

Online Video Distributors and the Current Statutory and Regulatory Framework: Issues for Congress

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Summary

Digital and Internet protocol technologies have spawned a number of online video distributors (OVDs) whose "over-the-top" video services are in some ways akin to, and in some ways different from, traditional cable and satellite video programming distribution services. However, most of the statutory and regulatory framework for video predates the commercial Internet and was developed within a policy debate that could not consider digital technology and online services. As a result, many statutory provisions apply only to cable companies or satellite carriers, or only to "multichannel video programming distributors" (MVPDs)—a category that includes cable and satellite operators, but as currently interpreted by the Federal Communications Commission excludes online video distributors.

Congress has begun to consider this issue. At both the June 27, 2012, House Energy and Commerce Subcommittee on Communications and Technology hearing on "The Future of Video" and the July 24, 2012, Senate Commerce, Science, and Transportation Committee hearing on "The Cable Act at 20," questions were posed about which of the existing statutory provisions and regulatory rules, if any, should be applied to the new service providers, which provisions and rules should be modified in light of the new technologies and new market realities, and even whether changed circumstances are so great that major statutory reform is needed.

Statutory provisions and regulatory rules affecting media and communications typically are shaped by negotiations among the many stakeholders present at the time the statutes and regulations are being developed. The resulting framework creates obligations, prohibitions, privileges, and even rights for the various stakeholders. The industry players construct business models based on these. But statutes and regulations that are tailored to existing technologies may create impediments to the deployment of new technologies, especially if they create privileges or rights that are technology-specific.

Some observers have raised concerns that the current statutory and regulatory framework no longer fosters the long-standing U.S. media policy goals of competition, diversity of voices, localism, and innovation because it does not extend to online video distributors the privileges and rights—and also the obligations and prohibitions—that are applicable to traditional video distributors. For example, competition and innovation may be harmed if online video distributors are denied the access to programming that MVPDs enjoy through the program access and retransmission consent rules or if they are denied the guaranteed low cost compulsory copyright license that cable companies and satellite carriers enjoy. At the same time, localism may be harmed if online video distributors that rebroadcast broadcast television signals are not required to carry their subscribers' local broadcast stations and are not required to black out distant broadcast signals that duplicate the network and syndicated programming on local stations.

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Overview

Most of the statutory and regulatory framework for video predates the commercial Internet and was developed within a policy debate that could not consider digital technology and online services. Notably, the regime under which cable and satellite operators negotiate with programmers—the retransmission consent and program access rules—was created by the 1992 Cable Act[1] and the compulsory copyright licenses that allow cable operators and satellite carriers to retransmit the performance of works embodied on broadcast signals were created by the 1976 Copyright Act[2] and 1988 Satellite Home Viewer Act,[3] respectively. Today, digital and Internet protocol technologies have spawned a number of online video distributors (OVDs) whose "over-the-top" video services are in some ways akin to, and in some ways different from, traditional cable and satellite video programming distribution services. But the existing statutes do not cover online video distribution.

At both the June 27, 2012, House Energy and Commerce Subcommittee on Communications and Technology hearing on "The Future of Video" and the July 24, 2012, Senate Commerce, Science, and Transportation Committee hearing on "The Cable Act at 20," questions were posed about which of the existing statutory provisions and regulatory rules, if any, should be applied to the new service providers, which provisions and rules should be modified in light of the new technologies and new market realities, and even whether changed circumstances are so great that major statutory reform is needed. In the 112th Congress, the Next Generation Television Marketplace Act, which was introduced by Representative Scalise (H.R. 3675) and Senator DeMint (S. 2008), would have, among other things, made major changes to the statutory framework for video.[4]

Statutory provisions and regulatory rules affecting media and communications typically are shaped by negotiations among the many stakeholders present at the time the statutes and regulations are being developed. The resulting framework creates obligations, prohibitions, privileges, and even rights for the various stakeholders. The industry players construct business models based on these. One of the challenges when developing and implementing federal media policy is to construct a statutory framework and regulatory regime flexible enough to accommodate technological change.

It is difficult, and potentially counterproductive, to construct statutes and regulations based on surmises as to where future technologies will lead media markets. At the same time, statutes and regulations that are tailored to existing technologies may create impediments to the deployment of new technologies, especially if they create privileges or rights that are technology-specific.

To address this, Congress has enacted certain statutes that include definitions or terminology that intentionally leave room for interpretation by the relevant expert agencies (in this case, the

[1] P.L. 102-385.

[2] P.L. 94-553.

[3] P.L. 100-667.

