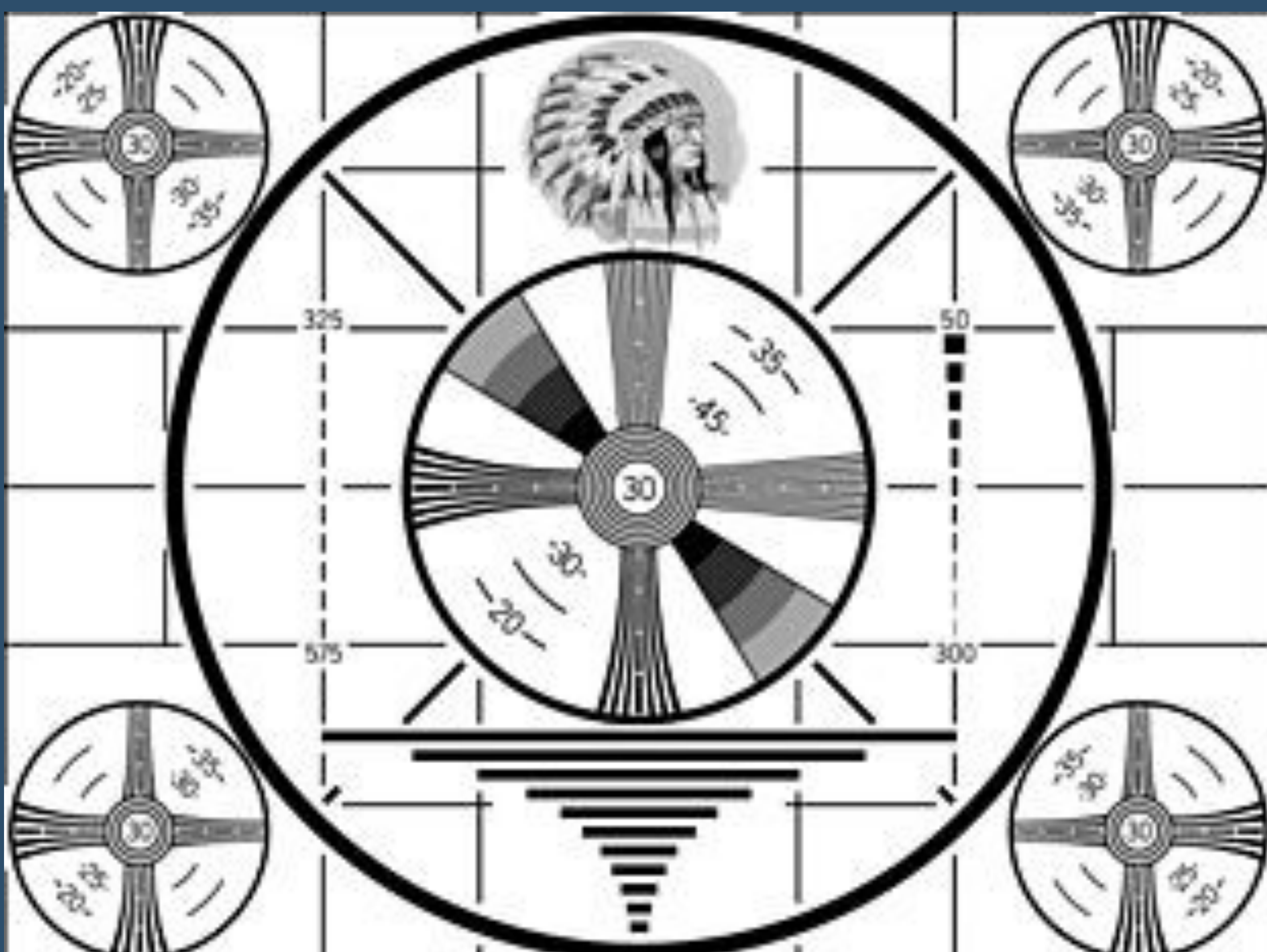
INSIDE THE FCC©®

Special Edition *Commentary & Analysis* *November 2017*

Changing Channels

Revising the Rules on Media Ownership



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Revising the Rules on Media Ownership

According to the Greek philosopher Heraclitus, "The only constant is change." Significant changes in law, regulation and business over the past decade have paved the way for the media and communications environment we live in today. In the world of media, change, indeed, has been the constant beacon for both incumbent companies and insurgent competitors alike. Technology and innovation have helped to drive convergence and consolidation, including a never-ending spate of new offerings, services and features.

Change has ushered in a new era of content, choice, and competition.—all of which provide great opportunity for consumers. But for federal policymakers, change has presented a challenging conundrum for determining what level of government regulation, if any, is needed to ensure that the media ecosystem not only functions, but flourishes. Clearly, times have changed since the foundational laws were established in 1934.

The media landscape is changing in large and dramatic ways. Against this backdrop, the current debate on media ownership takes on a special significance. The Federal Communications Commission (FCC) sets limits on the number of radio and TV broadcast stations an entity can own, as well as common ownership of broadcast stations and newspapers. Congress requires the FCC to review its media ownership rules every four years (the quadrennial review) to determine whether the rules are in the public interest, and to repeal or modify any regulation it determines does not meet these criteria. That review is underway and nearing completion as we go to press.

This edition of *Inside the FCC* is devoted to an examination of—what are called in the aggregate—the media ownership rules, and the broader media market that will be affected by those rules. Our hope is that this review and analysis of the rules and existing data will help to inform the current debate not only on media ownership, but also on the prospects for investment and innovation that are taking place in the broadcast industry today. With the recent and proposed mergers of unprecedented size among broadcast companies, the FCC's impending action is more than an academic exercise. Billons of dollars are at stake. Wall Street and Main Street are watching.

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The Short Story

- The FCC has a statutory obligation to review the media ownership rules every four years.
- This review has serious implications for the entire video ecosystem, including broadcast, networks, cable, mobile, and broadband providers.
- By law, the FCC must take into account the "public interest", and changes in the market, and determine appropriate rules based on those considerations.
- Ideally, the FCC should look both retrospectively and prospectively—not an easy undertaking.
- Industry experts and credible studies point out how the market has become more competitive for broadcasters, including competition for audience share and advertising dollars.
- Internet, over-the-top content creators, and other non-broadcast companies are competing with broadcasters to provide a range of video offerings. These new entrants are largely unregulated and do not have the same obligations, restrictions or regulations as broadcasters.
- Based on these factors, the FCC has proposed major changes in the media ownership rules.
- Inside the FCC believes those changes are sustained by the data and the numbers.
- So let's look at the facts.

"From the outset, we must acknowledge a truism of the modern media marketplace: platform lines have blurred. American consumers can access news and entertainment from social media giants like Google or Facebook, over-the-air-broadcasters, over-the-top applications, fiber head-ends and wireless devices, wherever, whenever. This is a wonderful development and a boon to consumer options for media content."

— FCC Commissioner Michael O'Rielly

Eliminating the [newspaper/broadcast cross ownership] rule would "provide much needed flexibility to the many newspapers and broadcasters throughout the country that provide important local news coverage and encourage even greater investment in original journalism."

— U.S . Representative Greg Walden (R-OR)
Chairman, Energy & Commerce Committee

"Going back to broadcast – I just don't understand how one can justify the current rules – specifically the national AND local ownership rules – at a time when the "media" marketplace has completely opened up to new entrants, who are literally devouring consumers' attention and time daily. Why is there a national ownership limitation for broadcast when companies quadruple the size can own assets across the United States with no worries, issues, or barriers? Why is there a limitation on the number of stations an operator can own in particular markets when again, companies quadruple the size can own cable assets, cable networks and broadcast stations in a single market? This does not make sense to me."

—Marci Ryvicker, MBA, CFA, CPA
Senior Equity Research Analyst
Wells Fargo Securities

A Tip of the Cap

Time to Expand or Eliminate National Ownership Rules

Adonis Hoffman, Esq., Chairman & Founder
Business in the Public Interest, Inc.
Principal, The Advisory Counsel, LLC.
Former FCC Legal Advisor

Before the end of the year, the Federal Communications Commission (FCC) will finalize its mandatory review of the national ownership rules—a set of regulations governing television and radio station ownership in the United States.

Currently, the law prohibits a single company from owning commercial TV stations that reach more than thirty-nine percent of American TV households. The national "ownership cap", as it is called, dates to 1941 and was imposed to protect localism, diversity and competition in the market, but many believe it has outlived its original intent. The cap has been updated a few times over the years – in 1985, 1996, and 2004, when Congress established the current limit and mandated the FCC to review the rule every four years.

Under Chairman Ajit Pai, the FCC is expected to expand, and perhaps eliminate, the national ownership cap. If it does, broadcasters will be dealt an unprecedented, but fortuitous, break which will change the media landscape for the foreseeable future. It would be a follow-on to the FCC's decision earlier this year to reinstate the UHF discount, an arrangement that allows broadcasters to count UHF stations as only 50 percent toward the national ownership cap. According to experts, these actions could spark a new spate of mergers, acquisitions, and consolidation in the TV industry at a time when the Trump Administration has shifted toward a more favorable policy toward mergers, generally.

To the outside world this may not be such a big deal. But to an industry undergoing fundamental change, it is monumental. The FCC's decision will be a long-overdue lifeline to broadcasters as they face a new wave of video competition. As one of the nation's most heavily-regulated industries, free over-the-air broadcasters are in a fierce battle not only for audiences, but also for advertising dollars, both of which are waning. Beyond traditional television, today's video market now includes cable and internet video providers that have bigger budgets and deeper pockets. Of the $148 billion spent on local advertising in 2017, only 13% has gone to local television, reflecting a steady decline since the glory days of broadcasting.

Competition has expanded well beyond the five major networks—ABC, CBS, FOX, NBC and CW. It includes the likes of Amazon, Apple, Google, Netflix, and other over-the-top (OTT) Internet services, in addition to traditional pay TV providers such as Comcast, AT&T, Charter and DISH. None of these entities, however, are subject to any rules that limit how many TV homes they can reach whatsoever, and all have a national footprint. The law also imposes numerous public interest obligations on over-the-air broadcasters that do not apply to non-broadcasters. In many respects, these disparities have disadvantaged broadcasters and favored the newer entrants in the market.

Given these conditions, the stakes surrounding the media ownership rules could not be higher for independent broadcast groups, including Nexstar Media Group (130 stations), Sinclair Broadcasting Group (118 stations), Gray (75 stations), ION Media (60 stations), Raycom (47 stations), TEGNA (45 stations), Tribune (41 Stations) Univision (38 stations), Hearst (32 stations) and Scripps (27 stations).

With an expanded or lifted national ownership cap, these companies would be free to pursue significant growth through acquisition and consolidation. Sinclair and Tribune filed a merger request two months ago which, if approved, will position it as the largest independent station owner in the country with 159 stations. With an increase of 221 hours per week of local news, 6,100 hours of local sports and more than $40 million already invested in newly-acquired stations, Sinclair Chairman, David Smith, promises to invest even more in local programming. Late last year, Nexstar Broadcasting completed the largest merger in its twenty-year history with the purchase of Media General, which positioned it as today's largest broadcast group. With growth, Nexstar CEO Perry Sook has publicly committed to "putting more stations in the hands of minority buyers as part of our future processes."

Despite these unforced assurances from the top two industry leaders, none of these transactions have come without criticism. Citing antitrust, public interest and competitive concerns, pay television companies and advocacy groups have opposed the mergers in comments at the FCC and Department of Justice. Yet for all the ink spent in opposition, the comparative analysis seems to favor the broadcasters.

While these mergers are big by traditional broadcast standards, they pale when compared to consolidation among other media players. Several mergers among broadband and content providers in the last three years have been significantly larger. In 2016, for example, Charter Communications merged with Time Warner Cable in a $65

The National Television Ownership Rule

The national television ownership rule prohibits a single entity from owning television stations that, in the aggregate, reach more than 39 percent of the total television households in the United States.

- **"Reach" is defined as the number of television households in the television Designated Market Area (DMA) to which each owned station is assigned.**
- **No market is counted more than once, even if a station owner holds more than one station in the market.**

The rule does not limit the number of TV stations a single entity may own nationwide so long as the station group collectively reaches no more than 39 percent of all U.S. TV households.

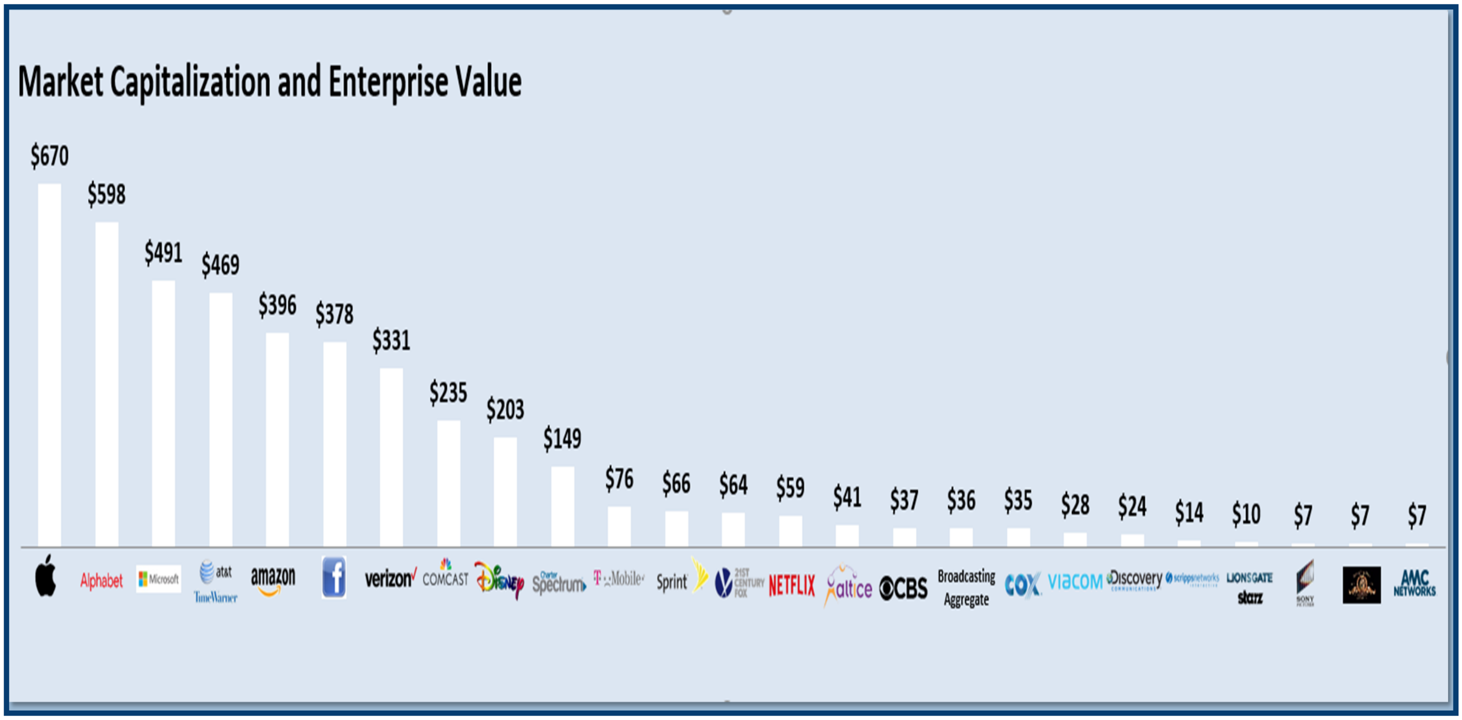
For the purposes of calculating the "national audience reach" under this rule, TV stations on UHF channels (14 and above) count less than TV stations operating on VHF channels (13 and below), this is also known as the UHF Discount.

Although the National TV Ownership rule is no longer subject to review in the FCC's quadrennial review proceeding, in September 2013, the Commission commenced a separate rule making proceeding specifically proposing to eliminate the UHF Discount.

The Commission notes in its rule making that the transition to digital television has undermined the technical justification for the discount and that the discount now has the effect of distorting the national audience reach rule.

billion deal. AT&T acquired DirecTV in a deal worth $49 billion, and is on track to close a merger with Time Warner for over $100 billion later this year. By comparison, the proposed Sinclair – Tribune merger is a $3.9 billion deal.

In addition to consolidation, there is a competitive disparity between broadcasters and other video programming distributors, especially in comparative size and value. Consider the market capitalization for the top non-broadcast media players: Apple ($670b); Alphabet ($598b); Amazon ($396b); Comcast ($235b), and Netflix ($59b). By contrast, the total value of all broadcast groups barely approaches $40 billion, which is less than the smallest (and newest) non-broadcast video provider, Netflix.



So, what does all this mean?

The message is simple and compelling. Broadcasters need scale if they are going to survive in an evolving media market, where their share of advertisers and audiences continue to wane. For this, they are seeking a level regulatory playing field that will realign the rules. A relaxed cap will allow them to negotiate with major cable companies more effectively and continue to provide quality local programming. New rules also would make it easier to secure investment capital needed for growth.

Finally, no one should lose sight of the enduring power of local broadcast to touch our lives like no other medium in trying times of national emergencies. In the midst of Hurricanes Harvey and Irma, local TV and radio broadcasters kept affected communities on top of developments, moment-by-moment. Countless families relied on their local news for community-specific instructions after the storms. This, alone, fulfils the public interest test beyond measure. Any decision by government that will bolster the ability of broadcasters to do more for Americans, not less, should be commended, not condemned.

The Mandate for Change

Photo : Harris & Ewing, Wikimedia Commons

FCC Commissioners Examining Television Set in 1939.

Section 202(h) of the Telecommunications Act of 1996 requires the Commission to review its ownership rules every four years and determine whether they are in the public interest as the result of competition. Under Section 202(h), the Commission shall repeal or modify any regulation it determines is no longer in the public interest. The Commission's current ownership rules can be found in the Code of Federal Regulations.[1]

The FCC's Statutory Mandate

Federal Communications Commission in 1937. Seated (l-r) Eugene Octave Sykes, Frank R. McNinch, Chairman Paul Atlee Walker, Standing (l-r) T.A.M. Craven, Thad H. Brown, Norman S. Case, and George Henry Payne.

Photo: Harris—Ewing Collection

The Federal Communications Commission was established by the Communications Act of 1934 as an independent U.S. government agency and is directly responsible to Congress. The FCC regulates interstate (between states) and international communications by radio, television, wire, satellite and cable in all of the 50 states, the District of Columbia and U.S. territories. Five Commissioners direct the FCC. They are appointed by the President and confirmed by the Senate. Only three Commissioners can be of the same political party at any given time and none can have a financial interest in any Commission-related business. The President selects one of the Commissioners to serve as Chairperson. All Commissioners, including the Chairperson, have five-year terms, except when filling an unexpired term. [2]

Today, the FCC is one of the most important regulatory agencies in the U.S. government, and perhaps in the world. With statutory authority over the nation's communications apparatus, systems and devices, the FCC can: approve or deny mergers; assess liability; levy fines and penalties; bring suit; award licenses and contracts; allocate spectrum; conduct hearings promulgate and interpret rules; establish standards and codes, and exercise a range of regulatory actions affecting television, radio, telephone, wireless, mobile, Internet, cable, satellite and international telecom services in the multibillion dollar communications and information technology sector. [3]

FCC Today: (L-R) Brendan Carr; Mignon L. Clyburn; Ajit Pai (Chairman); Michael O'Rielly, and Jessica Rosenworcel. Photo: FCC

The agency raises millions of dollars for the U.S. treasury through fees, fines and penalties, even though it has operated at less than full capacity for years. It is home to exceptionally capable and committed attorneys, economists, engineers and public servants who belie the term bureaucrat. Although these officials implement the laws passed by Congress, they do not set the regulatory agenda, which is reserved exclusively for the chairman and commissioners--three Republicans and two Democrats.

Communications Act of 1934

In 1934, Congress passed the Communications Act, which abolished the Federal Radio Commission and transferred jurisdiction over radio licensing to a new Federal Communications Commission. Congress also gave the new FCC the telecommunications jurisdiction previously handled by the Interstate Commerce Commission. In 1940, the FCC issued the "Report on Chain Broadcasting" which was led by new FCC Chairman James Lawrence Fly. The report led to the creation of the American Broadcasting Company (ABC) as a distinct entity from the National Broadcasting Company (NBC). [4]

In assigning television stations to various cities after World War II, the FCC found that it placed many stations too close to each other, resulting in interference. At the same time, it became clear that the designated VHF channels, 2 through 13, were inadequate for nationwide television service. As a result, the FCC stopped giving out construction permits for new licenses in October 1948, under the direction of chairman Rosel H. Hyde. Most expected this "Freeze" to last six months, but as the allocation of channels to the emerging UHF technology and the eagerly awaited possibilities of color television were debated, the FCC's re-allocation map of stations did not come until April 1952, with July 1, 1952, as the official beginning of licensing new stations. The FCC's "Sixth Report & Order" ended the Freeze. It would take five years for the U.S. to grow from 108 stations to more than 550. New stations came on line slowly, only five by the end of November 1952. The Sixth Report and Order required some existing TV stations to change channels, but only a few existing VHF stations were required to move to UHF, and a handful of VHF channels were deleted altogether in smaller media markets like Peoria, Fresno, Bakersfield and Fort Wayne, Indiana to create markets which were UHF "islands." The report also set aside a number of channels for the newly emerging field of educational television. [5]

A Brief History of Media Ownership

The Federal Communications Commission first adopted national ownership restrictions for television broadcast stations **in 1941**, with the imposition of a numerical cap on the number of stations that could be commonly owned. The Commission prohibited an entity from operating more than one TV station that "substantially served the same area." **In 1964**, the rules were changed to allow an entity to own up to two TV stations in a single market, provided there were at least eight independent TV stations in the market. This rule became known as the "Eight Voices" test. The numerical cap was increased several times, and the Commission eventually established a 12 station multiple ownership rule **in 1984**. [6] **In 1985**, the FCC determined that both a station limit, restricting the total number of television stations a single entity could own, and a national television audience reach limit were necessary to protect localism, diversity, and competition. [7] Thus, in addition to reaffirming its prior decision to limit the number of television stations that a single entity could own, operate, or control to 12 stations, the Commission revised the national television multiple ownership rule to prohibit a single entity from owning television stations that collectively exceeded 25 percent of the total nationwide audience. [8] At the same time, the Commission adopted a 50 percent UHF discount to reflect the coverage limitations faced by analog UHF stations. [9] The discount was intended to mitigate the competitive disadvantage that UHF stations suffered in comparison to VHF stations, as UHF stations were technically inferior, producing weaker over-the-air signals, reaching smaller audiences, and costing more to build and operate. [10] This technical inferiority, inherent in analog television broadcasting, was significant in 1985 because the vast majority of viewers received programming from broadcast television stations via over-the-air signals.

