently anticipated from Lifetime in the year ahead.) A&E canceled its well-reviewed *Bates Motel* in 2017, a decision that marked the network's exit from scripted series production altogether.

At the same time, while the industry still boasts record numbers of ongoing series on the air, networks have increasingly managed their spending by spreading out their series exhibition over time. Sometimes this means producing a single season in one production run, but exhibiting it as two separate seasons, or two separate half-seasons with an extra-long hiatus in between. (AMC took this approach in its exhibition of the fifth and final season of *Breaking Bad*, premiering the first half of the season in July 2012 and the second half in August 2013.) In other cases, networks simply allow particularly long breaks between production of consecutive seasons. For example, HBO premiered the seventh season of *Game of Thrones* in July 2017 and is expected to debut the show's eighth and final season nearly two years later, in April 2019. HBO took a similar break between the first season of *Westworld* (which premiered in October 2016) and the show's second season (which premiered in April 2018). On basic cable, FX debuted the first season of *Atlanta* in September 2016, and the second season returned in March 2018. These long lay-offs between seasons would have been unthinkable just a few years ago and present significant challenges for studios that need to manage option dates and talent availabilities. But they allow the producers and exhibitors of costly television series to amortize their investments over a longer period of time.

This deflation in the volume of series production has accompanied a broader industry moment of consolidation and contraction. One of the reasons the United States television industry has recently generated so many shows is because there have been more networks in general, and more networks focusing on original content production, than ever before. Many of these networks have been very nichified in their content offerings but have survived because they exist as part of broader network portfolios owned by major media conglomerates such as Viacom and Disney. But secondary and tertiary networks are quickly falling by the wayside. In February 2017, Viacom (which boasted one of the widest portfolios of networks, and was dubbed by the *Wall Street Journal* as "the poster child of the supersize cable-television bundle") announced that it would re-focus itself on just six key brands: Comedy Central, BET, MTV, VH-1, CMT, and a new Paramount Network (which would launch as a rebrand of Viacom's male-centric Spike network). Participant Media's youth-focused Pivot network ceased operations in November 2016. NBCUniversal shut down its Esquire network in June 2017.

Not coincidentally, this winnowing of peripheral networks has taken place in a context of significant consolidation among MVPDs. In May 2014, AT&T announced its acquisition of DirecTV, bringing AT&T's U-verse offering and DirecTV's satellite business under a single corporate roof. (The transaction closed in July 2015.) In February 2014, Comcast (the largest cable MVPD provider in the country) attempted to merge with Time Warner Cable (the nation's second largest cable MVPD provider). When federal regulators took steps to block the transaction in 2015, Comcast backed out, and Time Warner Cable was promptly purchased by Charter Communications (then the third largest cable MVPD provider in America). That acquisition was completed in May 2016. There are any number of reasons why these MVPDs sought the scale and theoretical efficiencies that would come with such combinations, but certainly the greater bargaining power that these larger entities would have in carriage agreement negotiations with cable network and retransmission consent negotiations with broadcast stations helped motivate the deals.

Of course, this trend of consolidation has not been limited to MVPDs or to horizontal combinations among companies in the same type of business. In June 2016, Lionsgate announced its acquisition of premium cable network Starz; the deal closed in December 2016. In April 2018, after years of negotiations, T-Mobile and Sprint agreed to merge, an agreement that would leave just three major wireless carriers in the United States (of which the combined T-Mobile/Sprint would be the second largest); the transaction is pending regulatory approval. In October 2016, AT&T (fresh off of its acquisition of DirecTV) announced that it would acquire Time Warner in a transaction valued at a net $108.7 billion. The proposed combination closely resembled a similar merger, announced in December 2009 and completed in January 2011, between cable provider Comcast and content company NBCUniversal. While regulators ultimately approved the latter merger (subject to conditions and concessions negotiated by the FCC and Department of Justice), in November 2017, the Department of Justice sued to block AT&T's acquisition of Time Warner.[1] The litigation is currently pending, and AT&T and

1 Some observers considered the litigation politically motivated, in light of President Donald J. Trump's ongoing feud with the Time Warner-owned CNN.