[4] The bill would have eliminated the compulsory copyright license for cable and satellite, most of the requirements relating to cable and satellite company carriage of broadcast signals, the retransmission consent requirements, the broadcast network affiliation rules, most of the broadcast media ownership rules, and the network non-duplication, syndicated exclusivity, and sports blackout rules. In their place, stakeholders would have been expected to rely on market negotiations.

Federal Communications Commission (FCC) and the Copyright Office) to accommodate new technologies over time. The FCC interpretations typically take into account the three longstanding U.S. media policy goals of competition, localism, and diversity of voices, and the more recently enunciated goal of innovation.[5] It is not unusual for an unhappy party to go to court to challenge the FCC's interpretation or to attempt to force the agency to make an interpretation. Several such court cases relating to new ways to deliver video services are moving forward today. But even as the FCC, the Copyright Office, and the courts attempt to interpret existing statutes, Congress may choose to perform its own statutory review in light of technological and market changes.

As a general rule, new providers of communications services seek access to the privileges and rights in the existing statutory and regulatory framework, and seek to avoid the obligations and prohibitions. To the extent that the new entrants potentially threaten incumbents' business models, the incumbents seek to minimize new entrant access to privileges and rights and to maximize new entrant obligations and prohibitions. Perhaps the most notable example of this is the attempt by Sky Angel, an online video distributor that was denied access to several cable networks owned by Discovery Communications, to use one such privilege—the FCC's Program Access complaint process—to obtain access to programming, and the arguments made by cable companies and cable network programmers that Sky Angel does not have legal standing to bring such a complaint.[6]

At the same time, entities may have the incentive to deploy new technologies that would allow them to "invent around" those obligations, prohibitions, privileges, and rights in the existing regulatory framework that are unfavorable to them. For example, copyright holders have the right to control public (but not private) performances of their works.[7] A cable or satellite company must obtain a copyright license to retransmit the copyrighted material on a broadcast television program, but a consumer can use an antenna to receive over-the-air, without obtaining a license and without payment, the same copyrighted work for her own private use. A start-up company, Aereo, now has deployed thousands of mini-antennas, which, though maintained at Aereo's premises, are assigned to individual subscribers as their personal antennas; these antennas send broadcast television signals to individual subscribers over the Internet. Aereo claims the broadcast programs received by its subscribers are private performances and not subject to copyright licensing requirements. The broadcasters claim otherwise and have sued Aereo for copyright infringement and sought a preliminary injunction.[8] On July 11, 2012, a federal district court judge denied the injunction, concluding "that plaintiffs have failed to demonstrate they are likely to succeed in establishing that Aereo's system results in a public performance."[9] Aereo therefore will be able to continue to offer its service as the copyright infringement case moves forward.

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[5] Section 706 of the 1996 Telecommunications Act (P.L. 104-104), titled "Advanced Telecommunications Incentives," instructs the FCC and state regulatory commissions "to encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" and instructs the FCC to "take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market."

[6] This case is discussed in greater detail in the **Appendix** to this report.

[7] Section 106(4) of the Copyright Act (17 U.S.C. §106(4)) states that the owner of copyright "has the exclusive rights," in the case of motion pictures and other audiovisual works "to perform the copyrighted work publicly."

[8] *American Broadcasting Cos. et al. v. Aereo Inc.*, U.S. District Court, Southern District of New York, No. 12-01540 and *WNET et al. v. Aereo Inc.*, U.S. District Court, Southern District of New York, No. 12-01543.

[9] A*merican Broadcasting Cos. et al. v. Aereo Inc.*, U.S. District Court, Southern District of New York, No. 12-01540 and *WNET et al. v. Aereo Inc.*, U.S. District Court, Southern District of New York, No. 12-01543, Opinion of Alison J. (continued...)

As the congressional committees with jurisdiction—the Senate and House commerce and judiciary committees—review the existing communications and copyright statutory framework, they may have to consider two complicating factors. First, there has been market entry by online video distributors with such a wide variety of service offerings, business models, technologies deployed, consumer equipment targeted, and even ownership relationships with traditional video distributors that it might not be optimal, or even possible, for Congress to construct statutory and regulatory provisions applicable to all entities. Rather, Congress may determine that some online video distributors (OVDs) are sufficiently similar to traditional video distributors (such as cable companies and satellite carriers) that they should be treated the same, while other OVDs have offerings and business models that are far removed from those of traditional video distributors and should be treated differently.

