The new eldorado: video streaming & streaming video content production

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Streaming means listening to music or watching video in “real time”, instead of downloading a file to one’s computer and watching it later.

the consumer's perspective, it implies saving time since one does not have to download a file first, and then consume it. Also, members of the public do not have to manage vast quantities of data and space on their computer's hard drive or external disks anymore, since there is no data to download and save as such. From the content producers' perspective, streaming also offers great opportunities: with internet videos and webcasts of live events, there is no file to download, therefore it is hard for most users to save content and distribute it illegally.

Streaming is a relatively recent development, because broadband connection had to run fast enough to show the data in real time. If there is an interruption due to congestion on the internet, for example, the audio or video will drop out or the screen will go blank. To minimise the problem, computers store a "buffer" of data that has already been received. If there is a drop-out, the buffer goes down for a while but the video is not interrupted. Streaming has become very common thanks to the popularity of internet radio stations and various audio and video on-demand services, including Spotify, Soundcloud, Last.fm, YouTube and the BBC's iPlayer. While streaming initially made its mark in the music sector, with music streaming revenues generating $3.3 billion at the end of 2014[1], streaming is currently making phenomenal headway in the video distribution and consumption space.

1. **The video streaming market today: beyond distribution and into content creation**

- ***Video streaming: the technical bit***

Video streaming technology has come a long way: the most influential group, of course, are the streaming technology providers themselves, who choose which technologies and services to integrate into their platforms. These include Apple, which provides Quicktime as well as the HTML5-based technology to reach iOS devices; Adobe with Flash; and Microsoft with Windows Media and Silverlight. In the early days of streaming, the most relevant playback platforms were Windows and Macintosh computers.

While Apple and Microsoft still hold tremendous leverage, computer platforms tend to be more open than mobile devices, while the latter comprise the fastest growing segment of streaming media viewers. Because Apple owns both a very popular platform (iDevices) and operating system (iOS), it retains absolute power to control standards adopted by Apple devices. Other mobile influencers tend to be split between hardware vendors – like LG, Samsung, Motorola, Nokia and HTC – and mobile operating system providers like Google (Android) and Microsoft (Windows Phone).

Streaming media delivery providers such as online video platforms ("**OVPs**") (which are productized-services that enable users to upload, convert, store and play back video content on the internet, often via a structured, scalable solution that can be monetized) and such as user-generated-content sites ("**UGC sites**"), also influence streaming technology adoption. For example, though Microsoft introduced Silverlight in 2007, it wasn't supported by any OVP until 2010, stunting its adoption. In contrast, OVPs like Brightcove and Kaltura, and UGC sites such as YouTube and Vimeo were among the first to support the iPad and HTML5, accelerating their adoption.

While there are dozens of providers in both markets, the key OVPs include Brightcove, Kaltura, Ooyala, Sorenson Media, Powerstream and ClickstreamTV, while the most notable UGC sites are YouTube, Vimeo, DailyMotion, Viddler and Metacafe. On the video live-streaming front as well, technology has made significant strides. Specialised OVPs such as Ustream and Livestream offer instant broadcasting of user-generated live videos with a live chat window running alongside the video player, giving users an opportunity to not only watch events as they unfold but comment on them, too[2].

YouTube made a video live streaming service available to its users too. And now, the icing on the cake: video streaming distributors and providers. The description of this whole ecosystem of video streaming would, indeed, not be complete without mentioning the providers of on-demand internet streaming media also called streaming video on-demand services ("**SVoD services**"). From 2011, the press began blogging about the most popular streaming media services that would bring high-quality commercial content streamed to the TV sets, smartphones and computers of the masses[3].

Netflix, Amazon Video on Demand (now rebranded Amazon Instant Video and Amazon Prime), Hulu Plus and Vudu came out on top ("**SVoD providers**").

- ***Replicating the successful business model of music streaming in the video streaming sphere: it's all about scale, baby***

SVoD providers have it so good: not only can they benefit from the great strides made by streaming media technology since the mid-noughties, but they can also educate themselves faster thanks to, and avoid the pitfalls which threatened, their predecessors, i.e. streaming music on demand providers such as Spotify, Deezer, Pandora, Rdio, Grooveshark and Beats (the "**SMoD providers**").

While SMoD providers typically charge USD4.99 per month for an access plan to their services, and up to USDD9.99 per month for a premium plan, SVoD providers start their monthly subscription plans at USD7.99 with a maximum price of USD11.99 per month for SVoD services on up to 4 screens per household. Fearless Netflix even got a lot of flak, in April 2014, for hiking up its new subscriber fees globally by USD1 to USD2 a month[4]. If we quickly do the maths, we can forecast that there is more money to be made in SVoD services, than in SMoD services, provided that these services are scaled up.