Time Warner have indicated their intention to litigate vigorously for the right to complete their transaction, and to resist any requirement that they divest CNN.

In December 2017, Disney announced its acquisition of a substantial majority of 21st Century Fox's entertainment assets (and this purchase is also pending as of the submission of this manuscript).[2] The transaction contemplates that, after closing, the legacy Fox company would retain ownership only of its Fox Sports and Fox News cable networks, and the Fox broadcast network and stations (the latter of which could not be purchased by Disney, which also owns ABC and the ABC station group, under prevailing FCC rules). The transaction would give Disney ownership of Fox's stake in Hulu, making it the new majority owner of the streaming service. Notably, while Disney would not take over ownership of the Fox broadcast operation, it *would* acquire 20th Century Fox Television, the sister studio and primary content provider for the Fox broadcast network. The notion of a broadcast network left without a functioning sister studio has caused many observers to question the future of the Fox network. Some Fox executives have indicated an intention to build a new studio to support the network; others expect the network to focus on sports and unscripted programming (for which it generally does not rely on its sister studio in any event), while some analysts anticipate a subsequent sale of the Fox broadcast operations to an eligible buyer. In any event, while the specific end result is uncertain, significant change at Fox seems inevitable. Indeed, the main factor that could scuttle the Fox-Disney combination is a competing combination: as of May 2018, Comcast is reportedly securing financing to support an all-cash bid to trump Disney's all-stock deal and acquire Fox's primary entertainment assets. At the same time, Fox and Comcast both have outstanding offers to acquire European pay TV operator Sky (with Comcast looking like the likely winner in that competition, despite the fact that Fox already owns a significant minority stake in Sky).

This period of consolidation—which has already fundamentally transformed the landscape in which the television industry grew to its current "Peak TV" heights—may not be over yet. By January 2018, less than a month after Disney and Fox announced their deal, rumblings emerged of a potential merger between CBS and Viacom. CBS and Viacom had actually merged once before, in 1999, in a $35.6 billion deal that was, at the time, the biggest deal of its type ever. In 2006, the companies split back apart, albeit with some assets having been reallocated between the two. In mid-2016, Shari Redstone (the daughter and successor of media magnate Sumner Redstone), still the dominant shareholder of both CBS and Viacom (through National Amusements, the movie exhibition company her father built), indicated her desire that CBS and Viacom re-merge. By the end of 2016, Redstone dropped her demands, but the bombshell of the Fox/Disney combination quickly renewed chatter of a CBS-Viacom re-combination (which Redstone appears to continue to favor). In February 2018, CBS and Viacom each announced

2 More cynical observers might suggest that regulatory approval seems overwhelmingly likely in light of the fact that, shortly after the deal was announced, President Trump personally called Fox's Rupert Murdoch to congratulate him on the transaction.

the formation of special committees to formally explore a potential merger. By May 2018, however, contentious wrangling among the parties over the valuation of Viacom and the proposed leadership of the combined company threatened to scuttle negotiations, with CBS going so far as to sue National Amusements, its own parent company, in an effort to resist the deal. As of publication, the merger negotiations and litigation are both pending.

These companies have sought opportunities to band together, in part, as a means of weathering the challenges presented by evolving consumer preferences for how they receive (and pay) for their content experiences. It is hard to overstate the impact that cord cutting has had, and continues to have, on the industry. According to estimates released by research firm eMarketer in September 2017, by the end of 2017, a total of 22.2 million U.S. adults would have "cut the cable" on their traditional MVPD packages, while the number of "cord-nevers" (consumers, usually younger, who have never subscribed to a pay television service) would rise to 34.4 million. In short, the widespread availability of high-quality, high-speed broadband Internet services has enabled customers to piece together, on an a la carte basis, a content experience that is at once more affordable and more narrowly tailored to their interests. And the upcoming rollout in the United States of high-bandwidth 5G (or "fifth generation") wireless mobile Internet infrastructure may accelerate this trend further by increasing competition and service quality in the broadband market.