Second, several industry stakeholders have alleged that the United States is prohibited from taking certain actions, or must take certain actions, in order to conform to an article that has been included in a number of bilateral and multilateral trade agreements for which Congress has passed implementing language. The article states, "neither Party may permit the retransmission of television signals (whether terrestrial, cable, or satellite) on the Internet without the authorisation of the right holder or right holders of the content of the signal and, if any, of the signal."[10]

The Walt Disney Company claims that extending the compulsory copyright license currently available to cable companies and satellite carriers to online video distributors would violate the article because under a compulsory license the right holders could not control authorization.[11] The Copyright Office, which "continues to oppose an Internet statutory license that would permit any website on the Internet to retransmit television programming without the consent of the copyright owner," claims "An Internet statutory license would require renegotiating the relevant FTAs [free trade agreements] with other countries."[12] The local broadcast stations affiliated with the ABC, CBS, and NBC broadcast networks claim that online video distributors must be made subject to the retransmission consent rules "in order for the United States to honor these free trade commitments."[13] However, this article generally has been incorporated in the trade agreements at the behest of American, not foreign, companies; statutory or regulatory actions taken in furtherance of domestic media policy goals that are not in accord with the article may be opposed

(...continued)

Nathan, District Judge, July 11, 2012, at p. 37. If the broadcasters are unsuccessful in this case and lose copyright revenues, they are likely to seek alternate compensation, most likely by seeking to make Aereo and similarly situated video distributors subject to retransmission consent requirements. (See Harry A. Jessell, "Stations' Online Future Hinges on 'MVPD,'" *TVNewsCheck,* April 20, 2012, http://www.tvnewscheck.com/article/2012/04/20/58897/stations-online-future-hinges-on-mvpd.)

[10] United States-Australia Free Trade Agreement, Art. 17.4(10)(b). This language, or similar language, is included in the Dominican Republic-Central America Free Trade Agreement and in the free trade agreements with Bahrain, Morocco, and South Korea.

[11] See Testimony of Preston Padden, Executive Vice President, The Walt Disney Company, Before the U.S. Copyright Office "Sec. 109 Hearings on the Operation of, and Continued Necessity for, the Cable and Satellite Statutory Licenses," November 12, 2010.

[12] Satellite Home Viewer Extension and Reauthorization Act Section 109 Report: A Report of the Register of Copyrights, June 2008, at p. 189, http://www.copyright.gov/reports/section109-final-report.pdf.

[13] *Before the Federal Communications Commission, In the Matter of Interpretation of the Terms "Multichannel Video Programming Distributor" and "Channel" As Raised in Pending Program Access Complaint Proceeding,* MB Docket No. 12-83, Reply Comments of ABC Television Affiliates Association, CBS Television Network Affiliates Association, and NBC Television Affiliates, June 13, 2012, at pp. 26-27.

by the entities that sought the provision, but may not be likely to generate trade complaints against the United States.

The Current Statutory and Regulatory Framework

Obligations, Prohibitions, Privileges, and Rights Relating to All Multichannel Video Programming Distributors (MVPDs)

In 1992, Congress responded to a perceived lack of competitive alternatives to the local cable company and concerns about cable company vertical integration into programming by passing the Cable Television Consumer Protection and Competition Act (1992 Cable Act).[14] That act created a number of legal obligations, prohibitions, privileges, and rights relating to a newly defined group of entities—multichannel video programming distributors (MVPDs). MVPDs primarily are cable and satellite operators but, as discussed in the **Appendix** to this report, the definition is sufficiently broad and non-specific to potentially include other video distributors.[15]

Several of the obligations, prohibitions, privileges, and rights created by the 1992 Cable Act fundamentally affect the way that MVPDs may interact with local broadcast stations and with broadcast and cable programming networks, and vice versa. Notably, the 1992 Cable Act added provisions to the Communications Act that

- require an MVPD to obtain the consent of a local broadcast station before retransmitting that station's signal to its subscribers (retransmission consent requirements).[16] This, in effect, creates a new property right for broadcasters that allows a broadcast station to demand compensation from an MVPD for the retransmission of its *signal*.[17]
- require both the local broadcast station and the MVPD to participate in retransmission consent negotiations in good faith.[18] On one hand, this restrains an MVPD from refusing to agree to pay reasonable compensation. On the other hand, this benefits an MVPD because it implies a right to retransmit a local station's signal that cannot be circumvented by bad faith retransmission consent negotiations by the station.
- prohibit a cable or satellite operator that has an attributable interest in a programming network from denying a competing MVPD access to that programming (program access rules).[19] This allows an unaffiliated MVPD to seek redress at the FCC if a cable programming network in which a competing

[14] P.L. 102-385. See, in particular, the findings in Section 2(a) and statement of policy in Section 2(b).