And scaled up they are: on 23 April 2014, Amazon announced a licensing agreement that gives Amazon Prime members exclusive access to highly-sought after HBO's library of original content, hence undoubtedly increasing the appeal of becoming an Amazon Prime's subscriber. On 24 April 2014, competitor Netflix announced that it had contracted with three small cable companies to provide subscribers access to its content via TiVo DVRs, while on 28 April 2014 it announced a deal with Verizon to provide Netflix subscribers high-speed online access to streaming content, the second such deal Netflix has made with an Internet service provider ("**ISP**").

As the technology industry – and to a degree the entertainment sector – function very much on a "winner take all" economic model, streaming content is an evolving battlefield teeming with opportunities and risks, in which companies assert their dominance and grow their market share. There are some clear winners, in the SVoD services' sector, such as Netflix which, in the first quarter of 2014, added 2.25 million streaming subscribers in the US and a total of 4 million worldwide. It now has 35.7 million US subscribers and more than 48 million globally, in line with its long-term goal of 60 to 90 million domestic subscribers. It all makes sense from the consumer's standpoint too: streaming is converting the most valuable downloaders (of music and video content) into subscribers and in doing so is reducing their monthly spending from USD20 or USD30 to USD9.99 on average.

By the end of 2014, music streaming revenues accounted for USD3.3 billion, up 37% from 2013. In comparison, online and TV-based video streaming services combined to pull in a revenue of USD7.34 billion in 2013, a figure that PriceWaterhouseCoopers ("**PwC**") says will rise to USD11.47 billion in 2016, before reaching USD17.03 billion in 2018. That rise will be driven primarily by subscription video services such as Netflix and Hulu, PwC says, rather than by through-TV subscriptions.

- ***The leap into content creation and production***

What is interesting is that SVoD providers are going beyond what SMoD providers have ever done: they are entering the content production sphere, in order to enrich their catalogues and offerings; to expand their networks of, and reach to, high-powered executives, producers and movie-stars as well as to assert their newly-acquired status and clout. Online streaming video services such as Netflix and Hulu will make more money per year than the US movie box office by 2017, according to a new report released by PwC.

The report projects that streaming services will be the biggest contributor to the American filmed entertainment industry in four years, as the revenue generated by TV and subscription video on-demand providers reaches almost $14 billion, $1.6 billion more than the amount earned from the traditional cinema box office. Therefore, SVoD providers have, and will keep on having, a lot of disposable cash to invest.

How to better invest this available income than in producing high-quality video content, to enrich one's catalogue and products offering? The main area streaming services will have an impact on the traditional box office, the PwC report says, is in release dates. At the moment, most movies are given months in theaters before they slowly make their way to streaming services. PwC says the strength of companies such as Netflix is expected to put pressure on the industry to make this transition faster, offering filmed entertainment to consumers earlier.

More importantly, SVoD providers keep on expanding their content inventories. Netflix already has USD7.1 billion in existing obligations for original and licensed content, and it recently contracted for an original Spanish-language series; a new series from Mitch Hurwitz (the creator of much-loved *Arrested Development*); a third season of *House of Cards* and a final season of AMC's *The Killing*. Indeed, the economic returns of *House of Cards,* the test case, were as successful as the critical reviews. Netflix's new strategy fortified its existing revenue model—acquiring and retaining subscribers—and even opened up new revenue streams such as content licensing or even a branded channel with traditional distributors. Netflix spent roughly USD100 million to produce the first season of *House of Cards* plus additional marketing investments, including advertising buys for primetime TV spots and high-profile billboards. If *House of Cards* brought in half a million new Netflix subscribers, with the same average life span as current subscribers (an estimated 25 months), the show would have just about broken even in two years. The real test was the lifetime value of these new customers.

What if many or most turned out to be opportunistic viewers who ended up canceling their subscriptions a few months after watching *House of Cards*? Then, the breakeven opportunity looked vastly different. For example, if the average customer life span was closer to four months, then Netflix would have needed more than 3 million new subscribers for the project to breakeven—essentially, a 43 percent increase over its current average acquisition rate. Needless to say, this debate is now closed and, in addition to its string of series, very successful Netflix has brokered many recent theatrical deals – it plans to release the sequel to Ang Lee's Crouching Tiger, Hidden Dragon day-and-date online and in Inmax theatres, and has struck an exclusive four-picture deal with Adam Sandler – which have supposedly enraged many in the business.