The industry's traditional power players have responded to cord cutting, in part, by following the customers to where they are going: online. In so doing, however, while the companies have gotten bigger and bigger (both horizontally and vertically), the service offerings have gotten smaller and smaller. "Virtual MVPDs"—subscription services that function over the Internet, often integrating with and offered through third-party devices (e.g., smart televisions and set-top boxes like the Apple TV), that provide MVPD-like multi-channel programming services (without meeting the technical regulatory definitions of "MVPD"s)—have grown in availability and popularity. Hulu, YouTube, Sony PlayStation, and Dish Network all now offer services of this nature and carry some of the most popular and essential networks as part of their bundles. But these vMVPDs have systematically focused on offering so-called "skinny bundles" of fifteen to thirty channels (rather than traditional cable bundles of 200 to 500 channels), which allows them to offer their services at a significantly lower price point than traditional cable or satellite packages. (The trend toward smaller multi-channel packages further contextualizes Viacom's decision to shift its corporate strategy from a broad network portfolio to one that is more narrowly focused on a small group of distinct core brands.)

This narrowing, however, threatens to challenge some of the core economic assumptions on which the television industry (and indeed, much of the entertainment and media industries more generally) are built. Television has traditionally been a business of cross-subsidization. And for some companies, particularly heavily integrated and infrastructure-intensive service providers, consolidation creates a new opportunity for cross-subsidization. For example, AT&T excludes streaming of its DirecTV service from mobile data caps for its AT&T Wireless customers. Comcast and Spectrum offer landline telephone service at a loss in order to encourage customers to subscribe to more lucrative television and broadband service packages (the so-called "Triple Play" service offering).

But for others, consolidation threatens to upend companies' typical strategies for managing risk and seeking upside. Media conglomerates have invested in new and niche cable network offerings on the assumption that they could obtain carriage for these services as part of package deals for their most desirable networks. Networks and studios have taken losses on multiple unsuccessful or marginally successful series, essentially punching lottery tickets to find the mega-hit series that would cover their other losses and provide them with their operating profit for years to come. The winnowing of networks, and the resulting reduction of inventory space for new programming, limits opportunities for such cross-subsidization. The increasing prevalence of lower-margin productions for rights-hungry international digital platforms also limits opportunities for any project to become wildly and disproportionately successful and profitable. This loss of upside, in turn, limits studios' capacity to absorb (far more frequent) losses from unsuccessful projects.

The resulting squeezes will be felt most acutely by the few remaining independent players in the marketplace. Ever since the breakdown of the "Financial Interest and Syndication" or "fin-syn" regulatory regime in the late 1980s and early 1990s (which opened the door to the major broadcast networks owning their own content), networks have embraced the economic opportunity that comes with being owners, and not merely licensees, of the content on their air. (This is also another prime example of cross-subsidization in action: given that a successful television series is generally more profitable for a network in its early years, and more profitable for a studio in its later years, then an integrated studio/network operation can essentially smooth out the swing of financial interests, and capture both profit centers for itself.) Many independent content providers went out of business altogether in the post-fin-syn world, and those who survived and thrived have had to develop strategies to endure—investing in developing content for unproven upstart networks without their own studio operations, embracing unscripted productions that offer more opportunity for scrappy low-overhead businesses, and/or simply working to develop content that is so undeniably good and desirable that networks cannot refuse it (often by paying for desirable underlying intellectual property or exclusive relationships with high-demand creators).

Even before the ongoing merger craze, independent providers began feeling pressure from buyers, whose ever-widening ambitions in the digital space, international footprints, and obligations to support affiliated companies (e.g., CBS's investment in CBS All Access; the other broadcast networks' investment in Hulu; and a wide array of network-specific streaming application offerings) caused them to make ever more expansive demands for distribution and exhibition rights (without necessarily offering significantly greater compensation for those additional rights). These more expansive demands for rights have undermined the traditional content revenue model of maximizing opportunities across media, territory, and time, because content owners are left with fewer rights to monetize (and more restrictions on those rights they do retain).