[15] The Federal Communications Commission has characterized the definition as "broad in its coverage" and "unclear" in its scope. See "Media Bureau Seeks Comment on Interpretation of the Terms "Multichannel Video Programming Distributor" and "Channel" as Raised in Pending Program Access Complaint Proceeding," MB Docket No. 12-83, DA 12-507, Public Notice released March 30, 2012, at p. 2, fn. 2.

[16] 47 U.S.C. §325(b)(1).

[17] This is separate from holding the copyright for works within the programming carried on that signal.

[18] 47 U.S.C. §325(b)(3)(C)(ii) and (iii).

[19] 47 U.S.C. §548(b).

cable or satellite company has an interest refuses to make that network programming available for reasonable compensation.

The statutory and regulatory framework for MVPDs also includes rules to foster the commercial availability to consumers of converter boxes and other equipment needed to access MVPD services;[20] program carriage rules that prohibit a vertically integrated MVPD that owns a programming network from discriminating against a non-affiliated programming vendor when choosing which programming networks it will carry and the placement of those networks in its channel line-up; [21] Equal Employment Opportunity requirements;[22] closed captioning and emergency information requirements to better serve persons with hearing and visual disabilities;[23] and various technical rules.

There are legal questions about whether some new online video distribution services qualify as MVPDs and are thus subject to all or some of the MVPD-specific obligations, prohibitions, privileges, and rights in the Communications Act, as well as questions about the public policy implications of applying—or not applying—some or all of the MVPD-specific rules to the new entrants.

Obligations, Prohibitions, Privileges, and Rights Relating Only to Cable Companies or Satellite Carriers

Several provisions in the Communications Act, the Copyright Act, or FCC rules create obligations, prohibitions, privileges, and rights that specifically pertain to cable companies or to satellite carriers, but not to MVPDs in general, nor to video distributors that are not cable or satellite operators. In particular:

- To foster localism, the FCC adopted network non-duplication and syndicated exclusivity rules that require cable companies to black out programming on the signals of distant (non-local) broadcast stations they import that duplicates the programming on a local stations if the local station has a contract with the program supplier to be the exclusive broadcaster of that programming within a geographic area.[24] The FCC initially adopted these rules for cable television without specific guidance from Congress. Later, Congress explicitly instructed the FCC to apply its network non-duplication and syndicated exclusivity rules to the signals of certain stations retransmitted by satellite carriers.[25] Although these

[20] 47 U.S.C. §549.

[21] 47 U.S.C. §536(a).

[22] 47 U.S.C. §554. Although the language in this provision refers only to cable television, the language in the rule adopted by the FCC to implement the provision explicitly includes all MVPDs (47 C.F.R. 76.71) and this rule has been upheld by the courts. Most recently, on June 25, 2012, the FCC Media Bureau chief released a Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture against Grande Communications of San Marcos, TX, an MVPD, finding that the company willfully and repeatedly violated the FCC's EEO rules and imposed a $10,000 forfeiture.

[23] 47 U.S.C. §613 and 47 C.F.R. §§79.1 and 79.2.

[24] 47 C.F.R. §§76.92-76.130. As explained in "A Short History of the Program Exclusivity Rules," appended to *In the Matter of Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent,* MB Docket No. 10-71, Opposition of the Broadcaster Associations, May 18, 2010, the first FCC program exclusivity rule was adopted in 1965.

[25] 47 U.S.C. §339(b).

rules do not apply to video programming distributors that are not cable or satellite operators, those distributors may have contractual arrangements with programmers with similar geographic restrictions.

- Also in support of localism, the 1992 Cable Act gave each broadcast station the right to demand that every cable operator in its local market carry its signal, though without compensation ("must carry" rules).[26] A satellite carrier is not required to carry the signals of its subscribers' local broadcast stations, but if it chooses to carry even one local station in a market it must carry all the stations in that market.[27] But these requirements do not apply to MVPDs or other video distributors that are not, in the first case, a cable operator or, in the second case, a satellite carrier.
- Sections 111, 119, and 122 of the Copyright Act create free or relatively low-cost compulsory copyright licenses for cable companies and for satellite carriers for the public performance or display of a work embodied in a broadcast television transmission, if the cable and satellite providers are "in compliance with the rules, regulations, or authorizations of the Federal Communications Commission governing the carriage of television broadcast station signals."[28] These privileges allow cable operators and satellite carriers that abide by the geographic restrictions in the FCC rules to pay lower fees to copyright holders when retransmitting broadcast television signals than they likely would had they been required to negotiate copyright license payments. These compulsory licenses are not available to online video distributors or other video distributors or MVPDs that are not cable companies or satellite carriers.[29]

There are serious questions about the public interest implications of making—or not making—some new online and other video distribution services subject to all or some of the cable-specific or satellite-specific obligations, prohibitions, privileges, and rights.