Mark S. Fowler, FCC Chairman, 1981-1987

Expanding The National Audience Reach Cap

Eleven years later, in the Telecommunications Act of **1996** (1996 Act), Congress directed the Commission to modify its national television multiple ownership rule to increase the national audience reach cap from 25 percent to 35 percent. [11] Congress also directed the FCC to eliminate the restriction on the number of stations that an entity could own, operate or control nationwide. [12] Subsequently, the Commission reaffirmed the 35 percent national audience reach cap in its **1998** Biennial Review Order, reasoning that it was premature to revise the cap until it had more time to observe the effects of raising the cap from 25 to 35 percent. [13]

William E. Kennard, FCC Chairman, 1997-2001

The United States Court of Appeals for the District of Columbia (D.C. Circuit) later remanded the 1998 Biennial Review Order after finding that the decision to retain the national ownership rule was arbitrary and capricious. The D.C. Circuit found the Commission's "wait-and-see" approach to be inconsistent with its mandate to determine on a biennial basis whether the rules were in the public interest. In addition, the court found that the Commission failed to demonstrate that the national audience reach cap advanced competition, diversity, or localism. [14]

In the **2002** Biennial Review Order (issued in a Report and Order on June 2, 2003), the Commission determined the cap should be raised to 45 percent. The Report and Order addressed several other aspects of media ownership, including:

Michael Powell, FCC Chairman , 2001-2005

(1) Eliminating the newspaper / broadcast and television / radio cross-ownership rules;

(2) Adopting a new rule to permit common ownership of two commercial stations in markets with 17 or fewer full power commercial and non-commercial stations and common ownership of 3 commercial stations in markets with more than 18 stations;

(3) Adopting a geography-based market definition to define a local market for radio station ownership rules, and

(4) Designating JSAs that account for more than 15% of weekly advertising inventory attributable to local ownership limits for radio.

(5) In both of these Orders, the Commission also considered and retained the UHF discount and the dual network rule. [15]

Congress Directs FCC to Set National Ownership Cap at 39 Percent

Following adoption of the 2002 Biennial Review Order, and while an appeal of that order was pending, Congress rolled back the cap increase by including a provision in the **2004** Consolidated Appropriations Act (CAA) directing the Commission to modify its rules to set the cap at 39 percent of national television households. [16]

The CAA further amended Section 202(h) of the 1996 Act to require a quadrennial (every four years) review of the Commission's broadcast ownership rules, rather than the previously mandated biennial (every two years) review. In doing so, however, Congress excluded consideration of "any rules relating to the 39 percent national audience reach limitation" from the quadrennial review requirement. [17] Prior to the enactment of the CAA, several parties appealed the Commission's 2002 Biennial Review Order to the U.S. Court of Appeals for the Third Circuit (Third Circuit). These cases were consolidated into one case — *Prometheus Radio Project v. Federal Communications Commission*. In June 2004, the Third Circuit found that the challenges to the Commission's actions with respect to the national audience reach cap and the UHF discount were moot as a result of Congress's action. [18] Specifically, the court held that the CAA rendered moot the challenges to the Commission's decision to retain the UHF discount. [19] The court found that the CAA insulated the national audience reach cap, including the UHF discount, from the Commission's quadrennial review of its media ownership rules. [20]

Kevin Martin, FCC Chairman, 2005-2009

In November **2007**, FCC Chairman Kevin Martin sought to relax the ban on newspaper and broadcast-cross ownership rules. In December 2007, the Commission completed the 2006 quadrennial review of its media ownership rules. This review involved an analysis of the marketplace in which radio, television, and newspapers operated alongside of – and sometimes provided similar programming – as other media such as satellite TV and radio, cable TV, and the Internet. As a part of the review, the FCC also addressed a 2004 court decision that blocked several ownership rule changes the Commission adopted in 2003. This was adopted into a formal proposal on December 18, 2007 – which became known as the **2008** Media Ownership Order. The 2008 Media Ownership Order (1) eliminated the newspaper and broadcast-cross ownership rules; (2) restored the radio/ television cross-ownership rule that was first adopted in 1999; (3) restored the 1999 8 voices test; (4) retained the existing local radio ownership rules, including the overall numerical limits and the AM/FM sub caps, and (5) retained the dual network rule, which prohibits a single entity from owning more than one of the top four networks.

The Prometheus Challenge

The **2008** Media Ownership Order was challenged by the Prometheus Radio Project, (*Prometheus II)* focusing on newspaper / broadcast cross ownership. The case went to the Third Circuit, which decided to vacate the FCC's attempt at deregulation on July 7, **2011**. In February **2008**, the Commission similarly concluded in the **2006** Quadrennial Review Order that "the UHF discount is insulated from review under Section 202(h)" as a result of the CAA, and thus beyond the parameters of the quadrennial review requirement. [21]

On June 13, **2009**, the Commission completed the transition from analog to digital television broadcasting for full-power stations. While UHF channels were inferior for purposes of broadcasting in analog, the DTV transition affirmed the Commission's longstanding belief that digital broadcasting would eliminate the technical disparity between UHF and VHF signals. In fact, experience has confirmed that UHF channels are equal, if not superior, to VHF channels for the transmission of digital television signals. [22]

To kick off the **2010** quadrennial review, the FCC held public workshops between November 2009 and May 2010 (Washington, DC; Columbia, SC; Tampa, FL; and Stanford, CA). The workshops were held to encourage input from the public, academics, industry stakeholders, and the public interest community on a range of media ownership issues and the methods the FCC should use to analyze them. On May 25, 2010, the

Commission released a Notice of Inquiry (NOI) in the 2010 quadrennial seeking comment on the current media ownership rules. [23]

In July **2011**, a court decision affirmed the Commission's decision in the 2006 quadrennial review to retain several of the rules, but vacated and remanded the modified newspaper/broadcast cross-ownership rule, as well as measures taken to foster ownership diversity. Following the Third Circuit's decision in Prometheus II, December 2011, the Commission released a Notice of Proposed Rule Making (NPRM) in December 2011 proposing modest changes to the broadcast ownership rules in response to the media marketplace and the court's action. The Commission developed a substantial record in the proceeding, including a number of economic studies commissioned to help inform its review of the media ownership rules. [24]

Julius Genachowski, FCC Chairman, 2009-2013

With 2014 approaching, however, the Commission faced the need to commence the next quadrennial ownership review. Thus, on March 31, 2014, the Commission adopted a Further Notice of Proposed Rule Making (FNPRM) initiating the 2014 review, incorporating the record from the 2010 proceeding, and seeking new and additional information and data on market conditions and competitive indicators as they exist today. . Details of the current ownership rules are summarized below. [25]

In **2014**, the FCC was required to complete the 2014 quadrennial review, but it had not completed either the **2006** or **2010** quadrennial reviews. In March 2014, the FCC adopted a Further Notice of Proposed Rule Making (FNPRM) and Report and Order initiating the 2014 review, incorporating the record from the 2010 proceeding, and seeking new and additional information and data on market conditions and competitive indicators. In the same report, the FCC also adopted the Television JSA Attribution Rule based on its review of the 2010 quadrennial review. [26]

On May 25, **2016**, the Third Circuit vacated the Television JSA Attribution Rule, stating that the FCC prematurely adopted the rule without evaluating whether the local ownership rules are "necessary in the public interest" in its 2010 and 2014 quadrennial review, which were not completed. The court stated that the rule can be readopted should the FCC conclude that the existing local ownership rules be "retained or replaced with a new rule." [27]

FCC Completes 2010, 2014 Review and Eliminates the UHF Discount

Tom Wheeler, FCC Chairman, 2013-2017

On August 10, **2016**, the FCC issued its Second Report and Order, and effectively completed its 2010 and 2014 quadrennial reviews. The Order determined that the current local ownership rules were necessary and in the "public interest." The FCC also re-adopted the Television Attribution rule after determining that local ownership rules continue to serve the public interest. This made JSAs attributable to broadcasters for purposes of determining a station's coverage/ownership if more than 15% of its weekly advertising time was sold by the JSA partner. Thus, companies that currently sell more than 15% of the JSA station's weekly advertising time would be grandfathered until September 30, 2025 – at which point they had to comply with the rule. The Commission also eliminated the UHF discount, finding that UHF stations are no longer technically inferior to VHF stations following the digital television transition and that the competitive disparity between UHF and VHF stations had disappeared. Then-Commissioner Pai and Commissioner O'Rielly dissented from this decision. [28]

Petition for Reconsideration of the Media Ownership Rules

On November 23, 2016, ION and Trinity filed their Petition for Reconsideration . [29] Free Press, the National Hispanic Media Coalition, Common Cause, Media Alliance and the United Church of Christ Office of Communication, Inc. (Public Interest Opponents) and the American Cable Association (ACA) filed Oppositions to the Petition on January 10, 2017. On December 1, 2016, the NAB (National Association of Broadcasters) filed a Petition for Reconsideration (Recon) asking the FCC to reconsider its Second Report and Order. The NAB argued that (1) the FCC failed to consider competitive changes in the media landscape when it did not include internet, cable operators and/or other digital media as legitimate competitors to local TV, especially when defining a station's "market," and (2) the eight voices test and top four restrictions are arbitrary and capricious, lacking any economic or general purpose. [30]

The Ups and Downs of the UHF Discount

"It is undeniable that eliminating the UHF discount has the effect of expanding the scope of the national cap rule. Companies . . . that are currently in compliance with the national cap ownership rule will be above the cap once the UHF discount is terminated. Yet, the Commission has refused to review whether the current national cap ownership rule is sound or whether there is a need to make it more stringent, which is precisely what [the *UHF Discount Order*] does."

— Commissioner Ajit Pai in Dissent from 2016 UHF Order

Photo courtesy U.S. Chamber of Commerce

". . . [T]he Ultra High Frequency (UHF) discount [is] inextricably linked to the national television ownership cap. The FCC's national television multiple ownership rule prohibits a single entity from owning television stations that, in the aggregate, reach more than 39% of the total television households in the United States. And until late last year, for purposes of calculating compliance with the 39% cap, a UHF television station was attributed with 50% of the television households in its market. For decades, this UHF discount was a critical component of the national cap. As one party pointed out in the record, the cap establishes a limit, and the discount defines how to calculate whether the limit is reached.

"In 2016, the FCC eliminated the UHF discount on a party-line vote. This effectively tightened the rule. For example, companies that were previously under the national cap suddenly went over it. But in reaching this decision, the Commission did not examine whether the facts justified a more stringent cap. Nor did it analyze whether the cap should have been raised at the same time as the UHF discount was eliminated. This was illogical and likely unlawful.

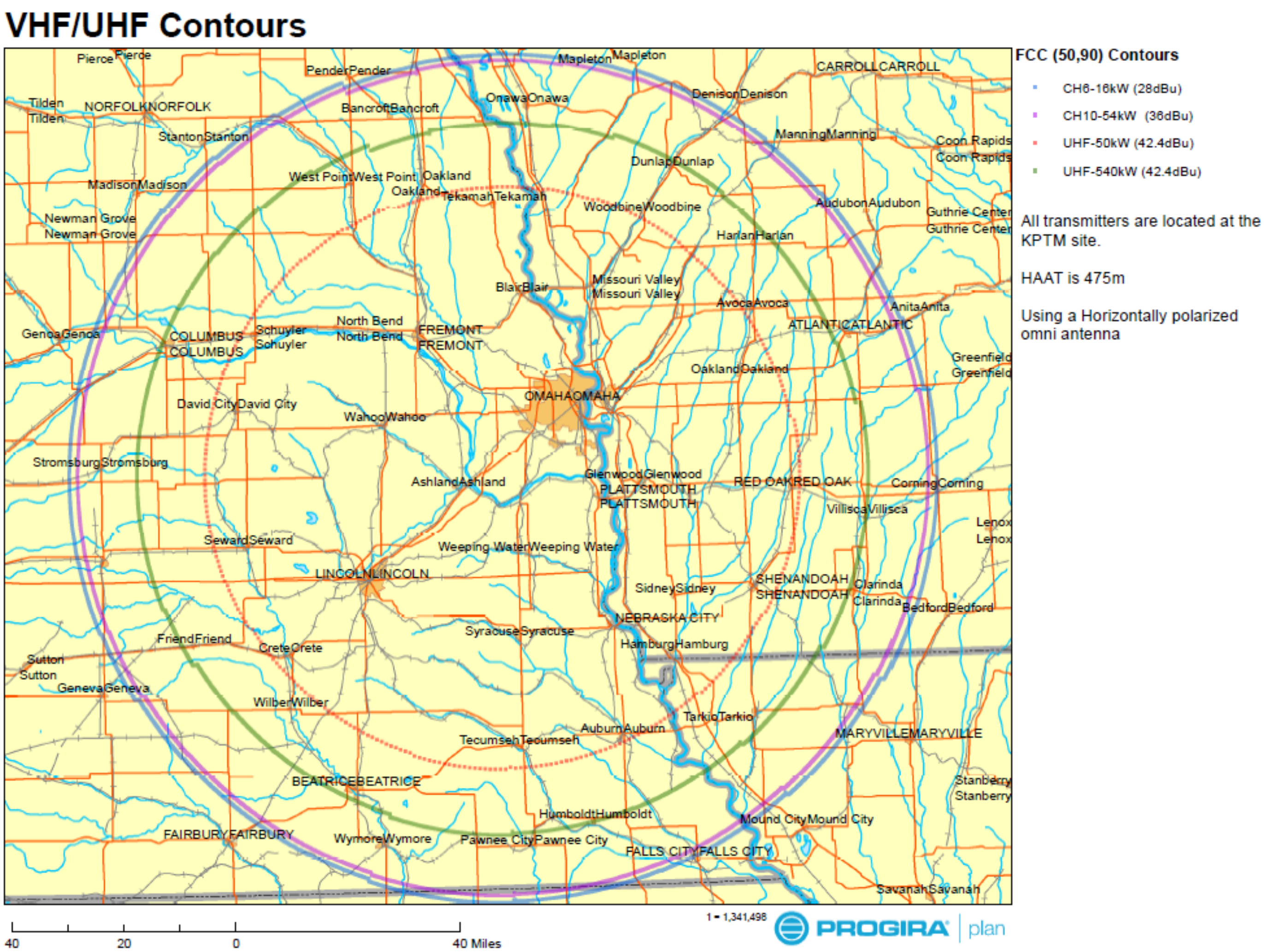
"This situation was avoidable. Back in 2013, when the Commission began this proceeding, I had a simple request. I asked my colleagues to seek comment on both eliminating the UHF discount and adjusting the national television ownership cap. I specifically argued that we could not do one without the other. Unfortunately, my plea fell on deaf ears. Among other things, I was told that the proceeding would take too long to complete if it included a broader examination of the national cap. Ironically, it then took the Commission almost three years to take action and release an Order actually eliminating the UHF discount. We easily could have reviewed the national cap during those three years.

"Today, the FCC is wiping the slate clean. And later this year, we will begin a new proceeding to review comprehensively the future of the national cap, including the UHF discount. Going forward, I will do everything within my power to ensure that this review does not similarly take three years to complete."

—FCC Chairman Ajit Pai on Reinstatement of UHF Discount, March 2017

VHF / UHF Contours

At the heart of the UHF Discount is the principle that UHF signals are inferior to VHF in terms of distance and fidelity. Recent proceedings have asserted that VHF and UHF signals are equal and digital technology has set UHF on par with VHF spectrum. The FCC's VHF / UHF chart suggests otherwise. [31]



Notes

1. Telecommunications Act of 1996, Pub. L. No. 104-104, Sec. 202(h), 110 Stat. 56, 111-112 (1996) (1996 Act).
2. 1996 Act.
3. 1996 Act.
4. https://en.wikipedia.org/wiki/Federal_Communications_Commission
5. https://en.wikipedia.org/wiki/Federal_Communications_Commission
6. https://www.fcc.gov/consumers/guides/fccs-review-broadcast-ownership-rules
7. Amendment of Section 73.3555 [formerly Sections 73.35, 73.240 and 73.636] of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, Memorandum Opinion and Order, 100 FCC 2d 74, 87-92, paras. 30-41 (1985) (explaining that a numerical cap would prevent the acquisition of a substantial number of stations in small markets, while an audience reach cap would temper the ability of a single group owner to increase its audience base substantially by acquiring stations in the largest markets).
8. *Id.* at 90-92, paras. 38-40.
9. *Id.* at 88-94, paras. 33-44.
10. *Id.*
11. Telecommunications Act of 1996, Pub. L. No. 104-04, § 202(c)(1), 110 Stat. 56, 111 (1996) (1996 Act); see also Implementation of Sections 202(c)(1) and 202(e) of the Telecommunications Act of 1996 (National Broadcast Television Ownership and Dual Network Operations), Order, 11 FCC Rcd 12374 (1996). The 1996 Act did not direct the Commission to amend the UHF discount. Id. at 12375, para. 4.
12. Telecommunications Act of 1996, Pub. L. No. 104-04, § 202(c)(1), 110 Stat. 56, 111 (1996).
13. *1998 Biennial Review Order – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,* Biennial Review Report, 15 FCC Rcd 11058, 11072-75, paras. 25-30 (2000) *(1998 Biennial Review Order).*
14. *See* Fox Television Stations, Inc. v. FCC, 280 F.3d 1027, 1040-49, modified on reh'g, 293 F.3d 537 (D.C. Cir. 2002).
15. 2002 Biennial Review Order – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13814, para. 499 (2003) (2002 Biennial Review Order).
16. Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 (2004) (CAA).
17. *Id.*
18. Prometheus Radio Project v. FCC, 373 F.3d 372, 395-97 (3d Cir. 2004) (*Prometheus I*).
19. *Id.*
20. Prometheus I, 373 F. 3d at 396-97.
21. 2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Report and Order and Order on Reconsideration, 23 FCC Rcd 2010, 2084-85, para. 143 (2008) (2006 Quadrennial Review Order), aff'd in part, rev'd in part sub nom. Prometheus Radio Project v. FCC, 652 F.3d 431 (3d Cir. 2011).
22. *See, e.g.,* Innovation in the Broadcast Television Bands: Allocations, Channel Sharing and Improvements to VHF, Notice of Proposed Rulemaking, 25 FCC Rcd 16498, 16511, para. 42 (2010) (recognizing the utility of the digital UHF band while seeking comment on ways to improve reception of digital VHF channels); 2002 Biennial Review Order, 18 FCC Rcd at 13847, para. 591; 1998 Biennial Review Order, 15 FCC Rcd at 11080, para. 38.
23. See NOI, 25 FCC Rcd at 6086.
24. Prometheus II, 652 F.3d at 460-61, 462-63. The local radio rule was also retained, in part, to help promote the Commission's diversity goal.

Notes

See id. at 462-63 (affirming the Commission's decision to retain the local radio ownership rule).

25. Report and Order, 29 FCC Rcd at 4527-45, paras. 340-72.
26. Id.
27. See generally Prometheus Radio Project v. FCC, 824 F.3d 33 (3d Cir. 2016) (Prometheus III). The court also rejected the argument that the Commission acted "arbitrarily and capriciously by not attributing all . . . SSAs" in the Report and Order, crediting the Commission's argument that it needed to study SSAs more closely before making an attribution decision.
28. UHF Discount Order, 31 FCC Rcd at 10248.
29. Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule, MB Docket No. 13-236, Report and Order, 31 FCC Rcd 10213 (2016) (UHF Discount Order).
30. Id.
31. Graph, courtesy Sinclair Broadcasting Group.

The Media Cross-Ownership Rules Are No Longer Relevant In Today's Market

President Gerald R. Ford, 1975

FCC Decides to Repeal Decades-Old Rule

"Upon reconsideration, we repeal the Newspaper / Broadcast Cross Ownership (NBC)) Rule in its entirety. For more than forty years, the NBCO Rule has prohibited common ownership of a daily print newspaper and a full-power broadcast station (AM, FM or TV) if the station's service contour encompasses the newspaper's community of publication. After reviewing the record from the 2010 and 2014 ownership reviews, and the issues raised on reconsideration, we find that the Commission failed to give adequate consideration to the significant record evidence demonstrating that the media marketplace has changed significantly. . . . Our decision to repeal the rule means that all newspapers (print and digital) now will be allowed to combine with television and radio stations within the same local market, subject to the remaining broadcast ownership rules . . . ."