But the current climate of contraction and consolidation has only further diminished the opportunities for independent providers to maximize their revenues across media, territory, and time, and challenged the more specific strategies these providers have used to navigate an already brutal marketplace. Big buyers with diverse, multifaceted businesses have even more expansive demands for rights (and even more bargaining power to satisfy those demands without paying a significant premium), leaving less upside for providers, when they can make a sale at all. And indeed, just making that sale is becoming increasingly challenging. Fewer networks means fewer new networks that need to be built up by motivated outside providers. At the same time, the centralization of resources within a few large companies means that even new networks have access to provider studios, while established networks have more "sister studios" from which to draw their content without having to look to outside providers. (For instance, in a post-Disney/Fox merger world, the ABC network could order series from ABC Studios, ABC Signature Studios, 20th Century Fox Television, or Fox 21 Studios, and in each instance, ABC would be buying from an affiliated studio, and the larger corporate body would still get the full benefit of the arrangement.)

So where does opportunity lie in a post-"Peak TV" world?

One place to look is abroad. The television industries in major territories such as the United Kingdom, France, Germany, Canada, Italy, South Korea, and China grow more sophisticated and better funded with each passing year. In the past, broadcasters in these countries may have been content to program their channels with a combination of imported high-end series that were developed and produced specifically for the American market, and lower-budget, lower-quality local productions. In more recent years, however, these territories have shown increasing demand for premium productions that are tailored, at least in part, to their audiences (and a willingness to pay for more substantial involvement in the development and production of internationally oriented series).

For several years, entrepreneurial foreign producers such as Gaumont International Television, Fabrik Entertainment, and Atlantique Productions have found success with international co-productions and co-commissions, producing high-profile series that were not obviously foreign imports (the way that the British origins of shows like *Downton Abbey* and *Sherlock* were always apparent to American audiences). For example, when *The Young Pope*, a richly produced series starring Jude Law as a youthful pontiff, premiered on HBO in January 2017, few viewers likely realized that it had been produced by a group of French, Spanish, and Italian companies that solicited simultaneous commissions from HBO in the U.S. and Canada, Canal+ in France, and Sky Atlantic in the United Kingdom, Germany, Austria, and Italy.

Given the growing challenges in the American market, U.S. producers have begun to make similarly entrepreneurial efforts to reach across the ocean, where growing budgets and license fees can make the extra effort worthwhile. NBCUniversal was an early mover, announcing a three-way co-production plan with German broadcaster RTL and French broadcaster TF1 all the way back in April 2015. More recently, several other major American producers have followed suit. In February 2017, Lionsgate Television President Sandra Stern gave a keynote address in which she advertised the company's active efforts to find international co-production and co-commission partners. In April 2017, HBO and Sky announced a $250 million joint development and production fund to produce high-end dramas with both American and European audiences in mind. And in late 2017 and early 2018, Sony Pictures Television brought to audiences the anthology series *Philip K. Dick's Electric Dreams*, a co-commission of Channel 4 in the United Kingdom and Amazon in the United States and other territories, which was filmed partially in the United States and partially in the United Kingdom, and which even premiered in the United Kingdom nearly four months before its Amazon debut.

For those whose reach may not extend across oceans, the solution may be to go small. In a world filled with massive entities, mid-size players may suffer, but smaller and nimbler companies may continue to find opportunity. The world of short-form digital content continues to confuse and elude most major conglomerates, whose efforts as both platforms and producers have been uneven at best. Warner Bros. has seen some success with its Super Deluxe comedy website and production studio (an independently operated subsidiary of Time Warner's Turner Broadcasting unit) and Blue Ribbon Content (the Warner Bros. Television Group's digital and low-budget series production unit). YouTube has managed to preserve a robust, dynamic, creator-driven ecosystem on its platform, although the company's efforts to participate in that ecosystem as anything other than a passive platform-provider have been costly, inconsistent, and frequently controversial.