Table 1 shows the differential treatment in the current statutory and regulatory framework of video distributors depending on whether they are MVPDs, cable companies, satellite carriers, or other (non-video) programming distributors.

[26] 47 U.S.C. §534.

[27] 47 U.S.C. §338(a)(1).

[28] 17 U.S.C. §§111, 119, and 122.

[29] See, for example, Statement of Marybeth Peters, Register of Copyrights, before the Subcommittee on Courts and Intellectual Property, House Committee on the Judiciary, June 15, 2000, available at http://www.copyright.org/docs/regstat61500.html.

Table 1. Treatment of MVPDs, Cable Companies, Satellite Carriers, and non-MVPD Video Programming Distributors Under the Current Statutes and Regulations

Obligation, Prohibition, Privilege, or Right	Multichannel Video Programming Distributors (all MVPDs)	Cable Operators (a subset of MVPDs)	Satellite Carriers (a subset of MVPDs)	Video Programming Distributors Not Classified as MVPDs (including OVDs)
Obligation to obtain retransmission consent from local broadcast stations	Yes	Yes	Yes	No
Implicit right to retransmit broadcast station signals (from requirement that broadcaster negotiate retransmission consent in good faith)	Yes	Yes	Yes	No
Access to below market rate compulsory copyright license for works in retransmitted broadcast signals	No	Yes	Yes	No
Access to programming of programmers that have an attributable interest in a competing MVPD (Program Access Rules)	Yes	Yes	Yes	No
If affiliated with a programmer, obligation to carry similar programming of independent programmer (Program Carriage Rules)	Yes	Yes	Yes	No
Prohibitions under Network Non-Duplication and Syndicated Exclusivity Rules and/or Unserved Household Rule from retransmitting broadcast signals in certain geographic areas	No, although MVPDs have similar prohibitions in their contracts with programmers	Yes	Yes	No, although non-MVPD distributors may have similar prohibitions in their contracts with programmers
Obligations under Must Carry or Carry One/Carry All Rules	No	Yes, subject to Must Carry Rules	Yes, subject to Carry One/Carry All Rule	No
Obligation to meet FCC's Equal Employment Opportunity Rules	Yes	Yes	Yes	No
Obligation to allow customers to use or attach competitively provided navigation devices (set-top boxes)	Yes	Yes	Yes	No
Obligation to provide closed captioning for the hearing impaired	Yes	Yes	Yes	Some may meet definition of "distributor of video programming for residential reception that delivers such programming directly to the home and is subject to the jurisdiction of the Commission"
Obligation to provide emergency video programming accessible to persons with hearing and visual disabilities	Yes	Yes	Yes	Some may meet definition of "distributor of video programming for residential reception that delivers such programming directly to the home and is subject to the jurisdiction of the Commission"

Source: Congressional Research Service, based on interpretations by the Federal Communications Commission and the Copyright Office.

The Overarching Policy Issue with Respect to Online Video Distributors: Access to Programming

Under current law, online video distributors, and other video distributors that do not fit the statutory categories of MVPD, cable company, or satellite carrier, do not have the privileges and rights firms in those categories enjoy under the Communications Act and the Copyright Act.

The provision in the Communications Act requiring broadcasters to negotiate retransmission consent terms "in good faith" with MVPDs implies a right to MVPDs for access to the broadcast signal if they offer reasonable compensation. Online video distributors that are not deemed MVPDs do not enjoy that implied right.

The program access provision in the Communications Act allowing an unaffiliated MVPD to seek redress at the FCC if it faces discriminatory access to a programming network affiliated with a competing MVPD is not available to an online video distributor that is not deemed an MVPD.

The provisions in Sections 111, 119, and 122 of the Copyright Act that create statutory compulsory public performance licenses for cable companies and satellite carriers that retransmit the signals of broadcast stations give cable and satellite providers the right to retransmit the broadcast signals as long as they pay the statutory fees and meet the other requirements, such as abiding by the FCC's network non-duplication and syndicated exclusivity rules. Moreover, these fees are generally viewed as being lower than the rates likely to prevail in market negotiations. In contrast, online video distributors and other non-cable and non-satellite distributors must negotiate public performance copyright permission with the copyright holders, under Section 106(4) of the Copyright Act, and the copyright holders are under no obligation to grant permission.