2017 Draft Order on Reconsideration and Notice of Proposed Rulemaking, in the Matter of 2014 Quadrennial Regulatory Review — Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Acct of 1996. MB Docket No. 14-50; MB Docket No. 09-182. para 8.

The Newspaper / Broadcast Cross-Ownership Rule Has Outlived its Role

Richard E. (Dick) Wiley & Ari Meltzer

Richard (Dick) Wiley, FCC Chairman, 1974-1977

In 1975, the Federal Communications Commission (then chaired by Dick Wiley) adopted the newspaper/broadcast cross-ownership rules. It did so at a time when newspapers played a dominant role in this nation's media landscape. And the agency's regulations largely were based on concerns related to that perceived dominance.

Now, some 42 years later, the cross-ownership rules remain substantially unchanged. And this is true despite the fact that the newspaper industry has struggled to prosper—and even survive—in an increasingly Internet-driven environment, that there are today many more radio and television stations than existed in the 1970s, and that the media world also includes numerous highly competitive multichannel subscription-based services. Moreover, in recent years, major newspaper/broadcast groups have moved their media properties into separate organizations. They have done so either for financial reasons or, perhaps, out of frustration with the Commission's continuing unwillingness to make any meaningful changes to its cross-ownership regime.

To appreciate where we are today, it is important to understand the origins of the newspaper/broadcast cross-ownership rules. When broadcasting was in its infancy, many local newspaper owners made the investment necessary to launch this new medium and develop the system of local broadcasting that we now take for granted. In the 1975 Order, the FCC referred to the "pioneering spirit" that newspapers brought first to radio and then to television.[1] By the mid-1970s, however, the broadcast industry had begun to mature. In a statement that now sounds prophetic, the Commission declared

Richard E. (Dick) Wiley, Esq. is the Co-Founder and Chairman Emeritus of Wiley Rein LLP. He served as Chairman, Commissioner and General Counsel of the Federal Communications Commission (FCC) from1970-1977. Wiley has received numerous accolades throughout his storied career, including being named a Washington "Visionary" by The National Law Journal, the "most influential media and telecommunications lawyer in the United States" by the International Herald Tribune, one of the top "100 Men of the Century" by Broadcasting & Cable, and the "Father of High-Definition" television by The Globe and Mail. As Chairman of the Federal Communications Commission (FCC), he fostered increased competition and lessened regulation in the communications field. Dick played a pivotal role in the development of HDTV in this country, serving for nine years as Chairman of the FCC's Advisory Committee on Advanced Television Service.

Ari Meltzer, Esq. is an Associate Attorney at Wiley Rein LLP in Washington, DC and an expert on communications law, policy and regulation.

that it "is obliged to give recognition to the changes which have taken place and see to it that its rules adequately reflect the situation as it is, not was."[2] Accordingly, in the interest of promoting diversity, the agency adopted a prospective and geographically narrow restriction on the acquisition of a broadcast license by a local newspaper.

In refusing to alter a rule that is long past its prime, the FCC has appeared to take the media marketplace as it was, rather than as it is. This inaction has been especially disconcerting because Congress, in the 1996 Telecommunications Act, directed the agency to examine its media ownership rules every two (now four) years to determine whether they are still "necessary" in the public interest.[3] Given the marketplace developments of the last four decades and the plethora of new competitors to both newspapers and broadcasters, it would seem difficult, if not impossible, for the Commission to contend that the cross-ownership rules remain necessarily or even justifiable.

Further, the FCC's lack of action has seemed even more puzzling given expressions made by a panel of the United States Court of Appeals for the Third Circuit. For more than 13 years, this panel (by a 2-1 majority) has maintained jurisdiction over the Commission's media ownership regulations and generally has resisted any deregulatory initiatives.

Yet, the panel itself has specifically questioned the need for a blanket prohibition on newspaper/ broadcast combinations in the same market. As early as 2004,[4] the Third Circuit concluded that the record supported the agency's conclusion "that cable and the Internet contribute to viewpoint diversity," rendering the cross-ownership rules ripe for revision. However, because the court took issue with various aspects of the Commission's deregulatory Order, the restrictions stayed on the books. And just last year, this same judicial panel recognized the fact that "the 1975 ban remains in effect to this day even though the FCC determined more than a decade ago that it is no longer in the public interest." [5]

Ari Meltzer, Esq.

Despite these congressional and judicial nudges, the FCC has held firm on the newspaper/broadcast rules (and, indeed, on its other ownership restrictions as well). But now, with a new deregulatory-minded agency majority and with a Chairman (Ajit Pai) who long has lamented the "archaic" nature of the broadcast regulations, there are signs that the Commission may be prepared to take decisive action in the near future on cross-ownership and, perhaps, other ownership prohibitions as well.

If so, the shame relative to the cross-ownership rules is that regulatory relief may come too late to remedy so much of what has afflicted the newspaper industry in this country. According to data cited by the National Association of Broadcasters, the number of daily newspapers has declined by nearly 25% since 1975, and the total daily circulation has fallen by a third. Newspaper advertising, likewise, has decreased dramatically. Over the past several decades, the general stability and profitability of elements of the broadcast industry might have helped to preserve at least some of the "lost" newspapers. While print journalism layoffs sadly have become all too common, staffing in local television newsrooms has steadily increased in recent years.[6] Concomitantly, the strength of local news reporting (which always has been a hallmark of newspapers' "journalistic tradition") could have been a valuable asset to broadcasters, especially in sometimes hard-pressed smaller markets. Nevertheless, any future FCC initiative to modify or eliminate outdated broadcast regulations—and, in particular, cross-ownership—would seem to be in the public interest. After all, the Commission would only be recognizing the realities of the media marketplace as it is today and not as it was in 1975, 1996, or even just a decade ago.

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1. *In the Matter of Amendment of Sections 73.34, 73.240, & 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, & Television Broadcast Stations*, Second Report and Order, 50 F.C.C.2d 1046, 1074 ¶ 27 (1975).
2. *Id.* at 1075 ¶ 27.
3. Telecommunications Act of 1996, § 202(h), 110 Stat. at 111–12, 47 U.S.C.A. § 609.
4. *Prometheus Radio Project v. FCC*, 373 F.3d 372, 400 (3d Cir. 2004), *as amended* (June 3, 2016), *amended sub nom. Prometheus Radio Project v. FCC* (3d Cir. June 3, 2016)
5 *Prometheus Radio Project v. FCC*, No. 15-3863, 2016 WL 3003675, at *13 (3d Cir. May 25, 2016)
6. *See* Bob Papper for the Radio Television Digital News Association, Newsroom Staffing (July 25, 2016), *available at* http://rtdna.org/article/rtdna_research_newsroom_staffing.

Newspaper / Broadcast Cross-Ownership Rule

A full-service broadcast station (TV or radio) and a daily newspaper may not be commonly owned if the station's contour (defined separately by type of station) completely encompasses the newspaper's city of publication.

- The order originally adopting the rule contemplated waivers: (1) where there is an inability to dispose of an interest to conform to the rules; (2) where the only possible sale is at an artificially depressed price; (3) where separate ownership of the newspaper and station cannot be supported in the locality; and (4) where the purposes of the rule would not be served by divestiture. The previous order also grandfathered a number of NBCO combinations, which remain in existence today.

Radio / Television Cross-Ownership Rule

The number of commercial radio and television stations an entity may own in the same market is tiered, with the amount of common ownership permitted depending on compliance with the local TV and radio ownership rules and the number of independently owned media voices (television and radio stations, cable systems, and newspapers) that would remain in the relevant market if the stations at issue are commonly owned:

- Regardless of market size: up to two TV stations and one radio station.
- If at least 10 independently owned media voices remain: up to two TV stations and four radio stations.
- If at least 20 independently owned media voices remain: up to two TV stations and six radio stations, or one TV station and seven radio stations.

Rep. Greg Walden, Chairman, Energy & Commerce Committee, U.S. House of Representatives

Eliminating the rule would "provide much needed flexibility to the many newspapers and broadcasters throughout the country that provide important local news coverage and encourage even greater investment in original journalism."

The Media Market Has Changed
In New and Dramatic Ways

A Regulator's Call to Modernize FCC's Media Ownership Rules

FCC Commissioner Michael O'Rielly

"From the outset, we must acknowledge a truism of the modern media marketplace: platform lines have blurred. American consumers can access news and entertainment from social media giants like Google or Facebook, over-the-air-broadcasters, over-the-top applications, fiber head-ends and wireless devices, wherever, whenever. This is a wonderful development and a boon to consumer options for media content.

"Broadcasters and newspapers can and should be allowed to fully compete in today's environment. But FCC rules disproportionately apply burdens on these industries that are not imposed on their newfound competitors, nor should they be. For example, under current FCC rules, a local broadcaster is prohibited from owning a newspaper in the same market (and vice versa), but nothing stops a tech company billionaire from acquiring this same entity. Despite bipartisan support in the U.S. Congress and past FCC efforts to repeal this ban, the newspaper / broadcast cross-ownership rules remain.

"We must define the media market as it exists today. That means the inclusion of newspapers, radio stations, and television stations, but also their competitors: MVPDs, over-the-top providers, Internet sites, social media platforms, streaming music services, and satellite radio. Once we accurately acknowledge the market we are regulating, we can have an honest debate about what rules ultimately make sense."

—Commissioner Michael O"Rielly Blog, October 20, 2017

Straight Talk from Wall Street

The Data Demand Changes in Media Ownership Rules

Marci Ryvicker, MBA, CFA, CPA

As a sell-side equity analyst, I spend the majority of my time with data. I gather data. I analyze data. I forecast off of data. I talk about data. And while this might sound a little lonely and somewhat boring, I actually find data to be quite fascinating. Data helps me make the right decisions – in both my professional and personal lives.

Marci Ryvicker, MBA, CFA, CPA,
Equity Research Analyst
Wells Fargo Securities

What I have learned – both professionally and personally - is that people tend to use data differently. I consider myself a very objective user of data. I do not walk into a project with a predetermined solution. I do not try to get the data to "fit" any type of norm. I let the data guide my ultimate response and decisions. Yes, data needs to be filtered and outliers removed. And yes, there is oftentimes a subjective way to interpret data. But I do this as honestly and objectively as I can. Unfortunately, I have found this to be a unique quality, as it seems most people I encounter tend to "interpret" data in a way that makes them either look good, sound smart, or reinforce their chosen thesis regardless as to whether the data truly supports the veracity of that thesis.

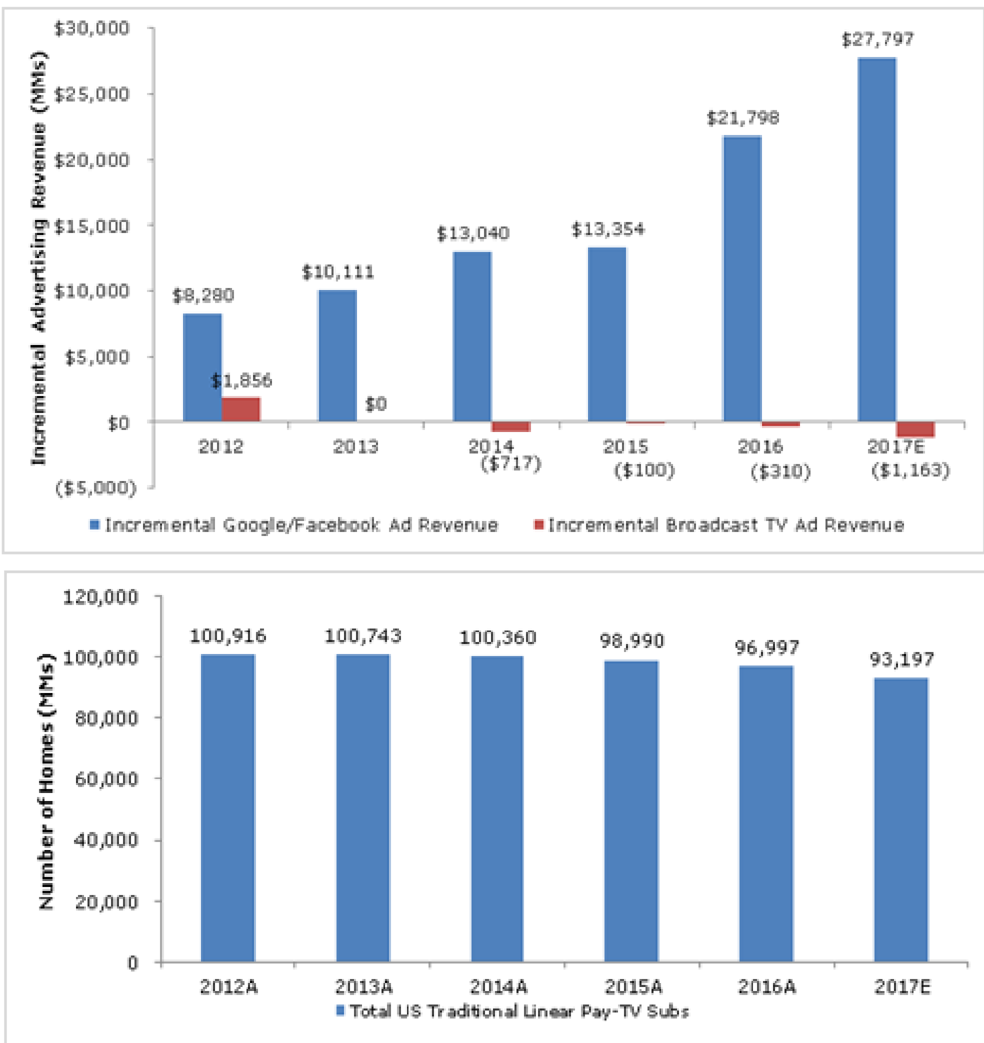
What has been most uncomfortable (and sometimes downright surprising) has been my observations regarding how data is "used" in Washington D.C. Given the partisanship of so many issues, it feels to me like data is not used, but rather abused – not always, but enough times to, again, make me uncomfortable. Perhaps what has been most perplexing to me is how data has oftentimes been ignored when it comes to some of the industries that are so tightly regulated. I don't understand why regulations that were created in a 1990's era are the "right" regulations for what is now the "Internet Era" – or perhaps more accurately, the "Mobile Era". While multiple industries have fallen under this curse (so I call it), the one of particular focus that lies near and dear to my heart is the broadcast industry. And when I talk about broadcast, I include both television and radio. These industries are clearly regulated on behaviors predicated from the 1990s.

But if you open your eyes, pay attention to what is going on around you, and LOOK AT THE DATA (any data really), you will immediately conclude that the consumer today is nothing like the consumer of the 1990's. Google (1998) and Amazon (1994) were in their infancy and simply a search engine and online book store, respectively. There was no iPhone (2007), no Facebook (2004). Netflix (1997) didn't stream at all –

Netflix SNAIL MAILED you DVDs….Today, these companies are literally taking over much of what had been the "media norm" back in the 1990's.

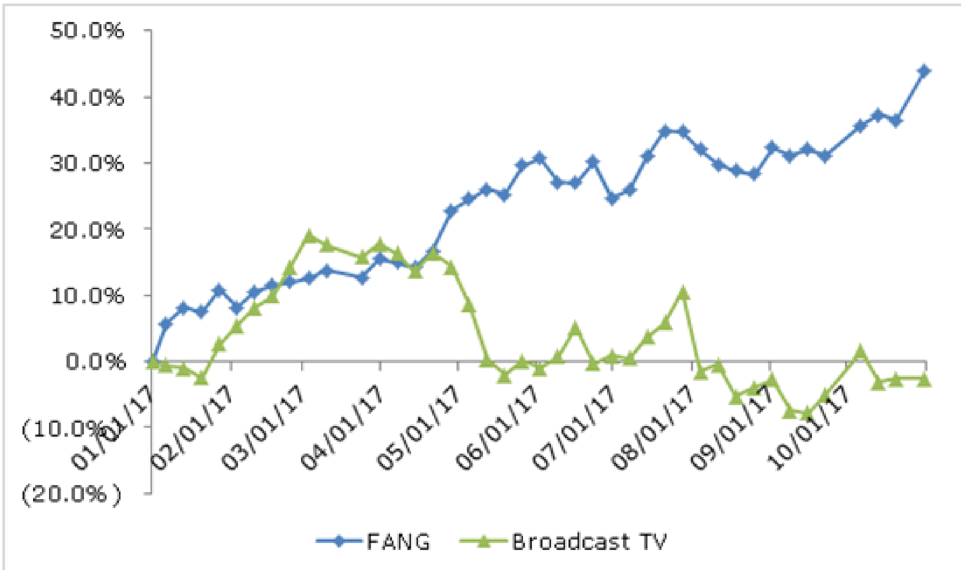
I can show this to you in terms of advertising (see the chart below) as well as TV subscriptions (see the other chart below). I can also show you in terms of stocks (which happens to be more my language anyway).

Incremental Advertising Revenue and Pay TV Subscribers, 2012-2017E



Sources for all data: Company data, MAGNA and Wells Fargo Securities, LLC estimates

Broadcast Industry vs FANG Stock Price Performance, 2017 YTD



Note: FANG represents Facebook, Amazon, Netflix and Google/Alphabet.
Source: FactSet and Wells Fargo Securities, LLC estimates

Going back to broadcast – I just don't understand how one can justify the current rules – specifically the national AND local ownership rules – at a time when the "media" marketplace has completely opened up to new entrants, who are literally devouring consumers' attention and time daily.

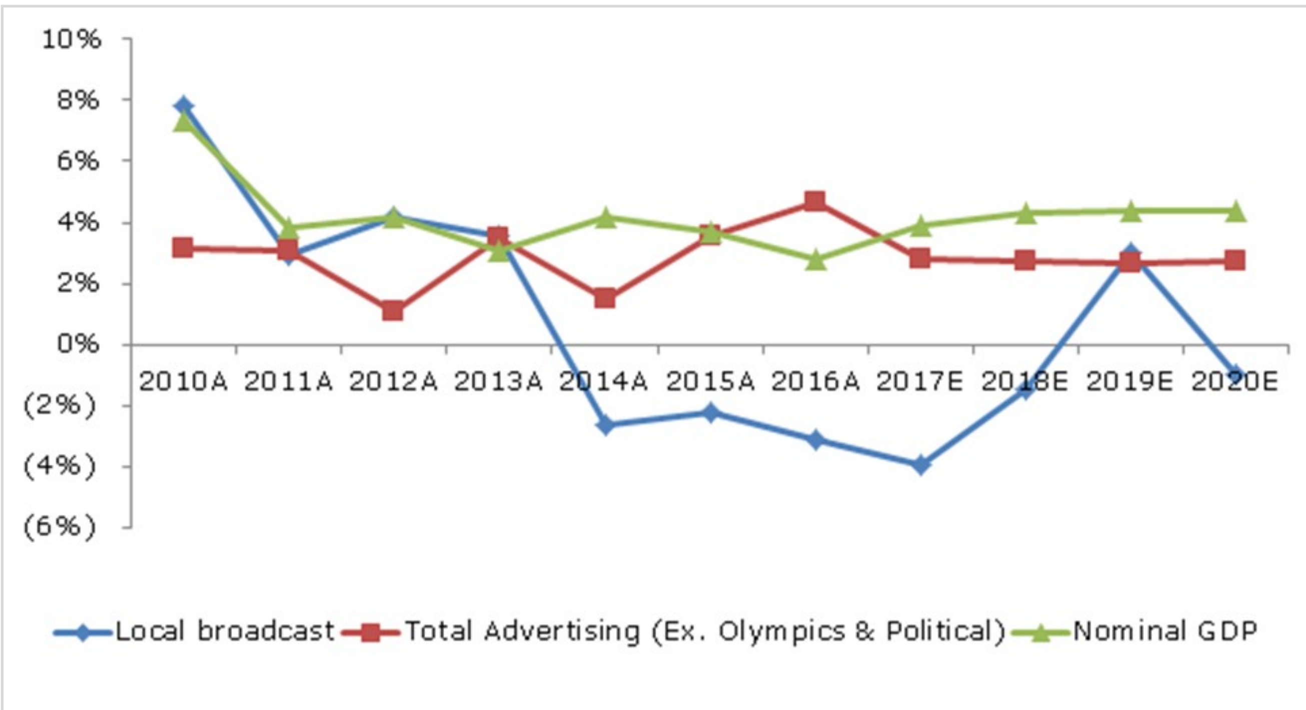
Why is there a national ownership limitation for broadcast when companies quadruple the size can own assets across the United States with no worries, issues, or barriers?

Why is there a limitation on the number of stations an operator can own in particular markets when again, companies quadruple the size can own cable assets, cable networks and broadcast stations in a single market? This does not make sense to me.

As I have done my work on the broadcast industry (for the past 16 years I might add), it has been very obvious to me that the very regulations that were created to protect the citizens of this country could actually wind up harming them by putting the broadcast companies out of business, in my view, ultimately hampering the citizens of this country. We remind you that the ONLY media that provided accurate information after the Boston marathon bombing (2013) was LOCAL NEWS.

Let's look at some data, shall we? Advertising is still a major component of broadcast revenue, and the data shows us that in the current environment, that advertising revenue is at risk – which means investment in content is at risk – which means local news for our citizens is at risk. While we cannot blame "everything" on the strict regulations, we can certainly say with a high degree of confidence that these regulations have absolutely hampered this industry.

