

Inside FCC Proposal To Regulate Online Video Distributors

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In the midst of the contentious public debate regarding net neutrality, it would be easy to overlook another important measure by the Federal Communications Commission relating to Internet transmissions. On Dec. 19, the FCC released a notice of proposed rulemaking tentatively concluding to define online video programming distributors providing linear streams of programming as “multichannel video programming distributors” (MVPDs) under the Communications Act.

The Communications Act sets forth certain rights and obligations regarding the manner in which MVPDs acquire programming and distribute content to subscribers. If the FCC moves forward with its proposed change, certain online video distributors would, for the first time, be subject to these rights and obligations. Accordingly, the NPRM raises a host of issues under the Communications Act, and has implications for copyright law and the economics of program licensing and distribution.



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In light of these considerations, this article reviews the legal and marketplace background in which the NPRM arose, provides an overview of the NPRM, and discusses the issues and implications.

Legal and Marketplace Background

Under the Communications Act, the definition of MVPD has historically been interpreted to be limited to video programming distributors that utilize “facilities-based” distribution systems (i.e., to qualify as an MVPD, an entity must control the physical transmission path by which programming is delivered to the subscriber). As such, the definition encompassed technologies such as cable, satellite and telco,[1] but was not extended to video distribution systems using the public Internet, such as the platforms of Amazon, Netflix, iTunes and Aereo. In announcing the vote for this NPRM, FCC Chairman Tom Wheeler asserted that “[v]ideo is no longer tied to a certain transmission technology, so our interpretation of MVPD should not be tied to transmission facilities.”[2]

This proceeding follows several years of legal evaluation of the status of online video distributors under both the Communications Act and other statutory regimes. In 2010, Internet-based distributor Sky Angel filed a program access complaint with the FCC, requesting that Discovery Communications be ordered to

negotiate for continued distribution on the Sky Angel service. Because the protection sought by Sky Angel was only available to MVPDs, the FCC invited comment on whether Sky Angel qualified as an MVPD. The FCC did not ultimately act further on the Sky Angel complaint, which remains pending.

Subsequent to Sky Angel, there have been several developments in online video distribution, including the Aereo litigation and discussions about net neutrality. It is in this context that the FCC now proposes to expand the definition of MVPD to include Internet distributors and has issued this NPRM to evaluate this change.

Overview of the NPRM's Scope

In introducing the NPRM, the FCC acknowledges the wide array of business models that have emerged for online video distribution, including:

- (1) Subscription Linear, which makes available continuous, linear streams of video programming on a subscription basis (e.g., Sky Angel, Aereo and the offerings announced by Dish's Sling TV and Sony PlayStation);
- (2) Subscription On-Demand, which makes available on-demand content on a subscription basis (e.g., Amazon Prime Instant Video, Hulu Plus, Netflix);
- (3) Transactional On-Demand, which provides video on-demand to consumers on a per-episode or per-season/movie basis (e.g., Amazon Instant Video, CinemaNow, Google Play, iTunes, Sony, Vudu, Xbox);
- (4) Ad-based Linear and On-Demand, which offers linear and/or on-demand video programming on a free, ad-supported basis (e.g., Crackle, FilmOn, Hulu, Yahoo!Screen, YouTube); and
- (5) Transactional Linear, which offers non-continuous linear programming on a transactional (pay-per-view) basis (e.g., UFC).

Of these business models, the FCC tentatively concludes that only the first category, entities offering video programming on a subscription linear basis, should be categorized as MVPDs. The FCC bases this conclusion on a modernization of its historical interpretation of "channel" in the statutory definition of MVPD. Whereas the prior interpretation viewed "channels" as discrete portions of physical spectrum or bandwidth (which served as the underpinnings for the "facilities-based" requirement noted by Chairman Wheeler), the FCC's proposed new interpretation understands "channel" as a prescheduled stream of linear video programming. The FCC seeks comment on this revised interpretation, as well as an "alternative" interpretation that would retain the status quo of "facilities-based" channels.

This definitional expansion would confer on these entities certain privileges and obligations under the Communications Act, in addition to raising collateral implications relating to the Copyright Act, existing contractual arrangements, and content licensing. Each of these implications is discussed individually below.

Implications Under the Communications Act: Privileges and Obligations

Expanding the definition of MVPD would bring certain online video distributors under the regulatory framework of the Communications Act, entitling them to certain privileges and also subjecting them to specific obligations. As outlined by the FCC, key privileges for MVPDs include the right to

nondiscriminatory access to certain programming and the assurance that broadcasters will negotiate in good faith for retransmission consent. At the same time, MVPDs must comply with requirements relating to nondiscriminatory program carriage and a parallel obligation for good faith negotiations for broadcast retransmission consent.

In addition, MVPDs are subject to other obligations such as competitive availability of navigation devices, equal employment opportunities, closed captioning, video description, access to emergency information, signal leakage, inside wiring, and commercial loudness restrictions.

The FCC's program access rules prohibit "vertically integrated" cable operators[3] from impeding competition by denying other MVPDs access to content from programmers affiliated with such cable operators. These rules specifically prohibit discrimination by vertically integrated operators and their affiliated networks with respect to whether and on what terms programming will be made available to other MVPDs, including prices, terms, and other conditions of access. The rules include a few exceptions, including the right of refusal to license programming if piracy cannot be adequately prevented as well as consideration of "economies of scale, cost savings, or other ... benefits" based on a distributor's number of subscribers.