Speaking at a keynote in Cannes's MIPCOM in November 2014, Netflix chief content officer Ted

Sarandos insisted that the company was only looking to modernize a theatrical distribution model that "*is pretty antiquated for the on-demand audiences we are looking to serve*". Netflix, he said, is not looking to kill windowing but rather to "restore choice and options" for viewers by moving to day-and-date releases. Not only that, but Sarandos said Netflix would be expanding into more niche genres, including the financing of documentaries and art-house films. Hence, the marketing stunt with teaming up with mega movie star Leonardo di Caprio on the release of documentary Virunga focusing on the fight against poaching endangered gorillas in the Democratic Republic of Congo. The documentary was released simultaneously on Netflix and in theaters in New York and Los Angeles on 7 November 2014. Amazon Prime's tally in content creation and production is also impressive, most notably thanks to its decision to engage Woody Allen to write and direct a series for its SVoD services in January 2015 and its competitive force in TV by landing 2 Golden Globe trophies for best comedy for its critically praised *Transparent* and actor for series star Jeffrey Tambor also in January 2015.

So the future is more than bright, for SVoD providers, but what are the threats to their growing supremacy and market share?

2. **A sorry state of affair for SVoD providers and traditional video distributors: counterfeiting in the video streaming market**

- ***A tentative expansion to international territories? A false alarm***

Initially, the major threat to the rise and scaling up of SVoD services worldwide came from the reluctance, by several European countries to accommodate and "psychologically adapt" to the business model offered by the likes of Netflix.

The French, in particular, were a headache: In the own words of then French Minister of Culture Aurelie Filipetti, "*(the French) are absolutely not going to close the door to (Netflix), but they need to get used to the differences with the French market and how they can participate constructively*." France has some of the world's toughest rules for protecting its home-grown film and music industries, and none of these will make it easy for a foreign service like Netflix to make a serious dent in the market. The company, which eventually started offering SVoD services in France around November 2014, faces higher taxes than it is used to, including 20 percent VAT, as well as obligatory investment quotas from its profits. Indeed, SVoD services based in France with annual earnings of more than 10 million euros are required to hand over 15 percent of their revenues to the European film industry and 12 percent to French filmmakers.

Meanwhile, France insists that 40 percent of mainstream broadcasters' content must be in French, while existing SVoD providers – including Canal Plus' "Infinity" and Wild Bunch's "Filmo TV" – are currently forced to wait 36 months after a film's cinema release before they can stream that content online. These rules – the so-called "Cultural Exception" – mean that France retains a healthy film and music industry despite fierce competition from the Anglo-Saxon world. And while some commentators have said this model is outdated as ever-increasing numbers of people get their audiovisual entertainment online rather than from more traditional TV and radio media, France is nevertheless continuing to do all it can to protect its homegrown industries.

As mentioned above, despite these hurdles, Netflix eventually started offering SVoD services in France, the toughest foreign market to enter as of yet, during the fourth quarter of 2014. At MIPCOM 2014, Netflix chief content officer Sarandos went on record for saying that viewer behaviour, in Germany and France, was "*on par with our successful launches elsewhere in the world*" and that Netflix prison dramedy 'Orange is the new black' was the most watched show on the SVoD service in all of the six new European territories. Sarandos added that the viewing mix in Europe – about 70 percent television series and 30 percent feature films – was also similar to that on Netflix services around the world. Therefore, the major threat to SVoD providers, and their more traditional video distributors, lies elsewhere.

- ***The culprits: illegal video streaming programs and providers***

While the illegal downloading of music has decreased compared to previous measurements (about a quarter of people who use music streaming services still download music illegally, compared to 32 percent in September 2014), 35 percent of people who use SVoD services are still downloading movies and TV series illegally. This is according to the study Trends in Digital Entertainment, from January 2015, which is conducted by GfK and appears once per quarter. Some illegal SVoD providers are alive and kicking such as Time4popcorn. They offer SVoD services to members of the public, on the internet, without having paid proper and agreed licensing royalties to the owners of the rights in the video content which is being streamed on their channels.

One of these illegal SVoD providers was Aereo.com, which filed for Chapter 11 reorganization proceedings in November 2014. In June 2014, the US Federal Supreme Court handed down a decision in ABC v Aereo. Aereo, a TV-over-the-internet service, had introduced a disruptive business model, using thousands of very small antennas stored in a warehouse, to live stream broadcast signals which they had encoded into packets, directly into the home of users. It was sued by the broadcasters (originally including 21st Century Fox, CBS, NBC and ABC) for infringement of their copyright in public performance. Aereo defended its actions claiming that all it did was to provide a device to watch a programme that was already available. The Supreme Court decided in favor of the broadcasters, ruling that Aereo and its cloud-based technology was too similar to a traditional cable company to say that its service did not infringe. The failed watch-TV-on-the-Internet startup Aereo.com may come back though, since TiVo bought its trademarks, domain names and customer list at auction, for the bargain price of USD1 million in March 2015. TiVo could be looking into offering an Aereo-like service but one that is licensed by TV networks[5].