Broadcast Ad Revenue Growth vs. Total Ad Revenue Growth vs. Nominal GDP Growth



Source: FactSet and Wells Fargo Securities, LLC estimates

Now, there is a faction within Washington D.C. that certainly agrees with my view that the media landscape needs to be updated for the current times. FCC Chairman Ajit Pai has been very vocal in his view that regulations of the 1990s should be left for the 1990s. This doesn't apply just to broadcast, it is also being applied to broadband (a topic for another piece I am sure) and other industries.

I wholeheartedly agree with the FCC's 86-page "Order for Reconsideration". I applaud the proposed elimination of the 8 voices test, the JSA (joint service agreement) attribution rule, and the newspaper/broadcast cross-ownership rule. I also applaud the flexibility with how the FCC will review the Duopoly Rule on a case-by-case basis. Again, I look at the data everyday -data that clearly demonstrates this broadcast industry needs to consolidate to be strong and to invest in innovative ways to distribute news that the younger generation might not otherwise get.

We all know deregulation is going to be a bumpy road faced with legal challenges. But the data suggests rational heads should prevail.

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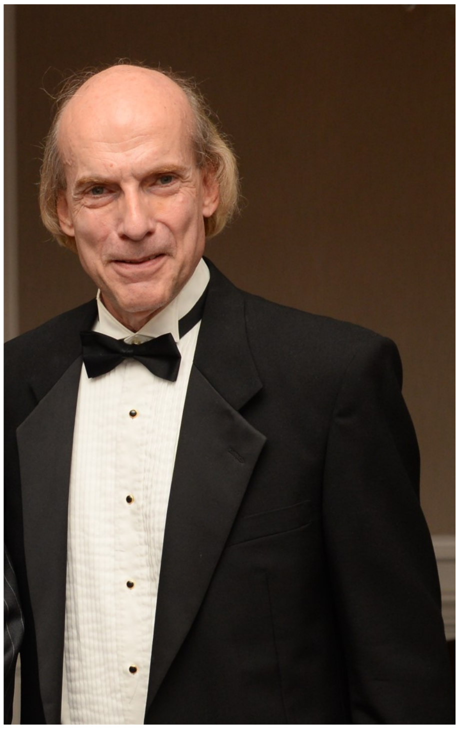


Richard T. Kaplar, Executive Director, The Media Institute in Arlington, VA. He has written, edited, or produced more than 40 books and publications on a wide variety of communications policy and First Amendment issues.

Repealing Media Ownership Regulations: It's About Time *

FCC Chairman Ajit Pai has proposed the most reasonable of actions: repealing or revising 40-year-old media ownership rules that long ago outlived any marginal usefulness they might've once had.

This should be a no-brainer. But, Washington being what it is, entrenched interests and politicians bent on maintaining the status quo for their own purposes have pilloried Pai for trying to do something that should've been done decades ago.

First, the facts. On Oct. 26, Chairman Pai released an Order on Reconsideration and Notice of Proposed Rulemaking. This proceeding seeks to accomplish the following:

- Eliminate the Newspaper/Broadcast Cross-Ownership Rule;
- Eliminate the Radio/Television Cross-Ownership Rule; and
- Revise the Local Television Rule to eliminate the Eight-Voices Test and to incorporate a case-by-case review provision in the Top Four Prohibition.

The proceeding would also seek to eliminate the attribution rule for television Joint Sales Agreements; retain the disclosure requirement for commercial television Shared Services Agreements; keep the Local Radio Ownership Rule; and create an incubator program to encourage new and diverse voices in the broadcast industry.

Chairman Pai's desire to eliminate certain ownership rules is based on the correct premise that the rules do not reflect the realities of today's media environment. "Not only have the means of accessing content changed dramatically, but the media marketplace has seen an explosion in the number and variety of sources of local news and information since the Commission adopted the NBCO Rule in 1975," the Order states at para. 17.

That's a bit of an understatement when one considers the media landscape of the mid-'70s: no Internet, no smartphones, no tablets. No digital news content. No satellite TV or satellite radio. Far fewer channels on cable systems, and little or no original cable programming. No CNN or Fox News or MSNBC.

But the explosion in media is nothing new – in fact it was in full swing 20 years ago. The FCC reviews of ownership rules that followed in 2002, 2006, and 2010 also found media environments that were vastly different from that of 1975. But for a variety of political, legal, and procedural reasons, no meaningful reforms were undertaken.

* This article originally published on November 7, 2017 by The Media Institute. http://www.mediacompolicy.org/

The explosion in media depth and breadth is a critical point here. Most FCC ownership restrictions have been premised in whole or part on the concept of media scarcity – that is, media outlets were considered a scarce resource and thus the FCC thought it had an obligation to make sure the views expressed through those scarce media outlets were as diverse as possible.

This "viewpoint diversity" principle was always suspect from a First Amendment standpoint. The First Amendment is intended to protect speakers from government-imposed censorship – not to ensure that listeners receive a variety of viewpoints.

Since the FCC is prohibited by law from regulating content, it has always used ownership diversity as a proxy for viewpoint diversity, employing the questionable assumption that many different media owners would offer many different viewpoints. Thus the panoply of regulations on numbers of stations that could be owned in a market or in total, cross-ownership bans, etc. But the First Amendment flaw (and terrific irony) here is that the FCC was trying to promote the voices of some media owners by stifling the voices of others – who also happened to have free-speech rights.

Unfortunately, this First Amendment argument never received a full and robust hearing in the courts. But the undeniable explosion in media content – and particularly digital media content – renders moot any remaining shred of the media scarcity argument.

"We find … that prohibiting newspaper/broadcast combinations is no longer necessary to serve the Commission's goal of promoting viewpoint diversity in light of the multiplicity of sources of news and information in the current media marketplace and the diminished voice of daily print newspapers," the Order states at para. 9.

Likewise, the Commission proposes to repeal the Radio/Television Cross-Ownership Rule, finding that the rule "is no longer necessary to promote viewpoint diversity in local markets." Furthermore, as the Order states at para. 65, "we cannot justify retaining the rule … based on the unsubstantiated hope that the rule will promote minority and female ownership." The Commission's proposals to eliminate the Eight Voices Test and modify the Top Four Prohibition for television stations similarly recognize the vibrancy of today's media marketplace.

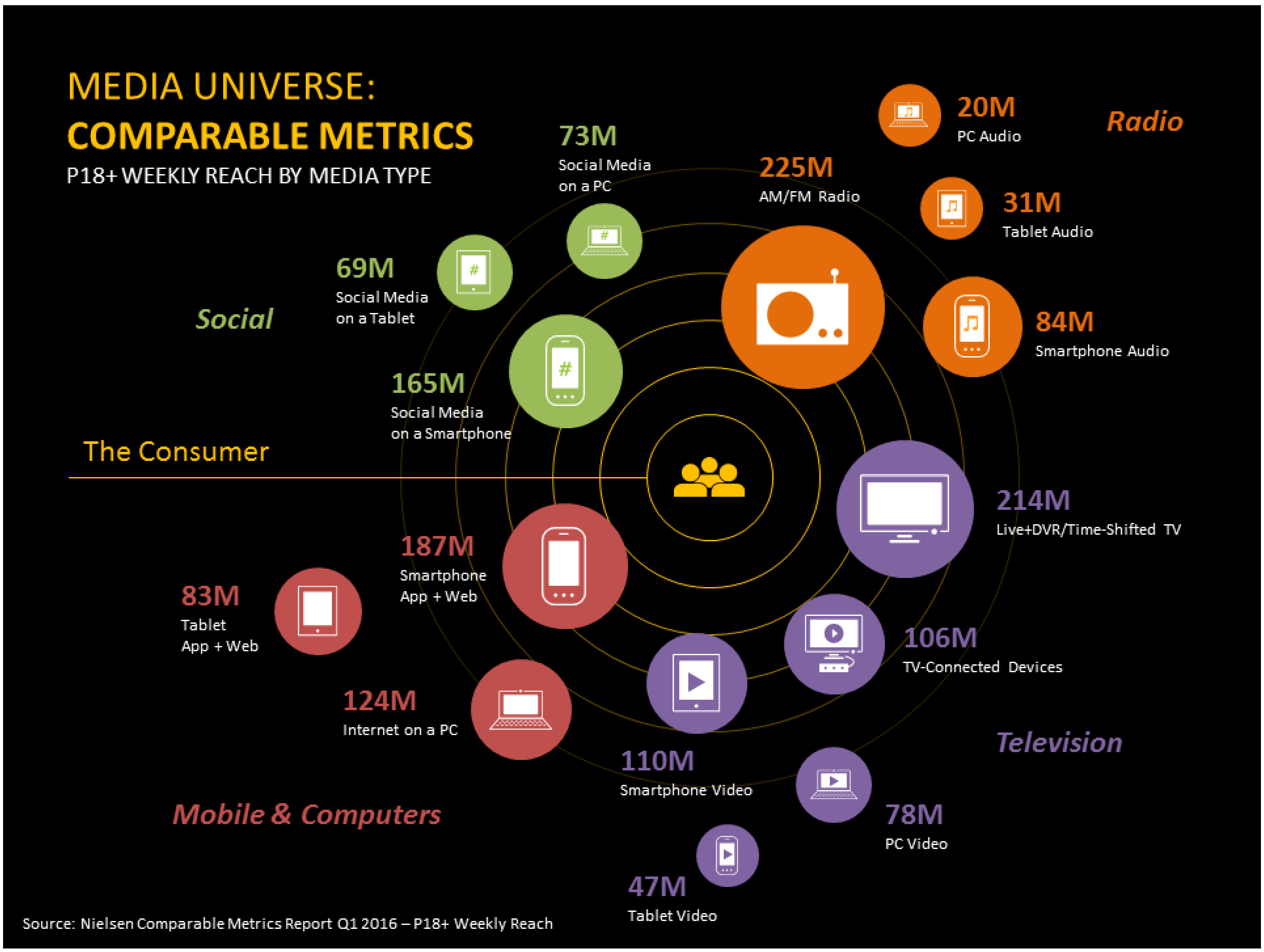
Repealing outdated ownership rules such as these is not merely an attempt by the Commission to clear out regulatory deadwood. It is an acknowledgment that broadcasters need to be freed from archaic governmental constraints if they are to compete effectively in today's media world. Broadcasting is moving inexorably toward economies of scale – and indeed must seek economies of scale – just to survive in the face of competition from tech giants like Facebook and Google. Newspapers, of course, continue to suffer their own financial woes and would benefit from any relief. This is all the more important because of the key role broadcasters and newspapers play as the sources of local news in their communities – they are the originators, not the aggregators.

Chairman Pai has pursued the right course of action by proposing to eliminate some of the most egregious media ownership rules and to modify others. If the Commission follows through, broadcasters will be able to compete more effectively on today's highly digitized playing field – just as many newspapers should realize a critically needed economic boost from new ownership arrangements. The real winners will be consumers, who should see more and better news coverage about their local communities.

Selected Data from Diverse Sources on Today's Media Market

Boundless Choice

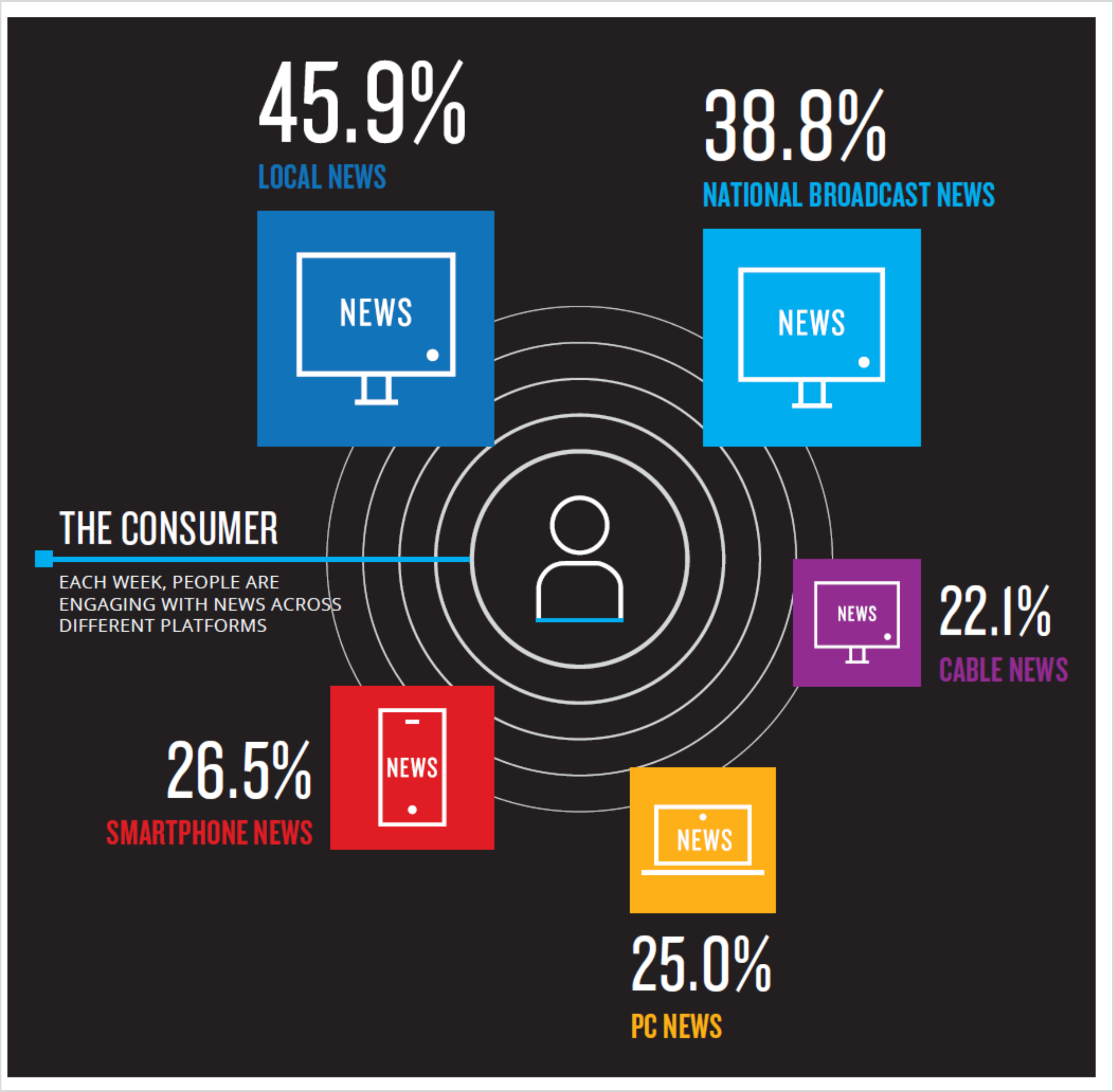
"The current state of the media universe presents a bounty of boundless choice to today's consumer. Like the cosmos, which is contemplated much in current times, the proliferation of devices and the abundance of media choices is presenting endless options for the consumer and endless challenges and opportunities for the marketer." — *Nielsen*



Source: Nielsen Comparable Metrics Report, 2016

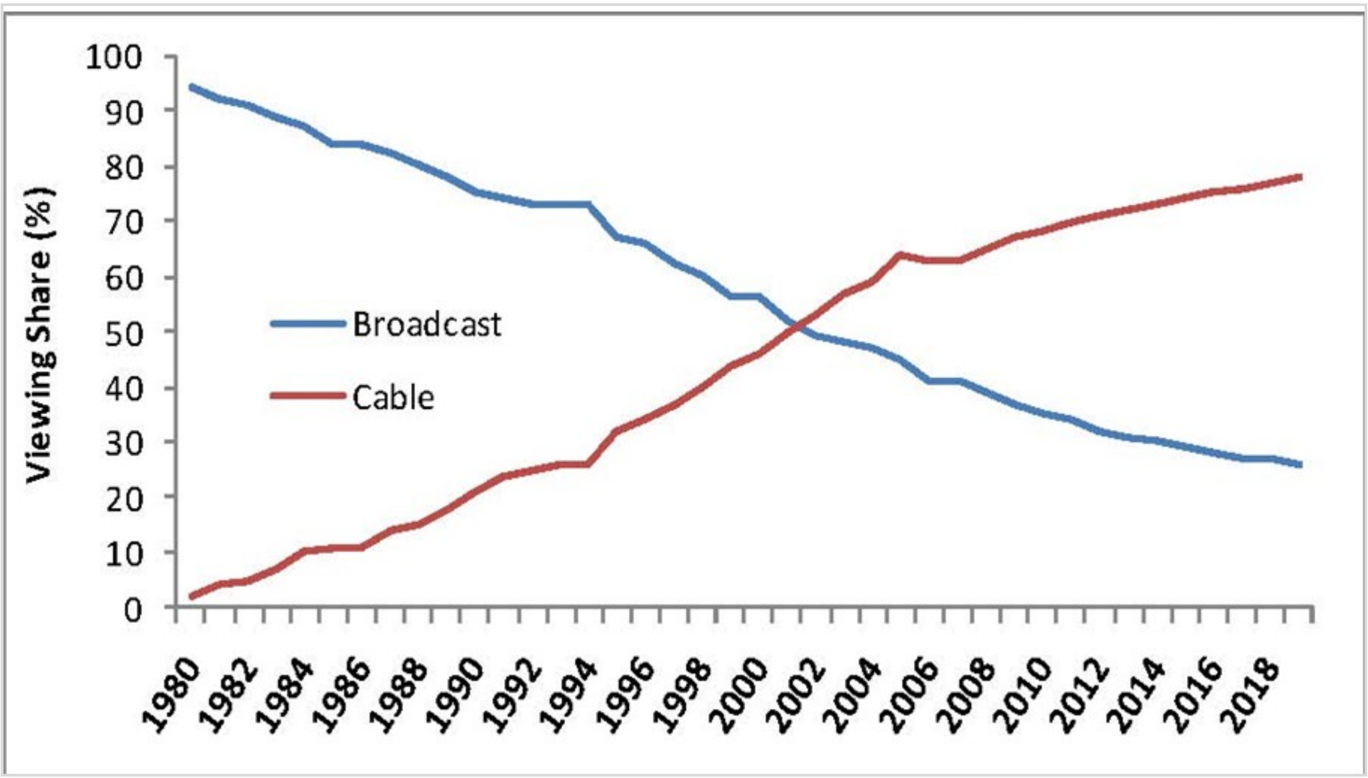
The Universe of News Consumption—

Americans are consuming news
in more ways today, than ever before.



Source: NLTV (Local News, National Broadcast News, Cable News) EMM Panel (Smartphone News), Netview (PCNews).
Reach % based on LPM Population

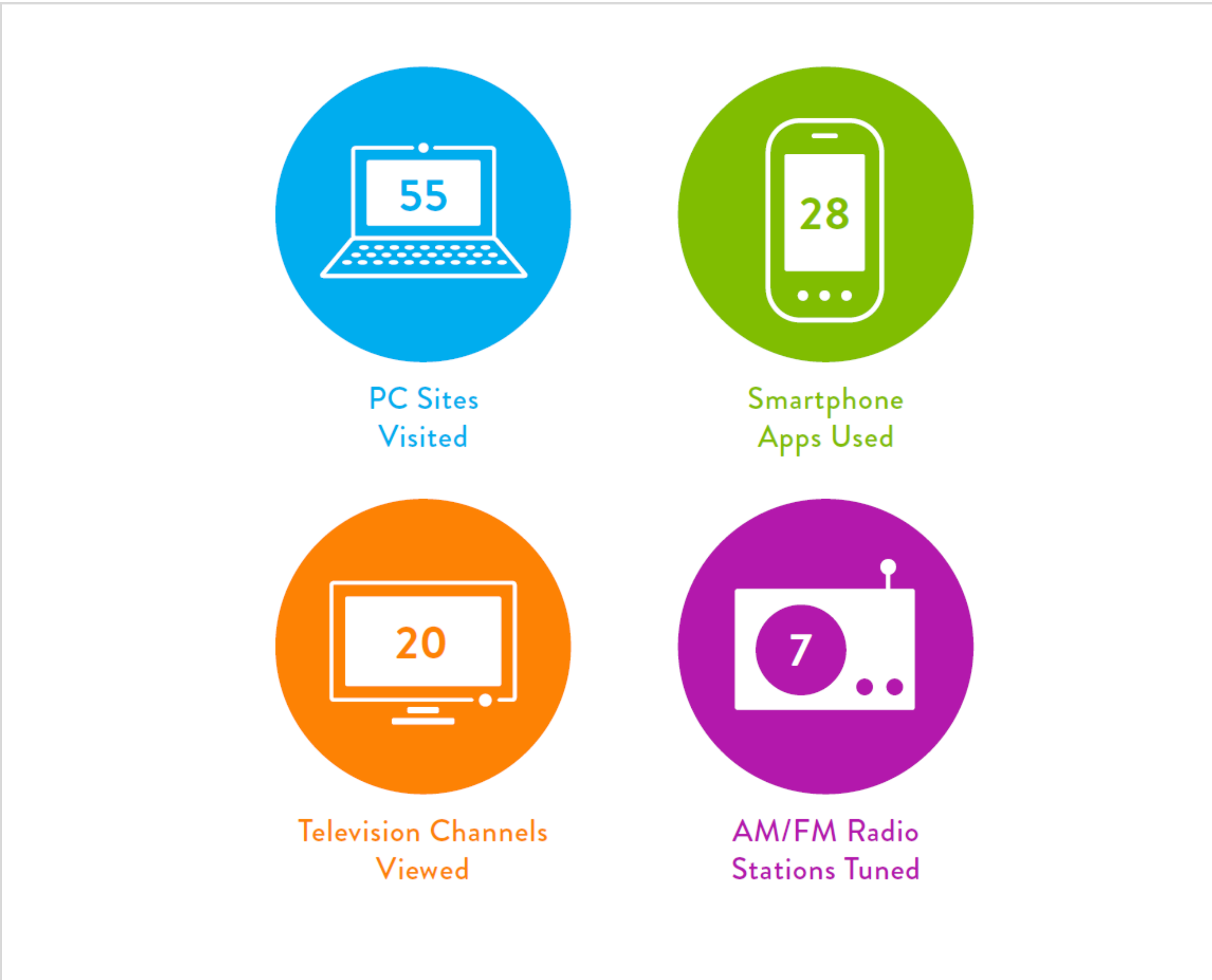
Audiences Have Shifted from Broadcast to Cable



Source: SNL Kagan, Broadband Cable Financial Databook. 2009 ed.