Although copyright holders often have the incentive to distribute their works as widely as possible, there may be situations when more exclusive distribution represents a more profitable business strategy. If the copyright holders believe that granting these rights to video distributors that compete against the incumbent cable and satellite video distributors could undermine the existing industry business model that has been very lucrative for the copyright holders and distributors alike, they have the right not to grant such rights. For example, if a copyright holder participates in the "TV Everywhere" strategy of making its programming available for use on all receiving devices (television sets, computers, game consoles, tablets, cell phones) but only if the consumer subscribes to the pay television service of a participating distributor, then that copyright holder might not have the incentive to grant permission to unaffiliated online distributors. This is in some way analogous to a manufacturer prohibiting discount stores from carrying its product line in order to maintain profit margins (that might be reinvested into product innovation).

In addition, to the extent that a broadcast network also has its own online video distribution service or has a financial interest in an online video distribution service (for example several networks have ownership shares in Hulu), it may not have the incentive to grant copyright permission to competing over-the-top services.

Many of the copyright holders for broadcast network programming are large programmers that also hold the copyrights for cable network programming. They may have the same incentives to withhold copyright permission from over-the-top providers for their cable network programming as they have for their broadcast network programming.

Given that there is certain "must have" programming that multichannel video distributors must provide in order to successfully attract customers, if the copyright holders of such programming choose to deny online video distributors access to that programming, successful competitive entry could be difficult.[30] That concern was the basis for Congress enacting the Program Access requirements in the first place.

The Policy Issues Raised by the Entry of Online Video Distributors

Some observers have raised concerns that the current statutory and regulatory framework no longer fosters the policy goals of competition, diversity of voices, localism, and innovation because it does not extend to online video distributors the privileges and rights—and also the obligations and prohibitions—that are applicable to traditional video distributors. For example, competition and innovation may be harmed if online video distributors are denied the access to programming that MVPDs enjoy through the program access and retransmission consent rules or if they are denied the guaranteed low cost compulsory copyright license that cable companies and satellite carriers enjoy. At the same time, localism may be harmed if online video distributors are not subject to the geographic restrictions in the network non-duplication and syndicated exclusivity rules that cable and satellite providers must obey.

As explained above, the current statutory and regulatory framework is characterized by provisions that are specific to certain statutorily-defined subcategories of video programming distributors—multichannel video programming distributors (MVPDs), cable companies, or satellite carriers. Congress may choose to review these provisions to determine whether, with some definitional modifications, the statute can accommodate online video distributors and better meet the policy goals. In so doing, it may find that, given the new technologies and new market dynamics, more extensive changes are needed to the statutory and regulatory framework, perhaps even a full re-evaluation of the retransmission consent/must carry regime and the compulsory copyright license. Similarly, in light of its longstanding concern about vertically integrated media companies leveraging market power from one market to another, Congress may choose to analyze the ability of vertically integrated Internet service providers to discriminatorily favor their own online video services over competing non-affiliated services.

Any review may have to address two complicating factors. There has been wide-scale market entry by online video distributors. But among those entrants there is such a wide variety of service offerings, business models, technologies deployed, consumer equipment targeted, and even ownership relationships with traditional MVPDs that it might not be optimal, or even possible, for Congress to construct statutory and regulatory provisions applicable to all OVDs. Rather, Congress may determine that some OVDs are sufficiently similar to traditional MVPDs that they are close substitutes that should be treated as MVPDs, while other OVDs have offerings and business models that are far removed from those of traditional MVPDs and should be treated differently.

[30] Access to "must have" programming may be less important for an OVD that does not seek to compete directly with traditional cable and satellite video providers, but instead pursues a business plan based on offering a low-priced alternative that does not include sports or other high-cost programming.

Second, as explained earlier, a number of free trade agreements include language that arguably constrains the ability of the United States to expand the compulsory copyright license to online video distributors and requires online distributors to get permission from broadcasters to retransmit their signals. Although these provisions generally have been incorporated in the trade agreements at the behest of American, not foreign, companies, and thus statutory or regulatory actions taken in furtherance of domestic media policy goals that are not in accord with these trade provisions may not generate trade complaints against the United States, any such actions are likely to be strongly opposed by the entities that sought the provisions.