During the AIPPI Congress in September 2014, Elizabeth Valentina, Vice President Content Protection for Fox Entertainment Group, (speaking on her own behalf as Fox was still litigating the case), pointed out that Aereo's business model involved the streaming of broadcast content obtained without permission, authorisation or license, and for which service Aereo were charging their subscribers. This business model was harming that of the broadcasters and content owners, by devaluing their content, interfering with exclusive deals for content to be delivered over the internet and to mobile devices, as well as diverting eyeballs from TV advertising revenue. It was a harm clearly recognised by Judge Nathan at first instance, in the broadcasters' motion for a preliminary injunction. During the same congress, Sanna Wolk (Associate Professor at University of Uppsala, Sweden and co-chair of AIPPI's copyright committee) compared the US position with that adopted in the EU where the CJEU in March 2013 ruled that online near-live streaming by the UK Company, TV Catchup, was an unauthorised "communication to the public" within the meaning of Article 3(1) of Directive 2001/29 (InfoSoc Directive) and therefore an actionable infringement of copyright. The CJEU concluded that as TV Catchup was making the works in the original "terrestrial" TV broadcast available over the internet, and hence using different technical means to retransmit the broadcast, this retransmission was a "communication" within the meaning of the Article 3(1). Furthermore, in the circumstances, the court did not have to consider whether communication was to a "new public", as the new transmission required an individual and separate authorisation from the copyright owners. While full-blown litigation seems the obvious and mostly-used response to copyright infringement and counterfeiting in video streaming services, it is debatable as to whether an ardent battle against streaming video piracy is worth it. Indeed, drawing on the experience from the inconclusive fight, led by the music industry, against illegal downloads of music tracks offered by peer-to-peer websites in the early noughties, it may be worth biting the bullet and exploring non-legal avenues to this endemic and crippling infringement.

For example, Popcorn Time, dubbed the "Netflix for pirates" was recently on the run. Time4Popcorn.eu, one of the most popular iterations of the illegal movie site, has had its URL suspended by European regulators in October 2014, effectively turning off the lights for a site that had attracted millions of users in just a few months.

The European ID Registry knocked Time4Popcorn.eu offline due to suspicion that the page was registered with inaccurate administrator contact details. The site's developers, rather than provide accurate contact information, simply relocated to Time4Popcorn.com. With more and more court decisions forcing ISPs to block access to certain websites in the territories that they cover, the best legal approach seems to request an injunction, in key territories, for ISPs to block end users access to the websites of illegal SVoD providers.

3. <u>What's in the stars for video streaming players and traditional feature film and sitcom producers?</u>

In the short term, I think that traditional players in the TV and film industries, including Hollywood major studios, are going to start feeling the pain, as revenues are derailed by the economic and creative successes of legal and illegal SVoD providers alike. As a result, traditional feature film and TV series producers will have to up their game, focusing their financial and creative efforts on solely "block-buster" material projects. It is going to become even more difficult for independent and young directors and producers to finance their content creation processes, in the future.

In the long term, there will be a leap towards more high-quality content being produced (with stronger plots, bankable stars and exceedingly talented writers, directors and actors included in the content creation mix) by both traditional and SVoD content providers: Darwinism will be in the works, with the survival of only the fittest. Major film studios and distributors will have to adapt or die because video streaming is here to stay and will eventually scale up even more due to easier accessibility and affordability on major consumers' territories, better wifi connections (in particular, due to the generalisation of optical fibre), a wider spectrum of devices on which to watch and stream videos (smartphones, tablets, PCs, TV screens, etc.) and changing habits towards culture consumption (such as, the reluctance to pay to watch movies, an inability to stay in front of a movie screen for around 2 hours for younger generations of consumers and the growth of cocooning).

All in all, the advent of SVoD services and the choice in various SVoD providers is a boon for consumers, as they are spoiled for choice in order to consume only high-quality content; will be able to avoid watching tiring and mandatory advertisements which are crippling TV shows, especially on US TV channels; and will be more in control over the devices on which they wish to consume TV series and feature film content.

The law and its actors (i.e. lawyers, judges, legislators) should accompany this change in consumption habits and video market offering, by being flexible and pragmatic, while protecting, enforcing and defending the rights of content owners and creators to stimulate the creation and production of the highest quality content in a competitive environment.

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