Digital Media Fragmentation—

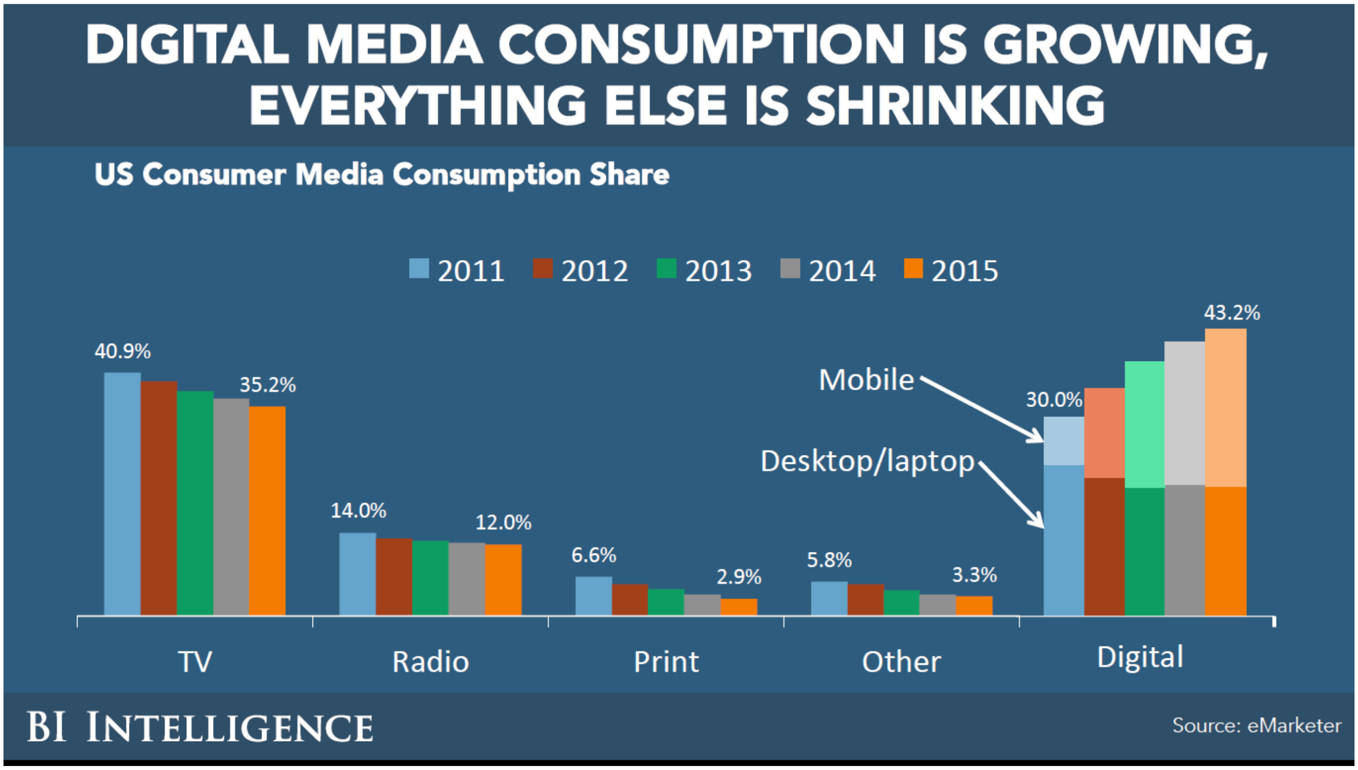
Average Monthly Choices by Device Among Adults in May 2016



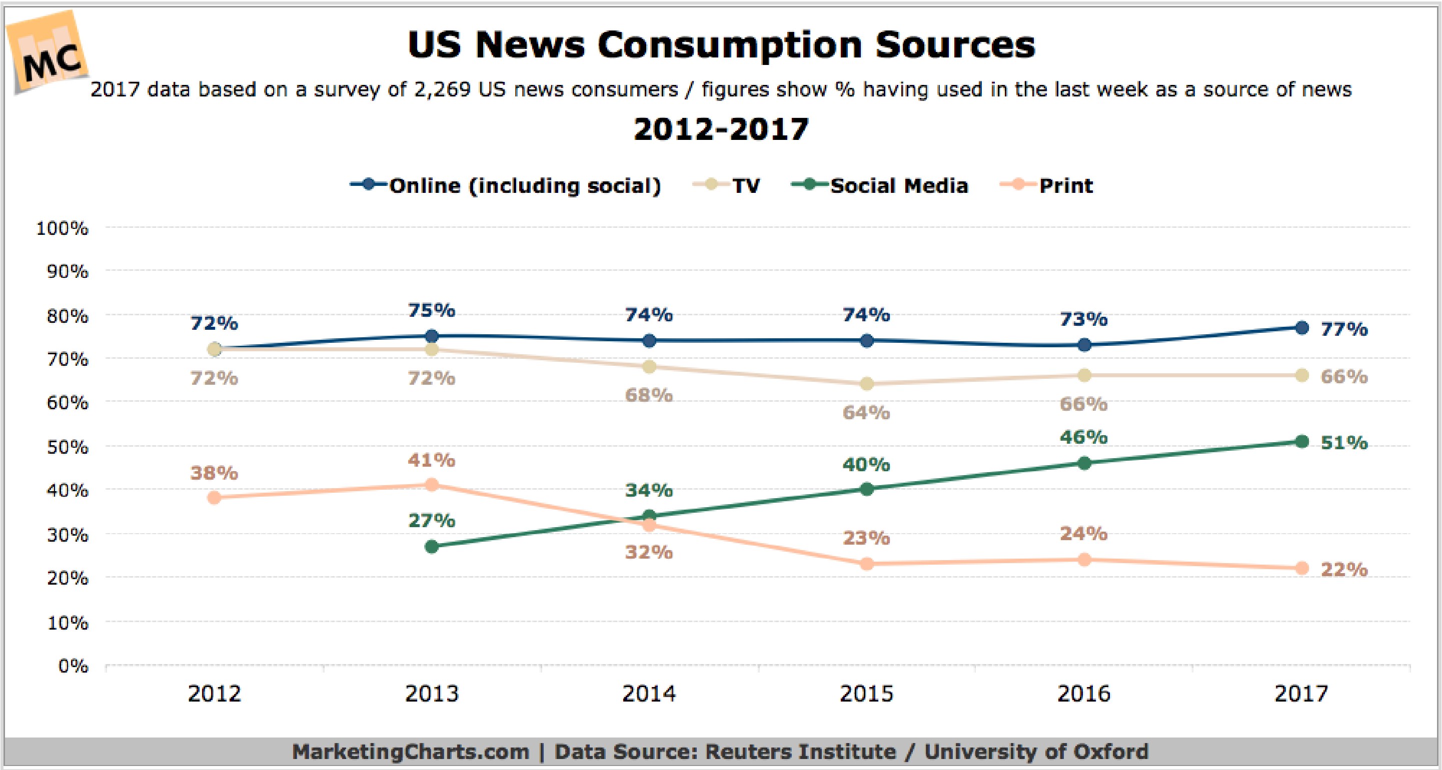
Source: Nielsen Media, 2016

Digital media creates even more fragmentation in media usage and consumption. With thousands of sites available, users visit them more often. Adults visit 55 PC sites and use 28 smartphone apps every month. The average adult views 20 television stations, and tunes to 7 AM/ FM stations per month, which account for the majority of time spent across devices.

Digital Media Opens Up Many Viewing Options

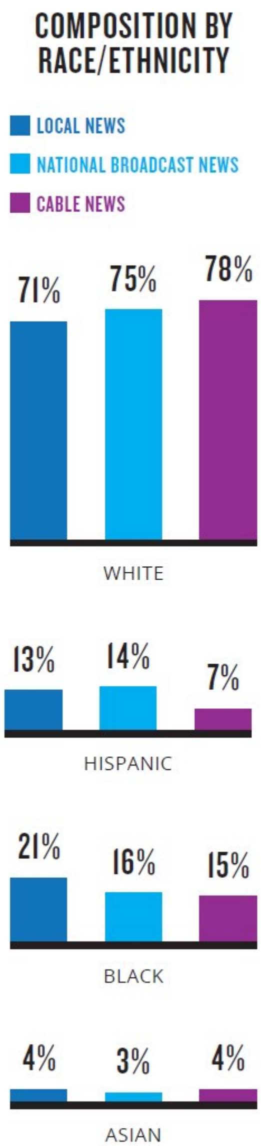


Where Americans Get Their News



Source: MarketingCharts.com | Data Source: Reuters Institute, University of Oxford

Local News Viewers are Diverse



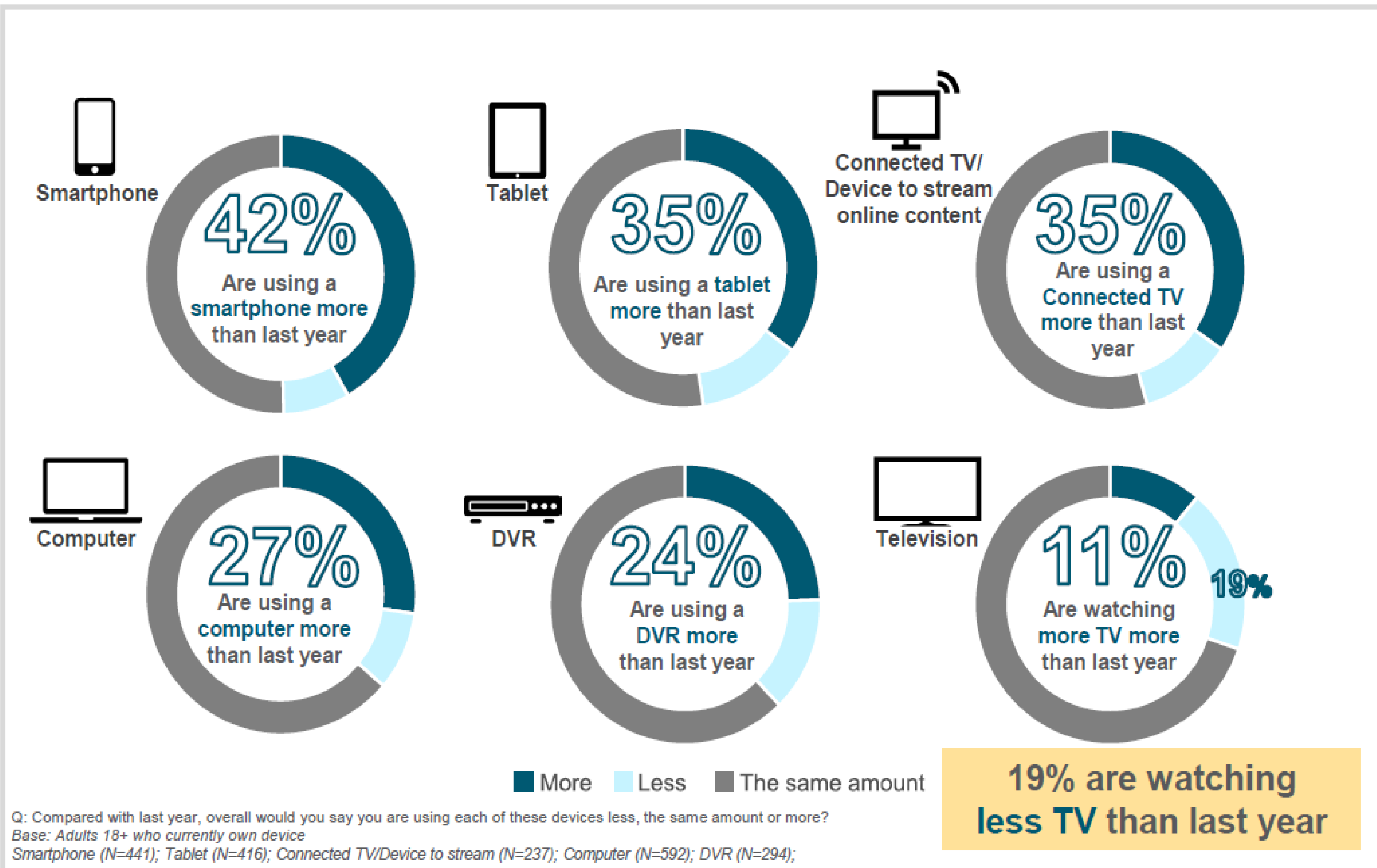
	WEEKLY TIME SPENT (HH:MM)*	SHARE OF TOTAL VIEWING
BLACK	7:17	17%
WHITE	6:12	19%
HISPANIC	2:57	13%
ASIAN	2:25	18%

African-Americans spend the most time consuming news, at 7:17; however, news viewing makes up the largest share for white adults, at 19% of all viewing minutes.

Source: Nielsen Local TV View. Q1, 2017, January 1– March 31, 2017. Local Watch Report.

Changing Viewing and Usage Practices

Smartphone, tablet and connected TV / device usage has increased considerably over the past year. Correspondingly, 19% of viewers are watching less TV than the previous year.

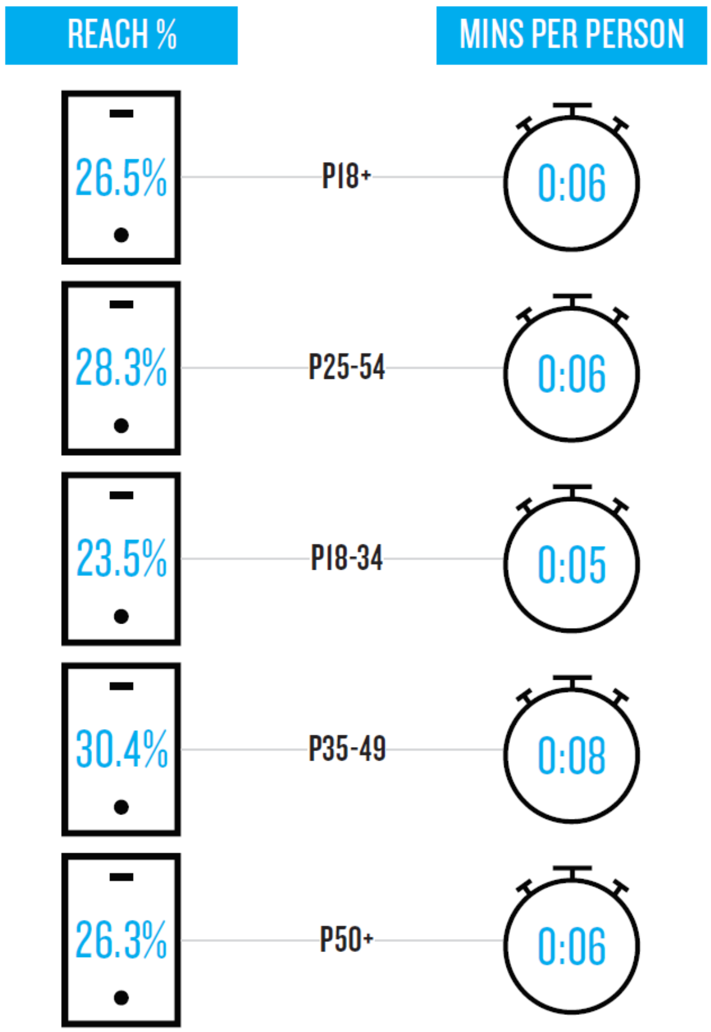


Source: IAB. The Changing TV Experience. Attitudes and Usage Across Multiple Screens, April 2015.

THE NIELSEN LOCAL WATCH REPORT | Q1 2017

WEEKLY REACH AND TIME SPENT WITH SMARTPHONE NEWS

SMARTPHONE NEWS IN LOCAL PEOPLE METER MARKETS (Q1 2017)



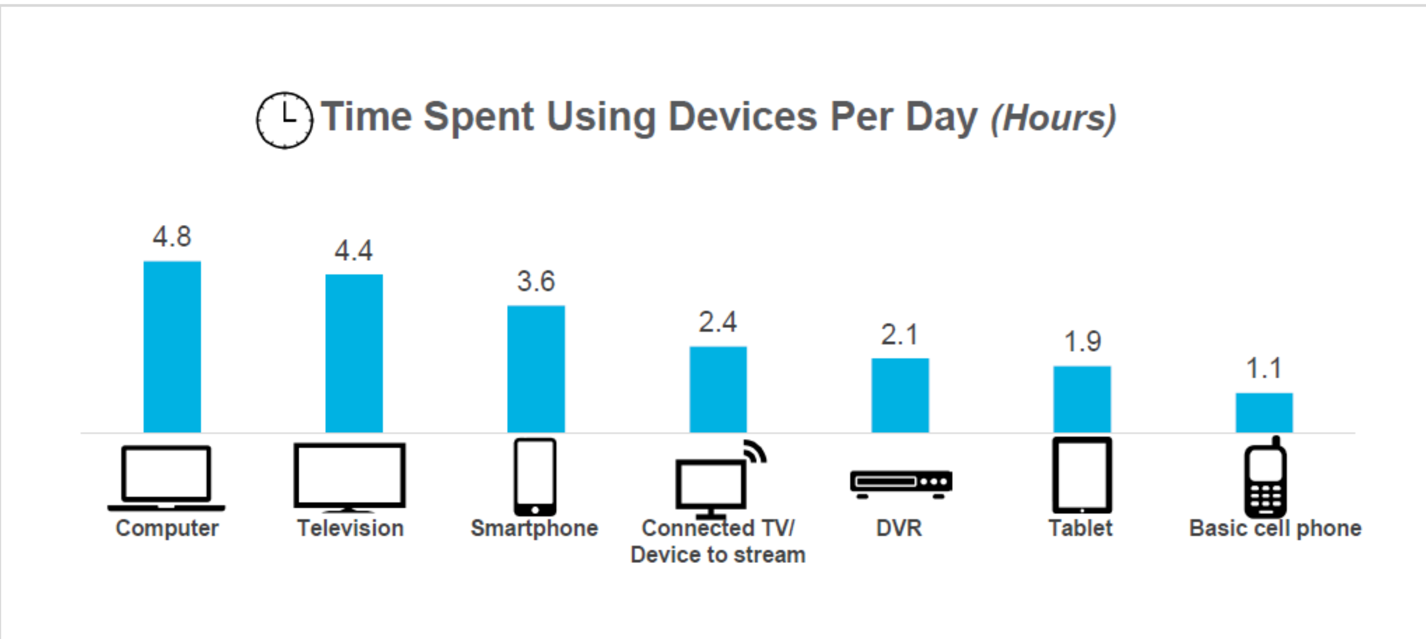
Persons 35-49 are reached most via smartphone and spend the most time consuming news on smartphones

Source: Nielsen Electronic Mobile Measurement, Q1 2017, based on total population in LPM markets.
See sourcing page for methodology details.