Refining or Modifying Constructs in the Current Statutory and Regulatory Framework

In the 1992 Cable Act, Congress defined an "MVPD" as "a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase by subscribers or customers, multiple channels of video programming."[31]

Congress could not predict the direction that video distribution technology would take. Given the many technological and market developments since 1992, Congress may wish to review the concept of an MVPD, both in terms of what constitutes an MVPD and what obligations, prohibitions, privileges, and rights should apply to MVPDs and the entities dealing with MVPDs—in particular with respect to online video distributors.

Should a Video Distributor Have to Offer Multiple Channels of Pre-Scheduled, "Linear" Programming to Qualify as an MVPD Eligible for Program Access Privileges?

There are many OVDs offering a wide variety of video services using different business models. Some offer multiple channels of pre-scheduled, "linear" programming of the sort long offered by television broadcast stations and incumbent MVPDs; others offer video-on-demand and pay-per-view services of the sort offered by many incumbent MVPDs but not by broadcasters; and yet other OVDs offer both types of services. Depending on the OVD service to which they subscribe, consumers may be able to view the video on their television sets, game consoles, computers, or mobile devices.

By common usage, and by statutory definition, a central element of an MVPD has been the provision of "multiple channels of video programming." Most of the MVPD-specific provisions in the 1992 Cable Act appear to apply to channels of pre-scheduled, linear programming offered by broadcast networks and cable networks, rather than on-demand offerings. Retransmission consent applies to the retransmission of a broadcast signal, but on-demand services do not retransmit a broadcaster signal, they provide a stored program. Similarly, the program access rules apply to "satellite broadcast programming" and "satellite cable programming,"[32] which by

[31] 47 U.S.C. §522(13).

[32] "Satellite broadcast programming" is defined as broadcast video programming when such programming is retransmitted by satellite and the entity retransmitting such programming is not the broadcaster or an entity performing such retransmission on behalf of and with the specific consent of the broadcaster (47 U.S.C. §548(i)(3) and 47C.F.R. §76.1000(f)). "Satellite cable programming" is defined as video programming which is transmitted via satellite and (continued...)

definition appear to be limited to pre-scheduled, linear programming retransmitted to MVPD subscribers, thus not including programming stored for future use by subscribers.

Yet, if a vertically integrated programmer-MVPD refuses to make its non-linear programming available to an unaffiliated video distributor, or does so only in a discriminatory fashion, that could have the same anti-competitive effect as a vertically integrated programmer-MVPD refusing to make its linear programming available, especially as the market appears to be shifting away from linear programming offerings toward on-demand offerings. Is there a policy reason to apply the program access rules to pre-scheduled, linear programming but not to on-demand programming?

The FCC appears to recognize this issue. It has sought public comment on how to address a hypothetical future scenario in which "traditional MVPDs…eventually make available video programming for purchase or rental exclusively on an on-demand basis?"[33] Congress may want to provide guidance.

This suggests an additional question. If a company, such as Verizon, has a traditional MVPD service offering, such as its FiOS, but also offers an over-the-top IP-based service, such as Verizon's joint venture with Redbox, to what extent, if at all, should the obligations, prohibitions, privileges, and rights associated with MVPD status apply to the second service?[34]

Should Online Video Distributors be Subject to the Geographic Restrictions in the FCC's Network Non-duplication and Syndicated Exclusivity Rules or the "Unserved Household" Rules in Order to Qualify as MVPDs?

In order to protect local broadcast stations from duplicative programming imported from distant broadcast stations, as early as the 1960s the FCC adopted network non-duplication and syndicated exclusivity rules that require cable companies to black out duplicative network programming or syndicated programming.[35] Later, Congress explicitly instructed the FCC to apply its network non-duplication and syndicated exclusivity rules to the signals of certain stations retransmitted by satellite carriers.[36] In addition, the Satellite Home Viewer Act of 1988 (P.L. 100-667) modified the Copyright Act by adding Section 119, which created a statutory compulsory license for satellite carriers for the retransmission of copyrighted material on broadcast signals to "unserved

(...continued)

which is primarily intended for direct receipt by cable operators for their retransmission to cable subscribers, except that such term does not include satellite broadcast programming (47 U.S.C. §605(d)(1) and 47 C.F.R. §76.1000(h)).

[33] "Media Bureau Seeks Comment on Interpretation of the Terms 'Multichannel Video Programming Distributor' and 'Channel' as Raised in Pending Program Access Complaint Proceeding," *FCC Public Notice,* MB Docket No. 12-83, DA 12-507, released March 30, 2012, at para. 14.