The big guys' records in small-scale digital only get more dismal from there. Disney's much heralded acquisition of Maker Studios in 2014, which ultimately cost the company $675 million, is widely understood to have been a huge failure, and by 2017, Disney had largely transformed Maker into a marketing engine for its other assets. Warner Bros.'s 2016 acquisition of Machinima seems to have been much less troubled (and, at a valuation just under $100 million, much cheaper), but thus far has not created the scale and value some had hoped to see. Sony's Crackle AVOD service has persevered for years without ever drawing a major audience, and its flagship series, Jerry Seinfeld's *Comedians in Cars Getting Coffee*, left the platform for Netflix in 2017. NBC launched its comedy-focused Seeso subscription streaming service in January 2016 and shuttered it in November 2017. ABC's own digital effort, a series of short-form comedy series available exclusively on ABC.com and through the ABC mobile application under the "ABCd" (or ABC Digital) banner, was even more short-lived, launching in July 2016 and quietly abandoned by January 2017.

Simply finding a stable platform in the digital space has proven challenging, as Seeso was not the only new platform to come and go in recent years. Comcast's

Watchable service, an app-based advertiser-supported free streaming service, launched in 2015 but never found a large audience; by late 2017, Comcast quietly let it be known that it would no longer invest in original content for the platform, signaling a likely end to the project in the near future. Fullscreen's similar app-based over-the-top subscription streaming service launched in April 2016 and survived only until November 2017, with the company indicating that it would re-focus its efforts on developing and producing original content for third-party platforms. Business Insider reported in April 2017 that Verizon had spent $200 million on original content in 2016, plus an additional $80 million in marketing expenses, to support its fledgling advertising-supported Go90 service—and wound up with only 2.1 million monthly app users, and 155 layoffs, to show for it. (Nevertheless, Verizon seems dedicated to figuring out the business, committing to producing 1,400 hours of original content in 2018 and continuing to order new series from providers such as Warner Bros.' Blue Ribbon Content unit.) In short, launching an over-the-top services requires huge investment in content, infrastructure, and marketing, and the companies who have been able to make it work have enjoyed some combination of first-mover advantage (Netflix), industry affiliate subsidization (Hulu, via its ownership structure), or massive deployable resources and complementary lines of business (Amazon and Apple).

Outside of the traditional television-like world of premium production for Netflix, Amazon, and Hulu (which has been dominated by traditional major television studios), the companies that seem to have done best in the digital ecosystem are ones like Funny or Die and AwesomenessTV, which have straddled the line between traditional and digital media, and which, critically, have stayed relatively small, distributing their content across a variety of third-party channels while avoiding business lines with cost-intensive investments in overhead, infrastructure and technology, and marketing. (Even these companies, however, have experienced challenges scaling their businesses and have endured rounds of layoffs.) This area of the market resembles unscripted programming, where the major players have also largely ceded the territory to smaller, low-overhead operations with greater expertise in scrappily efficient production (and greater tolerance for relatively low profit margins).

Ultimately, however, the greatest opportunities to come lie just outside of our current field of vision. Television has long been a uniquely innovative and entrepreneurial corner of the broader entertainment industry, with constant experimentation in business and technical models leading to the discovery of new opportunities. (It is also an industry that substantially rewards first-mover advantage, with innovators like Netflix and HBO inventing new business models, taking advantage of the rest of the industry's initial failure to fully understand and value what they were doing, and cementing dominant market positions that have allowed them to largely fend off challenges from newcomers.)

The current era of "Peak TV" was built on a series of tectonic shifts in the marketplace. Some of these, like the steady improvement in quality of and access to broadband Internet service, were relatively predictable. Others—like the invention of a new secondary exhibition window (in the form of Netflix and Amazon, which started out as a DVD mailing service and online retailer, respectively), and a massive influx of capital from titans of the exceedingly well-funded technology industry—were less obvious in advance, but have quickly become so ingrained in the fabric of the industry that we can already hardly imagine it without them.

Ultimately, the next era in television will be defined as the last one was: not by further incremental tinkering with existing business and technological models, but by bold invention of new ones. And the norms described in this book will help set the templates for how business gets done in that new world, even as, in the hands of creative dealmakers, they evolve to meet that world's unique demands and opportunities.