18

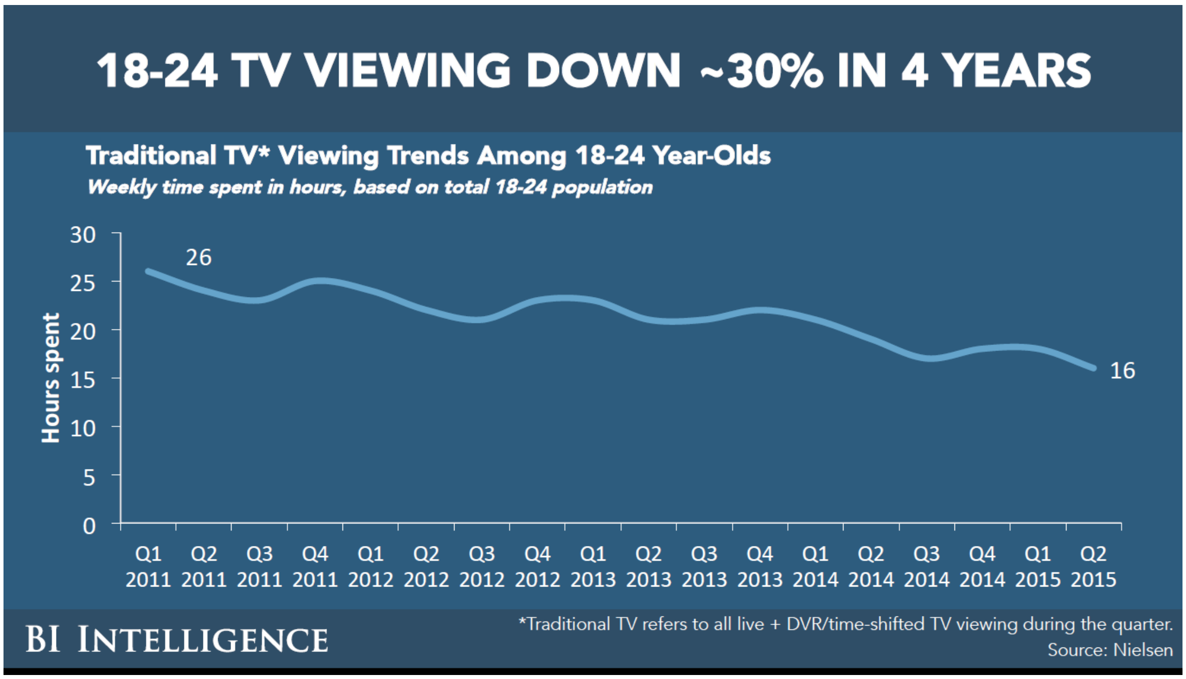
More Time with Computers than Television

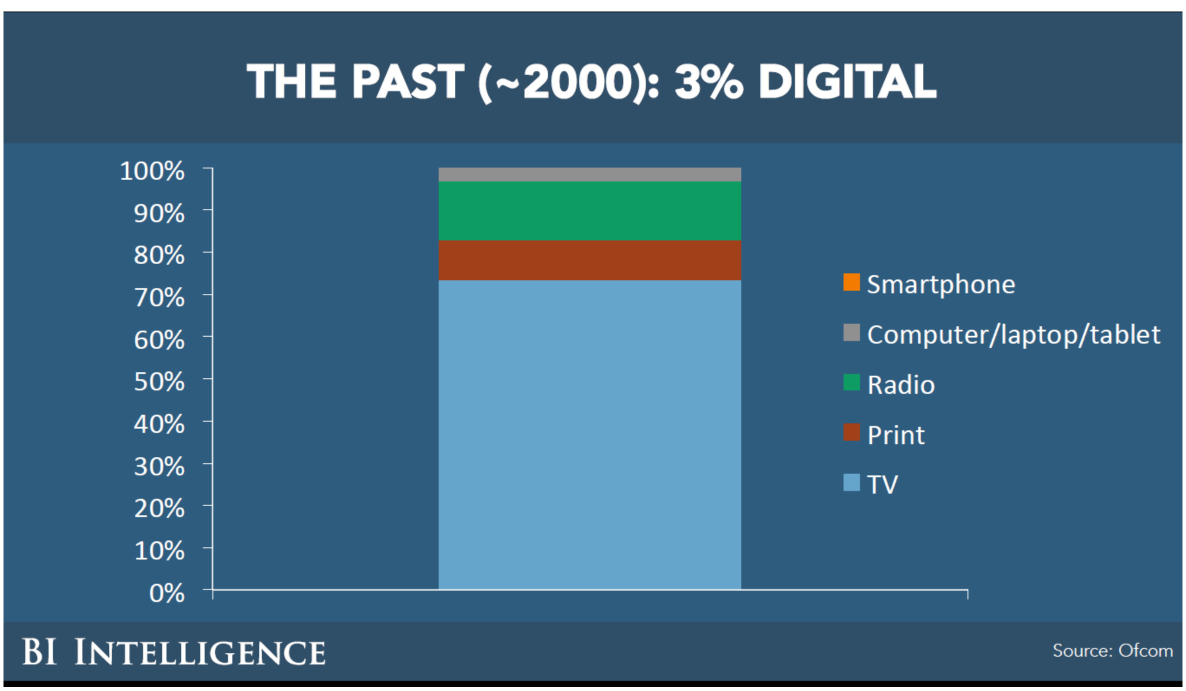
Time watching traditional television is giving way to time with other devices. On average, U.S. adults report spending nearly 5 hours using a computer each day, slightly more than they spend watching TV. When asked how many hours they spend on an average day, respondents' perception is that they typically spend more time with a computer than a TV and more time with a connected TV / device than a DVR.



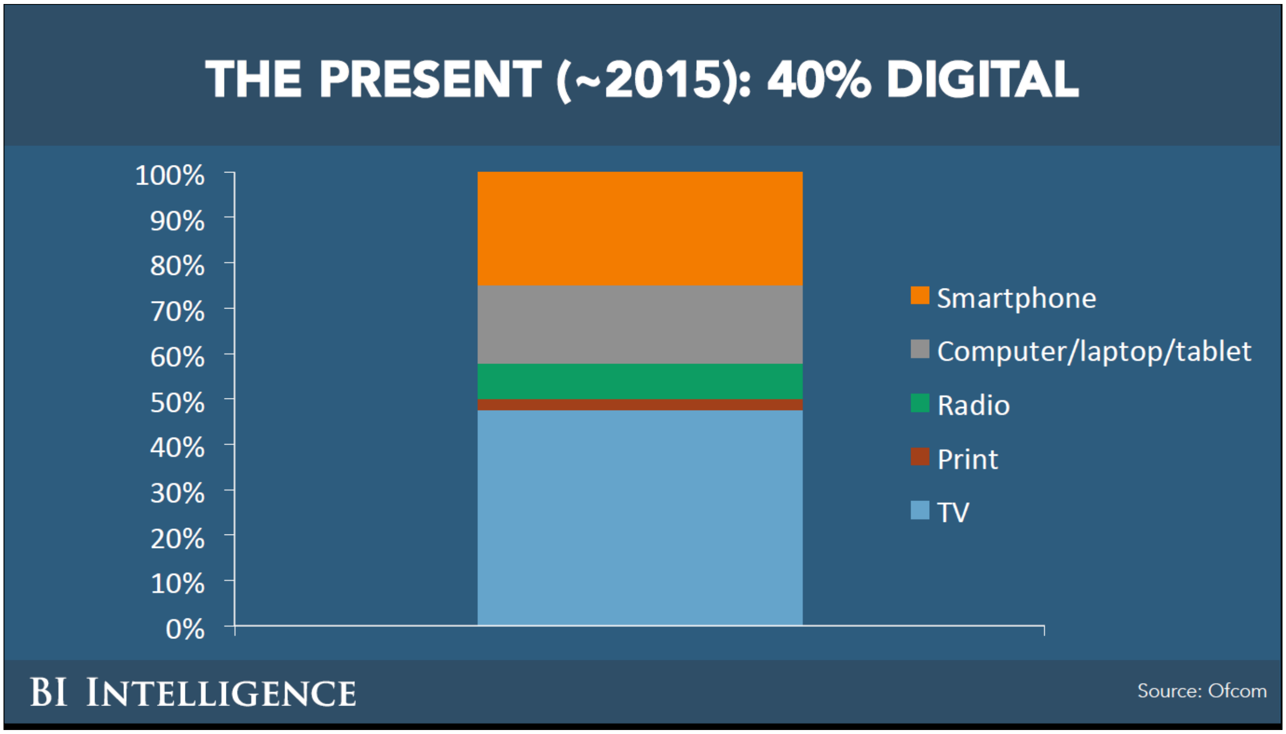
Source: IAB. The Changing TV Experience, Attitudes and Usage Across Multiple Screens, April 2015

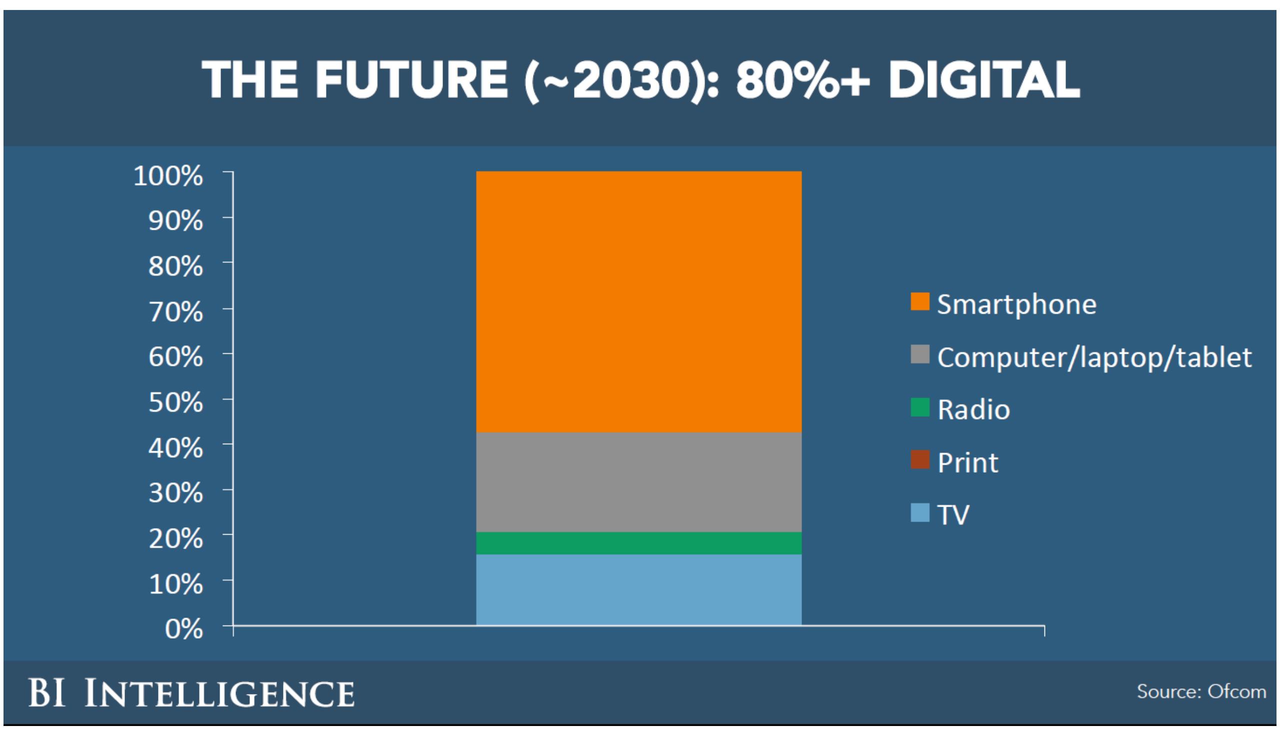
Traditional TV Viewing Trends—Past, Present & Future



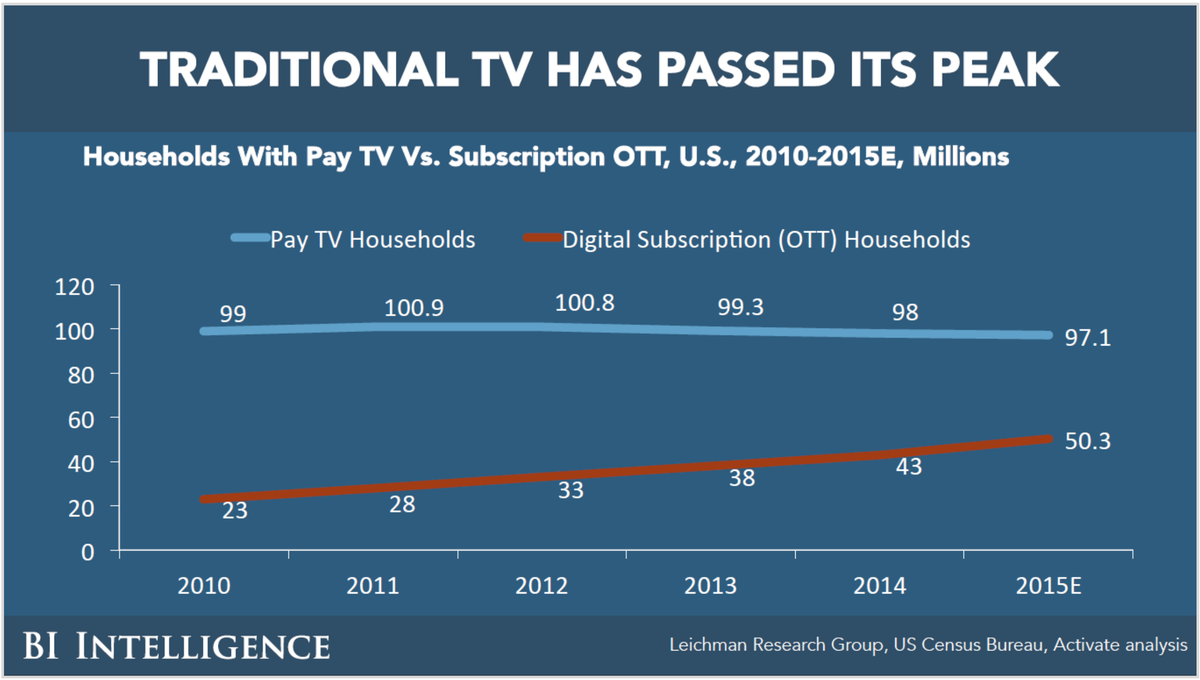


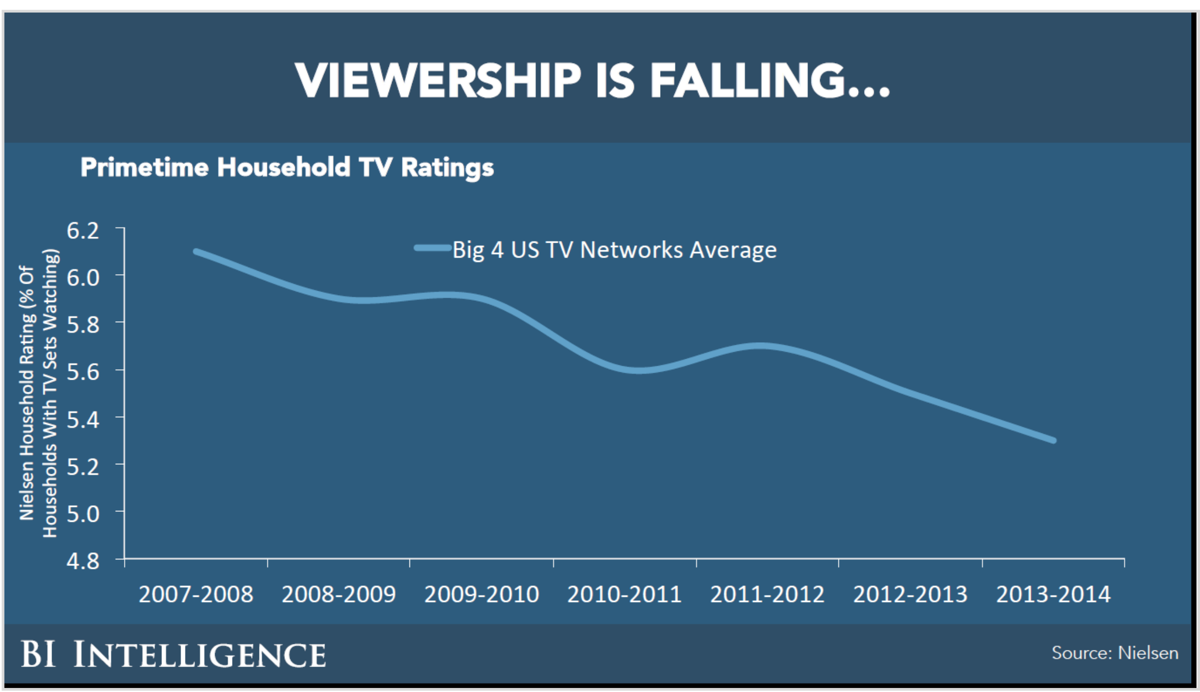
Traditional TV Viewing Trends—Past, Present & Future



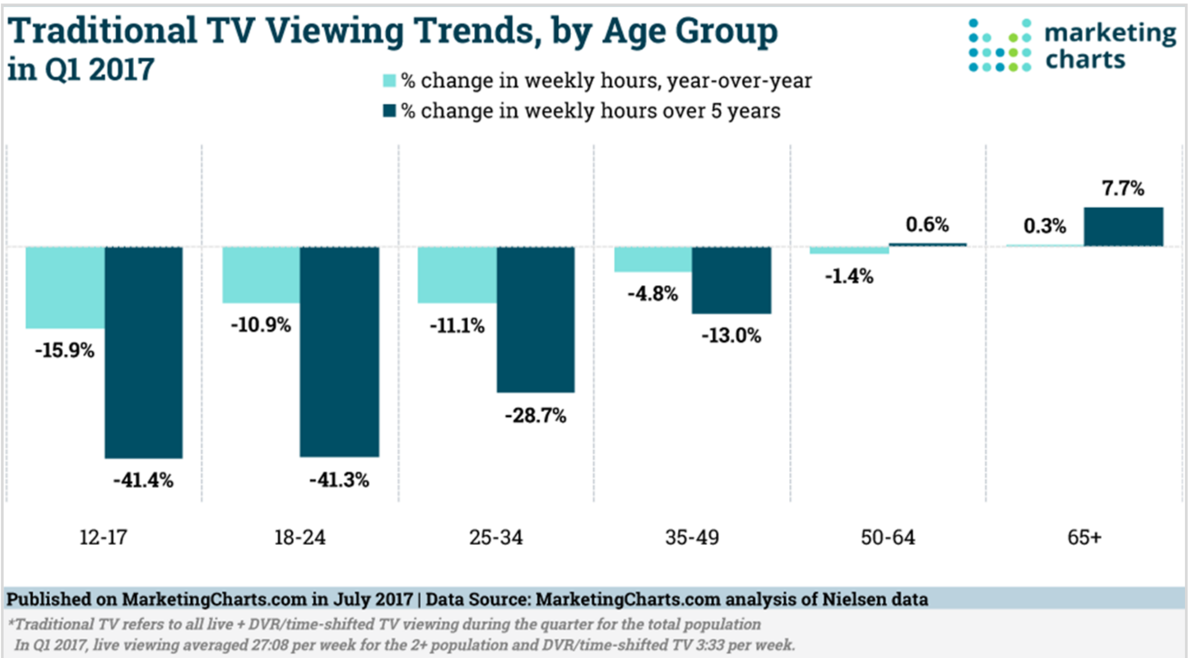


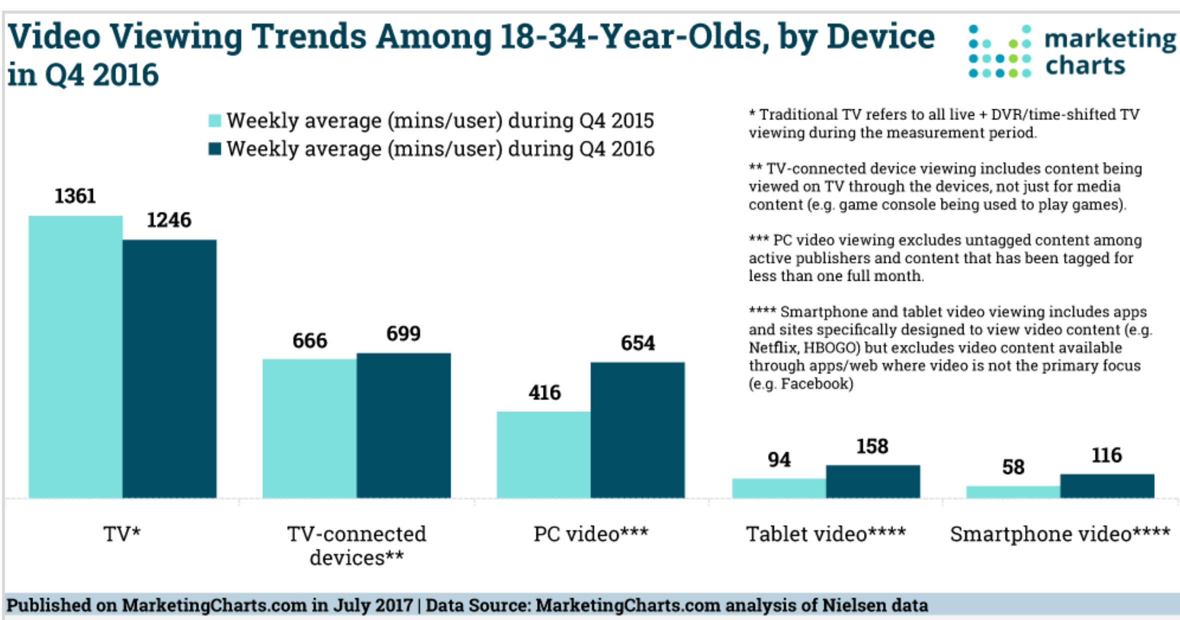
Traditional TV Has Competition





Linear television viewing among the younger demographic continues to decline, especially as other viewing options become more ubiquitous.