Conversely, program carriage obligations require that MVPDs negotiate on a nondiscriminatory basis and limit MVPDs from unduly pressuring content providers to license programming in ways that would harm competition. For example, MVPDs may not require a financial interest in a programming service or require exclusivity as a condition for carriage, or discriminate in carriage based on whether the programmer is affiliated with the MVPD.

With respect to retransmission consent, the FCC rules currently provide that MVPDs and commercial broadcast stations are obligated to negotiate with each other in good faith. Violations of the good-faith duty include refusing to negotiate at reasonable times and places, making a single, "take it or leave it" offer, requiring an arrangement that prohibits the station or MVPD from entering a retransmission consent agreement with another TV station or MVPD, or other conduct not in good faith under "the totality of the circumstances." Designating online distributors as MVPDs would include them in this good faith negotiation framework.

Collateral Implications

1. The Copyright Act and the Communications Act: A Definitional Gap

The FCC's proposed change to the MVPD definition would create a new category of video distributors under the Communications Act, which is not recognized under the Copyright Act. The Copyright Act has its own framework for licensing video content; under copyright, owners of copyrights in broadcast station programming have exclusive rights to perform their works publicly. Cable and satellite operators may — and generally do — take advantage of compulsory licenses in the Copyright Act to retransmit the content contained in broadcast signals; that is, operators of those services do not need to negotiate individual licenses from each content owner.[4] But the statutory license under the Copyright Act refers to "facilities" and covers only broadcast satellite and cable systems. Moreover, court decisions have held (and the Copyright Office has agreed) that the online retransmission of broadcast signals falls outside the scope of the statutory license.[5]

As such, absent a comparable expansion in the definition of cable system under the Copyright Act, online MVPDs would not be eligible for statutory licenses under the Copyright Act. Instead, these

distributors would need to negotiate with individual content owners, obtain licenses from the broadcast stations (which may or may not possess the necessary rights), or seek to establish a collective licensing body (similar to music performing rights organizations), though that infrastructure is not available today.

The FCC recognizes these issues in the NPRM and asks commenters to update the record concerning how expanding the definition of an MVPD would interrelate with the Copyright Act. Nonetheless, unanswered questions will remain, including how the Copyright Office might respond to the FCC's interpretation of certain online video distributors as MVPDs and whether it has the statutory discretion to expand the application of compulsory licenses. And perhaps the biggest question is whether Congress will react with any statutory changes.

2. Contractual Rights and Content Licensing: Potential Impacts and Conflicts

In the event that the definition of MVPD is expanded, application of program access, program carriage, and retransmission consent rights and obligations to online distributors would likely impact, and may conflict, with existing program license and distribution agreements, and, ultimately, may affect the economics of the content licensing industry.

As noted above, absent a change in the compulsory copyright framework, broadcast station and network program license agreements may not provide rights for Internet distribution of the underlying programming. Likewise, cable network programming (e.g., TBS, TNT, USA) has never been within the scope of broadcast compulsory licenses. Instead, cable networks have traditionally held copyrights or acquired licenses to distribute their underlying programming via MVPD systems, but may not have comprehensive rights for Internet distribution.

As such, it is unclear what will constitute good faith negotiation and nondiscriminatory access and carriage of broadcast and cable network programming if existing programming contracts do not grant Internet distribution rights for the full panoply of station or network programming. Would negotiations simply cover those portions of the linear feed for which rights are obtained, or would the FCC seek to require programmers be required to go into the marketplace and obtain Internet transmission rights? Further, it is conceivable that existing station and network carriage agreements may restrict distribution by these new online MVPDs, regardless of whether the rights have been cleared.

Thus, expanded program access and good faith negotiation rules may result in programmers being required — or pressured — to acquire extensive Internet distribution rights in their program licenses and revise any existing carriage restrictions. As a result, marketplace pricing for content may foreseeably increase. In the NPRM, the FCC asks whether the definitional change will impact the economics of content licensing and inflate the cost of programming.

Conclusion: A Changing Technology Landscape

Overall, this NPRM represents a significant undertaking to address the changing technology landscape and raises numerous questions about the impact on the media and content industry. Accordingly, content providers are well advised to examine their program licenses and carriage agreements with regard to Internet distribution rights and restrictions and evaluate whether the definitional change would alter contractual interpretations. Each company involved in the licensing and distribution of content online should consider its strategy for online offerings in light of the implications arising from the FCC's proposed action.

The NPRM was published in the Federal Register on Jan. 15, 2015. Comments are due Feb. 17, 2015, with reply comments due March 2, 2015. Given the complexity of the issues and the importance of this proceeding to interested parties, there may be requests for an extension of these deadlines.

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[1] The two most commonly known “telco” distributors are AT&T U-Verse and Verizon FiOS, which transmit video programming by means of controlled wireline systems.

[2] Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services, MB Docket No. 14-261, FCC 14-210, at 51 (proposed Dec. 19, 2014).

[3] Program access also applies to DIRECTV pursuant to an FCC order.

[4] Specifically, Section 111 governs the licensing requirements for cable operators (17 U.S.C. § 111) and a parallel regime exists for satellite distributors (17 U.S.C. §§ 119; 122).

[5] *Am. Broad. Companies, Inc. v. Aereo, Inc.*, No. 12-CV-1540, 2014 WL 5393867 (S.D.N.Y. Oct. 23, 2014); *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275 (2d Cir. 2012); Register of Copyrights, Satellite Home Viewer Extension and Reauthorization Act § 109 Report 188 (2008), available at <http://www.copyright.gov/reports/section109-final-report.pdf>.