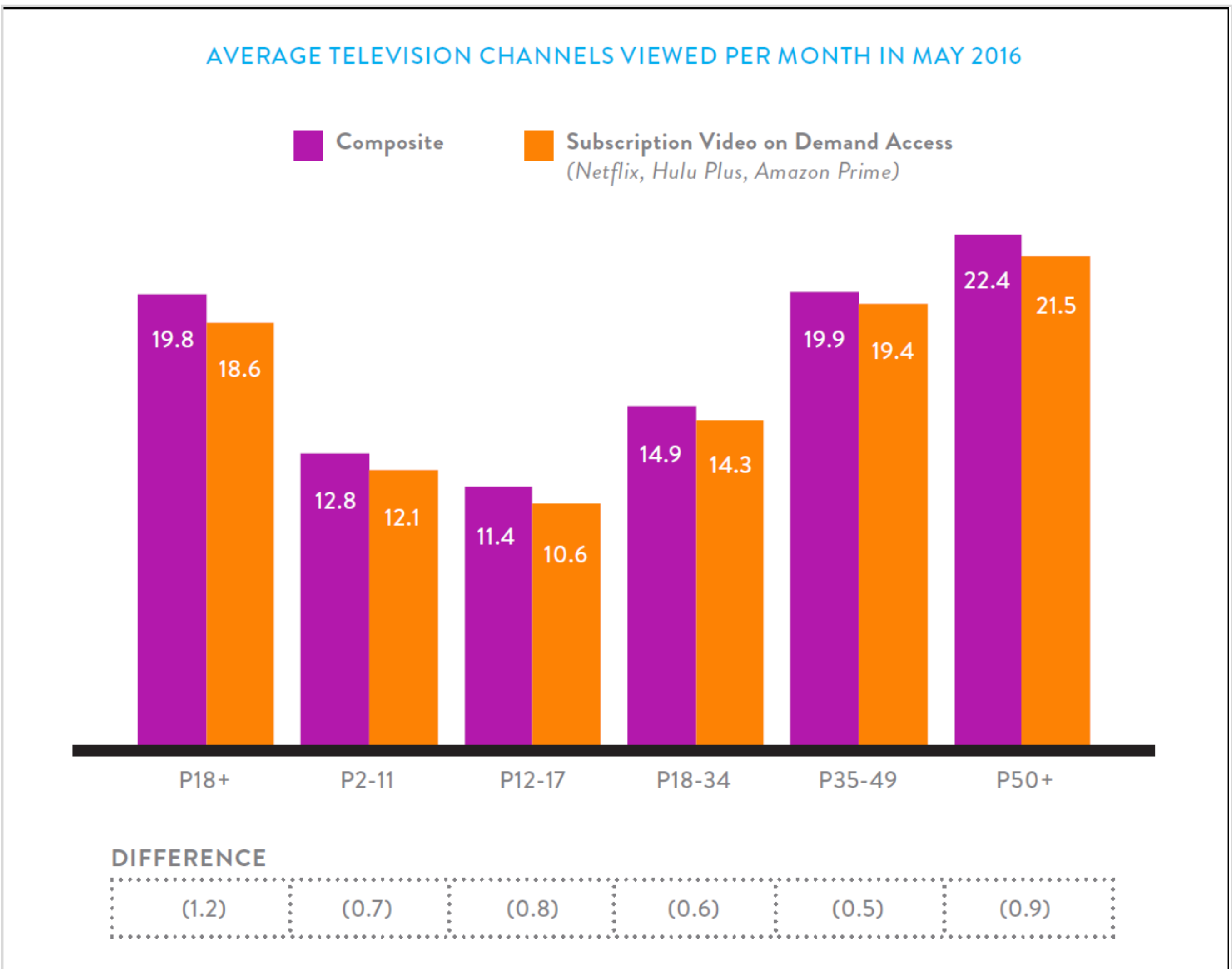




Weekly minutes per adult for an average week (9-26-16 through 12-25-16 vs 9-28-15 through 12-27-15
Source: MarketingCharts.com, July 2017.

Homes with SVOD Access Watch Fewer TV Channels

- Adults with Subscription Video on Demand (SVOD) view an average of 1.2 fewer television channels than average.
- Homes with SVOD tend to be younger and higher income, which are characteristics of homes that watch less television and thus watch fewer channels.
- In addition to these characteristics, it is likely that increased device usage in SVOD homes also reduces the number of television channels viewed.



Source: Nielsen

The Advertising Market Has Changed—

A Look at Selected Data

Bill Day & the Video Ad Landscape

Trends in SVOD Viewing

A Declining Advertising Revenue Forecast for Television

"Advertising is facing challenges on many fronts, especially within the two largest media, digital and television. Among the large packaged goods marketers and big brands who dominate television, we have market-share losses to smaller brands driving reduced spending for many who budget for advertising as a percentage of revenue and zero-based budgeting tactics for others. Further, there do not seem to be many significant new categories of marketers whose constituents are large, consumer focused, differentiated themselves on the basis of awareness of attributes, budget on a share-of-voice basis and operate in nationally oriented and oligopolistic sectors.

As those categories emerged in the past, they drove up pricing for all and revenues for owners of national television properties in particular. Increasingly fragmented and often unmeasured viewing makes it harder, if not more expensive to use television efficiently. So while it remains the "least inefficient" medium for many, it's difficult to see a path to growth. We generally see ad revenue growth at national TV media outlets declining by around -2% each year going forward, excluding incremental spending associated with the Olympics, similar to our expectation for this year."

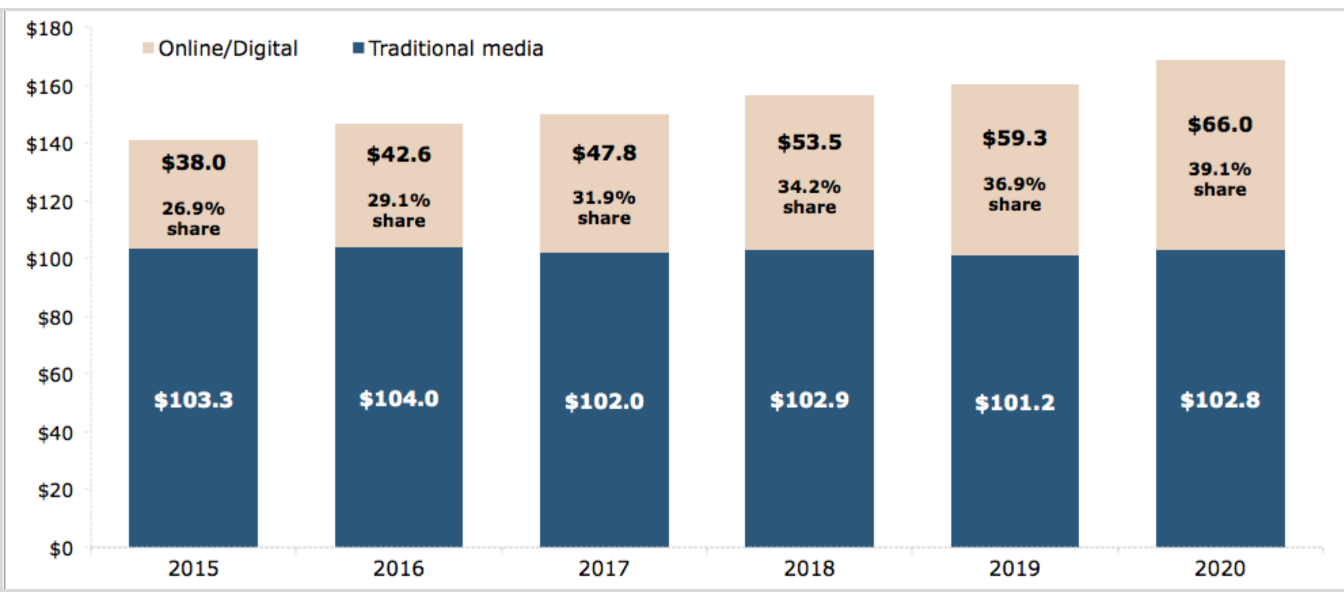
—Magna Global Advertising Forecast 2016

TV Advertising

- TV advertising spending grew from $73 billion in 2015 to $74.7 billion next year, at which point it ceded its status as the top media advertising market. Overall, TV will grow at a compound annual rate of 3.2% from 2015 through 2020.
- Meanwhile, within the broadcast advertising segment, broadcast networks are forecast to see a slightly higher advertising CAGR (3.9%) than cable networks (3.7%).

Local Media Advertising Spend, Traditional vs. Digital Media

2015-2020 in $billions

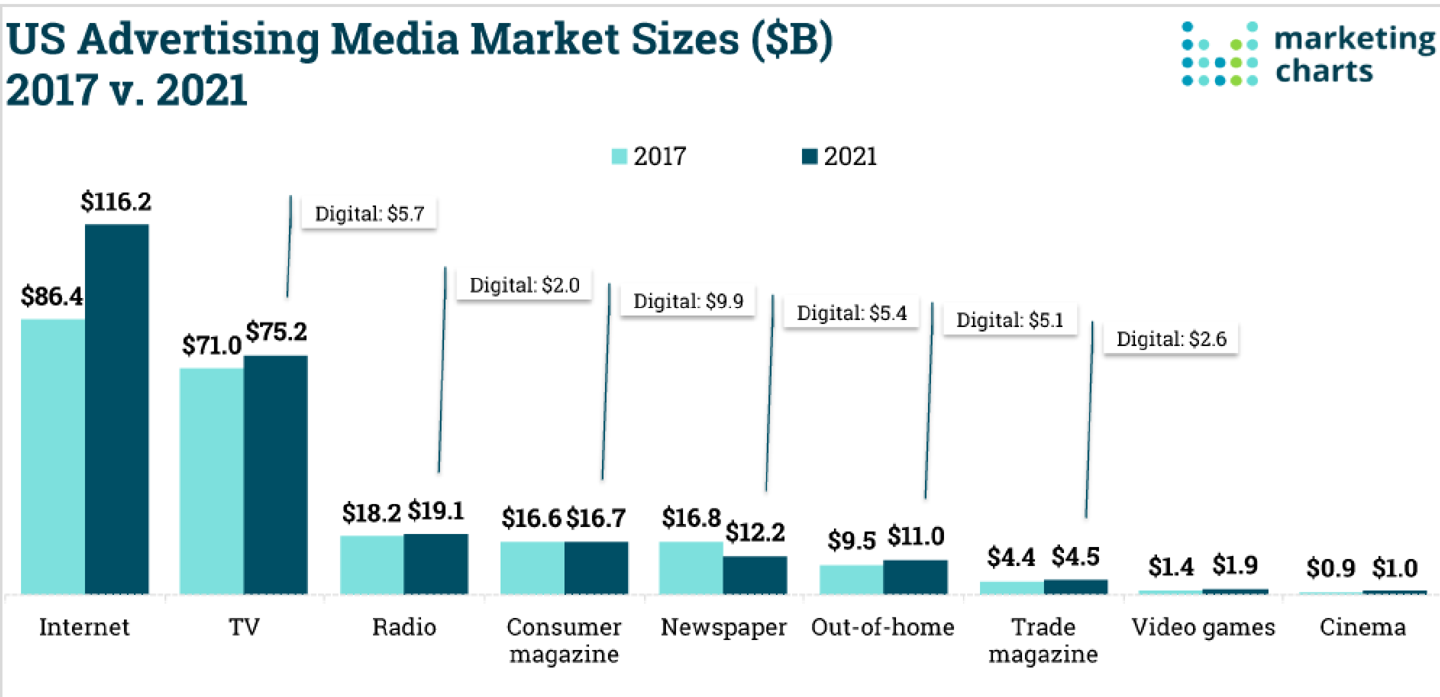


The researchers note that: "The TV advertising industry is adjusting to a decline in linear audiences, as viewership shifts to OTT and online video services across a range of devices. There is a wider problem for the TV advertising industry in sufficiently engaging with audiences. Even if advertisers effectively utilize multiplatform viewing, there is an increasing trend towards the usage of other screens. This is not solely the viewing of video content, but households simultaneously browsing apps and websites on smartphones and other connected devices while watching TV. The end result is advertisements increasingly vying for attention with a range of other media.

Source: MarketingCharts.com—Data Source: BIA / Kelsey

TV Advertising Eclipsed by Digital Media

TV is no longer the single largest advertising medium in the US, having recently been overtaken by digital media. But TV advertising remains a more than $70 billion business, and it's still growing, albeit slowly.

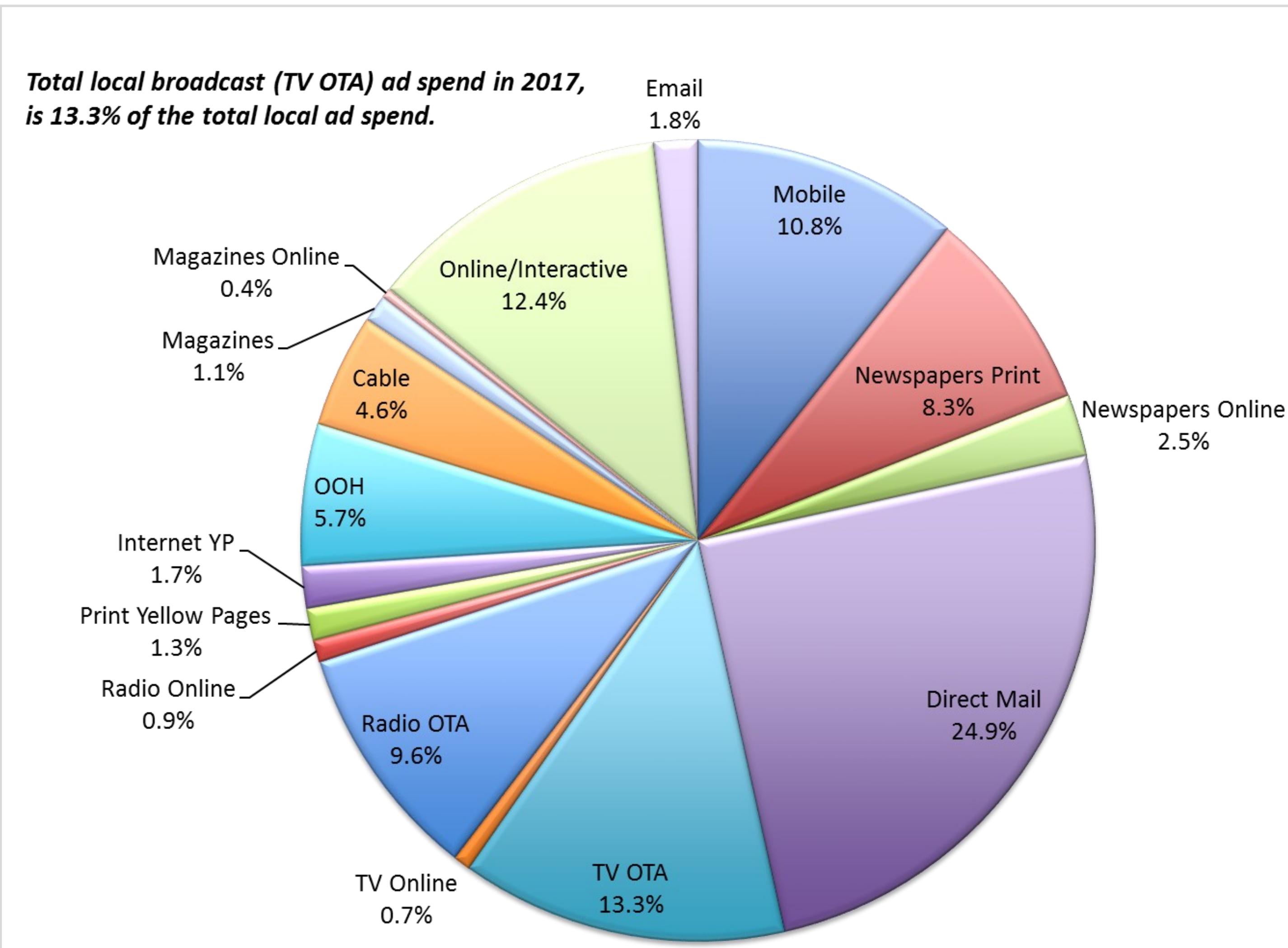


Source: Marketing Charts | Data Source: PwC

Competition for Local TV Advertising

Local broadcast TV competes with cable, mobile, Internet, direct mail, and other media for local advertising. National broadcast networks control most of the programming on local stations, including during the most expensive time slots; and control approximately 80% of the advertising time during such time slots

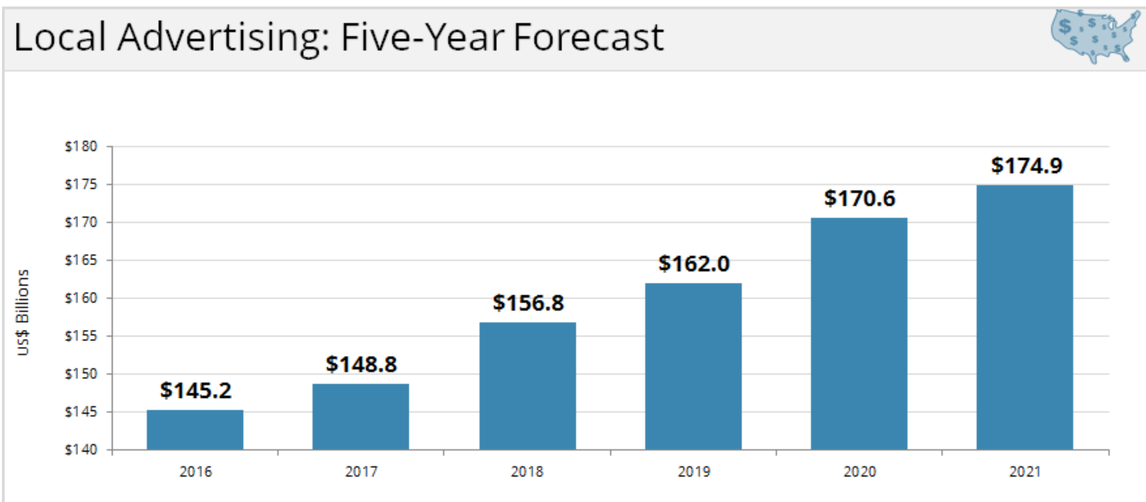
2017 Local Advertising Spend — $148.8 billion
Local Broadcast Share — 13.3%



Source: BIA Kelsey: www.biakelsey.com/biakelsey-forecasts-overall-u-s-local-advertising-revenues-reach-148-8b-2017-lifted-strong-growth-onlinedigital/

Growth in Local Advertising Attributable to Mobile, Digital

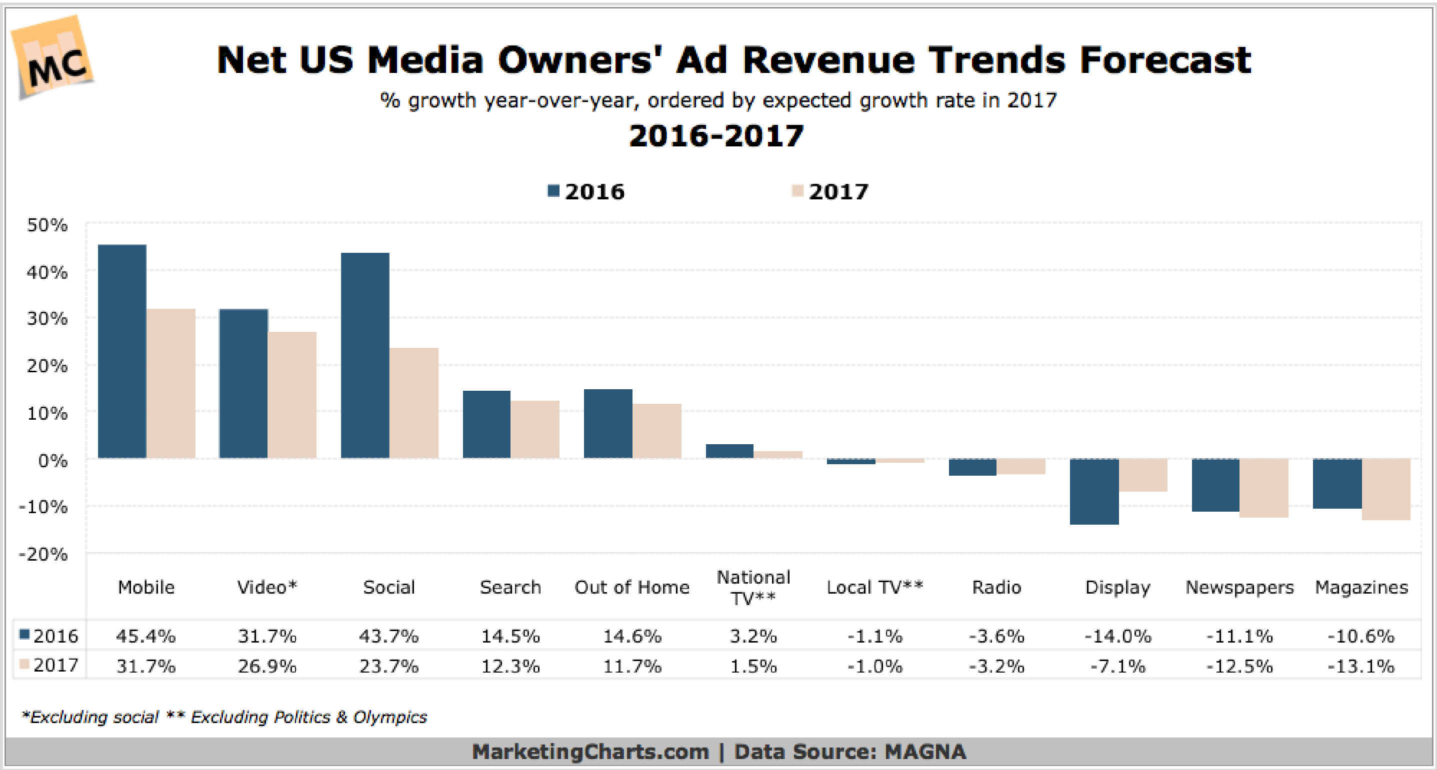
Faster growth in online/digital advertising revenues is a major component of the projected increases in the overall local advertising pie. BIA/Kelsey estimates online/digital will increase at 13.5 percent, from $44.2 billion in 2016 to $50.2 billion in 2017. That compares with a decrease of 2.4 percent next year for traditional – print and over-the-air – advertising revenues, going from $101.1 billion in 2016 to $98.6 billion in 2017.



"A range of factors will drive local ad revenues higher in 2017 and through the end of the next year. . . An improving U.S. economy, increased spending by national brands in local media channels, extraordinary growth in mobile and social advertising, and the continued expansion and selection of online/digital advertising platforms. In fact, we are predicting that online/digital local ad share will exceed the share of print media by 2018."

— Mark Fratrik, SVP and chief economist at BIA/Kelsey.

TV Ad Revenue Trending Downward



Source: Marketing Charts | Data Source: Magna Global

Traditional Media

Total traditional media ad sales are forecast to decline by 2.2% in 2017 after an expected drop of 1.5% in 2016. That should drive traditional media's market share of total ad spending down from 60.9% to an estimated 57.5% next year.

National TV (excluding the effect of political and Olympic ad spending) sales are expected to grow by 3.2% this year, moderating to a 1.5% increase next year.

Local TV isn't set to have quite the same outlook, with a 1.1% decrease in 2016 followed by a 1% drop in 2017.

Radio is also seeing declines, forecast at 3.6% in 2016 and 3.2% in 2017.

Digital Media

Unlike traditional media, digital channels are seeing rapid sales growth, though not uniformly. As detailed in the IAB's latest revenue report, mobile, social and video are the fastest-growing channels, with the display market (static banners) seeing more headwinds.

Here's the breakdown by channel:

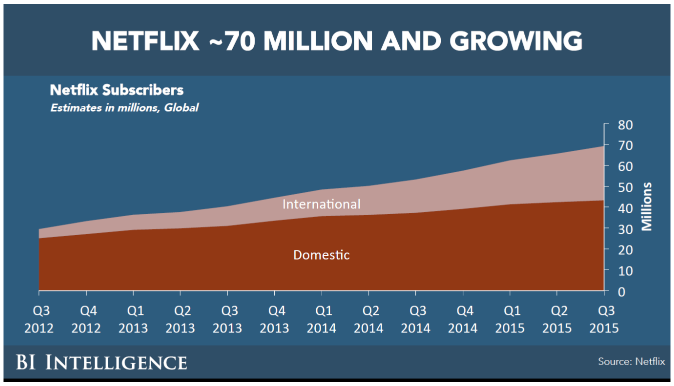
- **Mobile** ad sales are expected to grow by 45.4% this year before slowing to a 31.7% increase in 2017;
- **Social** ad sales are predicted to increase by 43.7% this year, but that growth will almost halve next year (23.7%);
- **Video** (excluding social) is forecast to better maintain its growth rate, with the 26.9% rise projected for next year not far behind this year's 31.7% increase;
- **Search** ad sales will continue their double-digit growth, expected at 14.5% this year and 12.3% in 2017; while
- **Display** losses will halve next year (-7.1%) after a 14% decline this year.

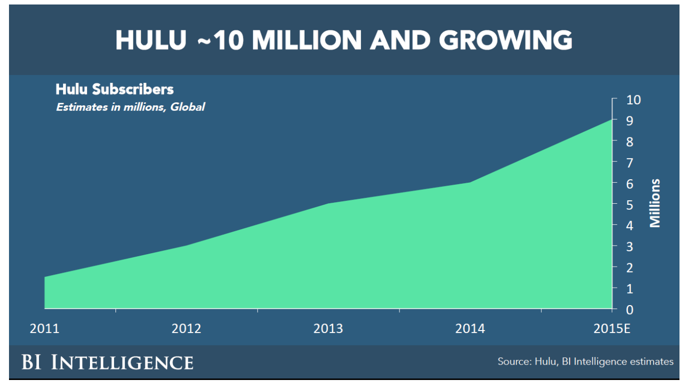
All in all, digital media ad sales should climb by 15.1% this year and then by 12.5% next year, per the forecast.

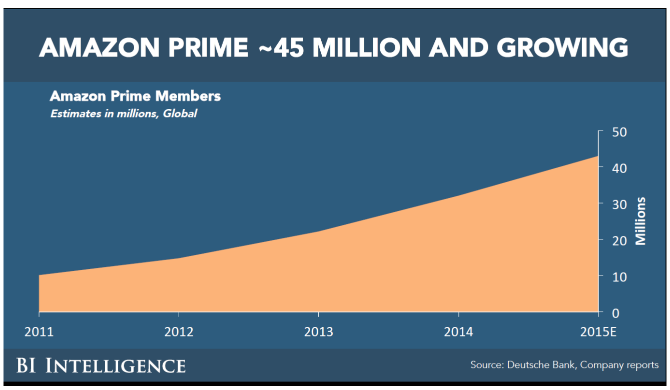
What this means is that – as variously forecast – digital media will grow to equal TV ad sales this year, with each capturing 38% of the ad market. By 2020, digital media will account for a majority 51% of all US ad sales, if MAGNA's forecast holds true.

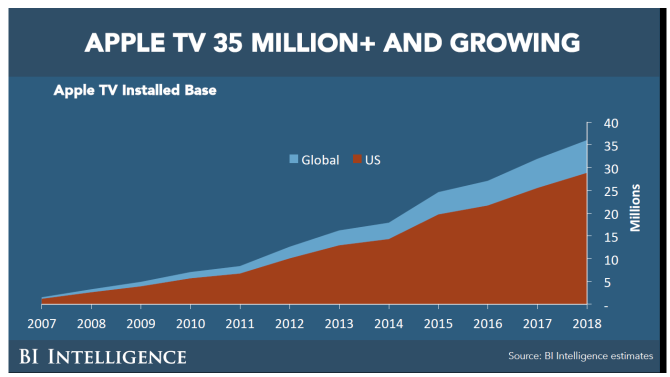
What Does a Competitive Market Look Like?

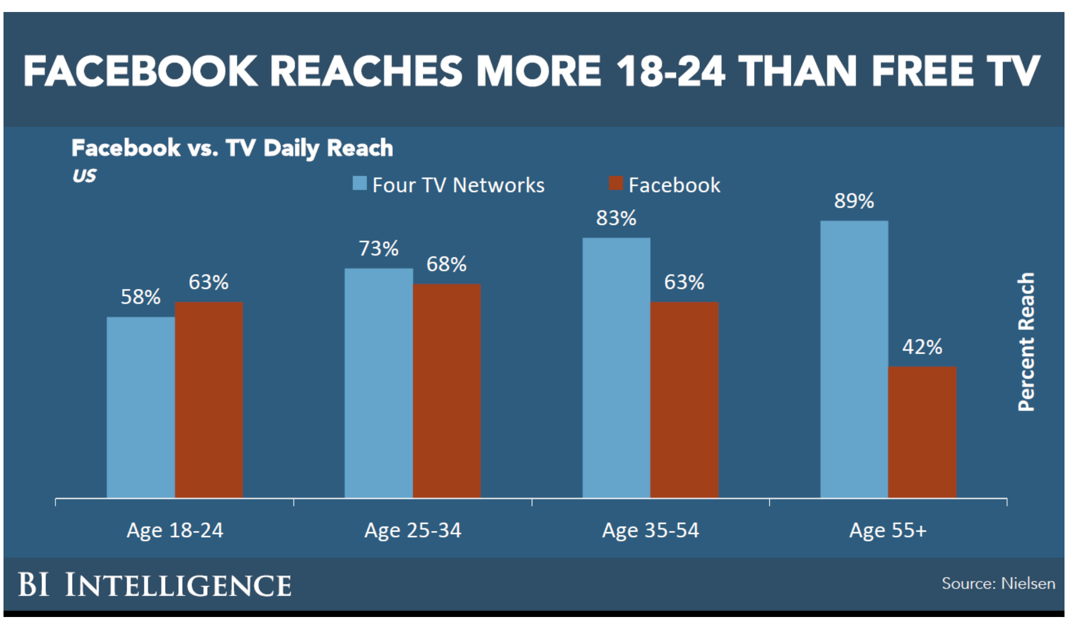
Tremendous Options for Viewing News and Content



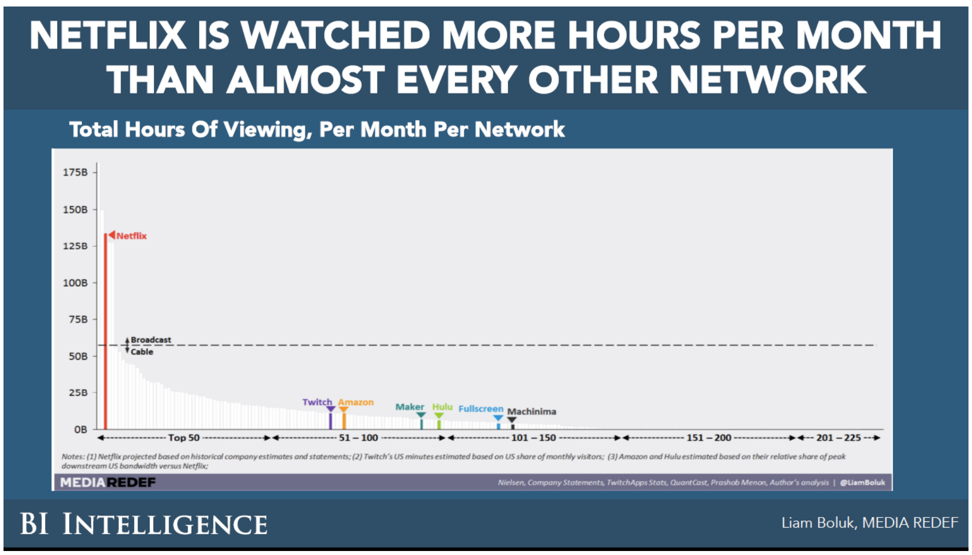


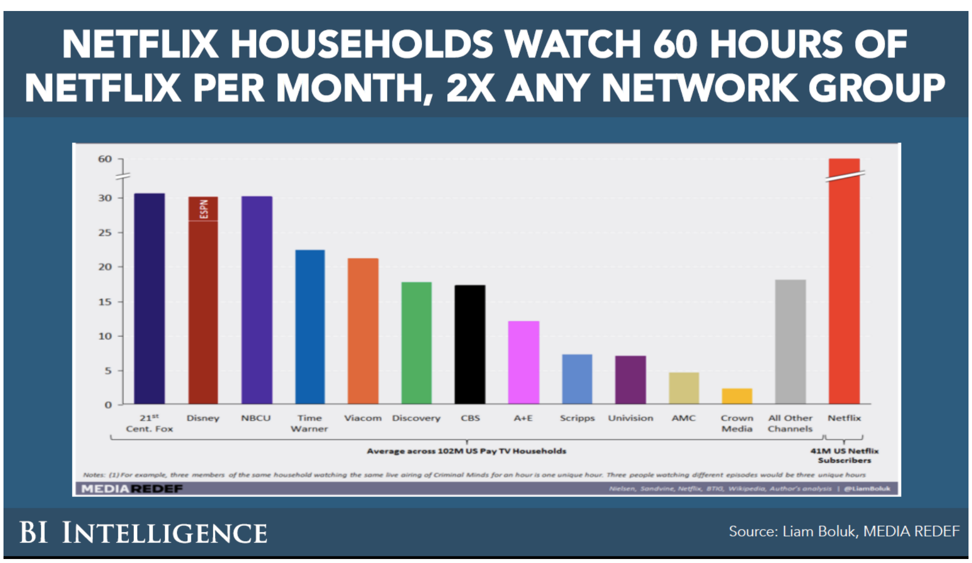


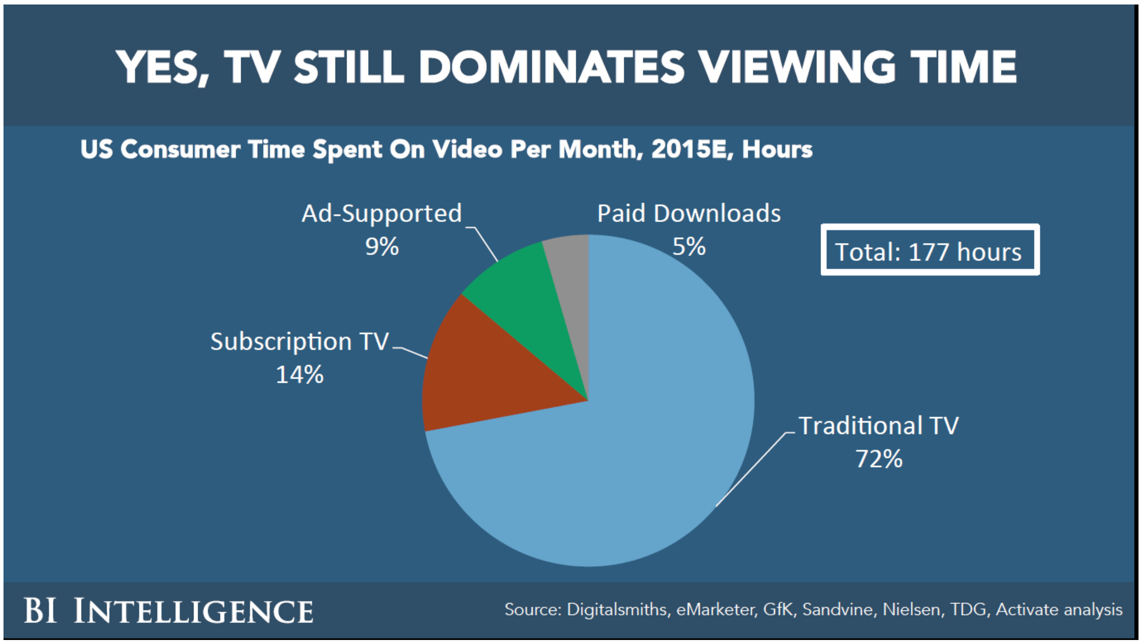


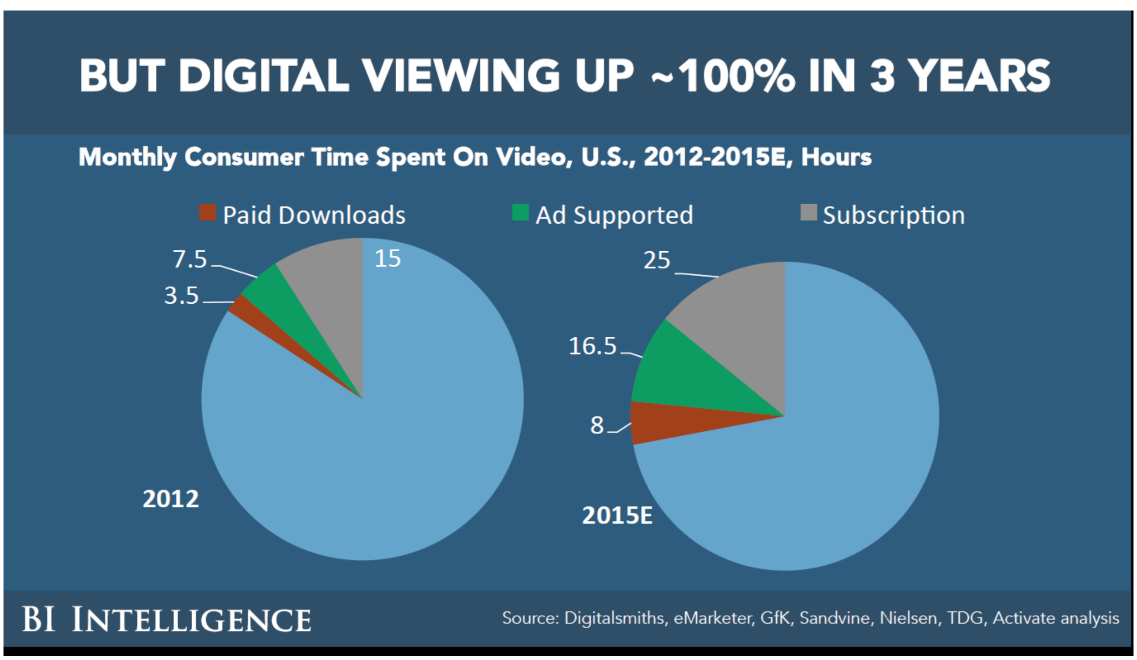


The Netflix Effect






YES, TV STILL DOMINATES VIEWING TIME
US Consumer Time Spent On Video Per Month, 2015E, Hours
Ad-Supported 9%
Paid Downloads 5%
Total: 177 hours
Subscription TV 14%
Traditional TV 72%
BI INTELLIGENCE
Source: Digitalsmiths, eMarketer, GfK, Sandvine, Nielsen, TDG, Activate analysis


BUT DIGITAL VIEWING UP ~100% IN 3 YEARS
Monthly Consumer Time Spent On Video, U.S., 2012-2015E, Hours
Paid Downloads
Ad Supported
Subscription
7.5
15
3.5
2012
25
16.5
8
2015E
BI INTELLIGENCE
Source: Digitalsmiths, eMarketer, GfK, Sandvine, Nielsen, TDG, Activate analysis

Local Revenue Up for Grabs

BIA Kelsey

Nationwide Overview

Local Revenue ($Millions) by Media
2015-2019 Market

Categories	**2015**	**2016**	**2017**	**2018**	**2019**
Direct Mail	37,910.0	36,891.7	37,088.9	37,173.2	37,181.3
Television OTA	**18,580.8**	**20,827.0**	**19,809.6**	**21,138.1**	**20,745.4**
Television Online	921.2	1,041.9	1,165.8	1,299.4	1,437.3
Newspaper Print	14,758.3	13,707.1	12,797.0	12,137.7	11,535.6
Newspaper Online	3,511.1	3,686.7	3,852.6	4,006.7	4,146.9
Radio OTA	14,021.0	14,165.0	14,275.0	14,408.0	14,529.0
Radio Online	955.2	1,204.8	1,417.9	1,627.1	1,839.2
Print YP	3,007.5	2,444.1	1,987.6	1,620.1	1,317.5
Online	15,629.0	17,272.0	18,763.6	20,250.1	21,745.8
Out-Of-Home	7,821.5	8,072.7	8,316.3	8,576.1	8,808.8
Magazines Print	1,607.5	1,489.5	1,391.1	1,309.3	1,241.9
Magazines Online	378.5	424.4	474.9	533.8	594.0
Cable TV	6,480.6	7,353.9	7,052.9	7,525.2	7,259.2
Internet YP	2,210.9	2,340.5	2,465.0	2,596.1	2,731.6
Email	2,389.6	2,566.3	2,714.8	2,842.7	2,968.2
Mobile	9,821.7	12,834.8	16,253.0	20,476.9	24,798.1
TOTAL	**140,004.2**	**146,322.4**	**149,825.8**	**157,520.3**	**162,879.8**
OTA TV%	**13.3%**	**14.2%**	**13.2%**	**13.4%**	**12.7%**

Source BIA Kelsey, 1Q 2017

INSIDE THE FCC©®

Special Edition | *Commentary & Analysis* | *November 2017*

The FCC has emerged as one of the most important independent regulatory agencies in the U.S. government, and perhaps in the world. With statutory authority to regulate the nation's communications systems, devices and apparatus, the FCC holds the power to approve or deny mergers; assess liability; levy fines and penalties; bring suit; award licenses and contracts; allocate spectrum; conduct hearings and inquiries; promulgate and interpret rules; establish standards and codes, and exercise a wide range of regulatory actions affecting television, radio, telephone, wireless, mobile, Internet, cable, satellite and international telecom services in the multibillion dollar telecom, media and technology (TMT) sector.

Controversial rulings on **media ownership, net neutrality, spectrum auctions, television and cable service, telephone services and pricing, video options, privacy and many other issues,** have brought intense scrutiny and criticism from outside and inside the agency. At stake are billions of dollars in investment capital and consumer services, often hinging on a single decision by the FCC. While the FCC continues to deliberate the fates of entire industries, there is more to its actions than meets the eye. For every item, rule or notice under consideration, there are behind-the-scenes policies, practices and personalities at play, in addition to intense lobbying by some of the most powerful and well-connected industries. As a result of the Internet, even the average American has become more aware of, more interested in, and more affected by federal communications policies. If there ever was a question, all doubts were put to rest when over 4 million Americans, and a popular television talk show host, forced the policymakers to make an about-face on their approach to regulating the Internet.

Although the FCC is governed by an arcane set of rules, practices and procedures developed over the decades, there are usually signs as to how it will act, often which defy logic or rationality. For outsiders, discerning these signs is difficult. Yet for those who work and practice on the inside—in the inner sanctum of the vaulted "eighth floor"—the FCC can be an open book. Inside the FCC provides readers with an insider's perspective on the policies, practices and personalities that drive important decisions in the communications, media and technology world today, and insights on the emerging issues we are likely to face tomorrow. Every issue of Inside the FCC features a stellar lineup of contributors, including current and former policymakers, legal and communications specialists, business leaders, and a host of today's top experts, including Analysts, Broadcasters, CEOs, Entrepreneurs, and Journalists. These contributors provide insightful commentary and analysis of today's most pressing communications policy issues. Inside the FCC has been embraced by a growing group of influential thought leaders, including Members of Congress and the Executive Branch, the media, think tanks, law firms, corporate executives and financial analysts. Our readership tracks similar general market demographics of the leading communications blogs and top industry trade magazines.