[34] See, for example, *In the Matter of Public Notice on Interpretation of the Terms "Multichannel Video Programming Distributor" and "Channel" as Raised in Pending Program Access Complaint Proceeding,* MB Docket No. 12-83, Comments of Verizon, submitted May 14, 2012, at p. 23, in which Verizon strongly argues that the two services should be treated separately, with its FiOS video service treated as an MVPD, but its joint venture with Redbox left unregulated.

[35] See "A Short History of the Program Exclusivity Rules," appended to *In the Matter of Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent,* MB Docket No. 10-71, Opposition of the Broadcaster Associations, May 18, 2010.

[36] 47 U.S.C. §339(b).

households"—broadly speaking, those households that are not able to receive that programming from local broadcast stations. These rules set geographic restrictions on the retransmission of broadcast station signals by cable companies and satellite carriers. The statutory compulsory licenses covering the retransmission of broadcast signals by cable operators (in Section 111 of the Copyright Act) and by satellite carriers (in Sections 119 and 122 of the Copyright Act) all restrict these licenses to cable and satellite providers that abide by the FCC's network non-duplication and syndicated exclusivity rules.

If a video distributor is deemed an MVPD, then it attains the access to broadcast programming and cable network programming provided by the retransmission consent and program access rules. A satellite carrier does not need to obtain a broadcaster's retransmission consent to provide its subscribers the signals of a "superstation"[37] if it is abiding by the FCC's network non-duplications and syndicated exclusivity rules. It also does not have to obtain a broadcaster's retransmission consent to provide its subscribers the signals of a non-local network station so long as the subscribers qualify as "unserved households."[38] These provisions suggest that Congress has sought to place geographic limits on satellite retransmission of broadcast signals. If Congress continues to be concerned about the geographic reach of retransmitted signals, it might want to set the same or similar geographic restrictions on online video distributors that retransmit broadcast station signals.

It is noteworthy that when the then-register of copyrights, Marybeth Peters, testified to Congress that she opposed extending the compulsory license for retransmission of broadcast signals to Internet distributors, she stated that "Our principal concern is the extent to which Internet retransmissions of broadcast signals can be controlled geographically."[39]

She further stated that the Section 111 license for cable companies

> was tailored to a heavily-regulated industry subject to requirements such as must-carry, programming exclusivity, and signal quota rules—issues that have also arisen in the context of the satellite compulsory satellite license. Congress has properly concluded that the Internet should be largely free of regulation, but the lack of such regulation makes the Internet a poor candidate for a compulsory license that depends so heavily on such restrictions.[40]

Ms. Peters also expressed concern that the compulsory licenses for cable operators and satellite carriers harmed copyright holders because they were set at a fee that was below market level. But if these compulsory licenses remain in effect for cable and satellite providers, and if Internet providers were required to abide by—and could demonstrate an ability to abide by—the same geographic and other rules imposed on cable and satellite video distributors, then differential (and

[37] The Communications Act identifies a class of "nationally distributed superstations" (47 U.S.C. §339(d)(2)) that is limited to six stations that were in operation prior to May 1, 1991. These are independent broadcast television stations whose broadcast signals are picked up and redistributed by satellite to local cable television operators and to satellite television operators all across the United States. These nationally distributed superstations in effect function like cable program networks rather than local broadcast television stations or broadcast television networks. The nationally distributed superstations are WTBS, Atlanta; WOR and WPIX, New York; WSBK, Boston; WGN, Chicago; and KTLA, Los Angeles.

[38] 47 U.S.C. §325(b)(2).

[39] Statement of Marybeth Peters, Register of Copyrights, before the Subcommittee on Courts and Intellectual Property, House Committee on the Judiciary, June 15, 2000, available at http://www.copyright.org/docs/regstat61500.html.

[40] Ibid.

inferior) treatment of online video distributors would have anticompetitive implications. If an online video distributor agreed to abide by all the obligations and prohibitions currently imposed on MVPDs, should it be granted the privileges and rights given those MVPDs?

In comments submitted to the FCC, Syncbak, Inc. claims its service "is designed to permit distribution of traditional television program networks via the Internet while observing and respecting all of the obligations imposed on MVPDs by programmers under traditional licensing and distribution agreements, and by the government, through law and regulation."[41] It further claims:

- with proprietary servers in local broadcast stations and proprietary hardware and software for use in homes and on mobile devices, it can and does control broadcast signal distribution with more granularity than the great majority of incumbent MVPDs; and
- before permitting a viewer to tune to a particular channel or program, it can authenticate every aspect of the session, including the user's right to view the particular channel or program where and when used.

If these claims can be confirmed—if Syncbak's investment in servers, set-top boxes, and other equipment give it the same capability as traditional MVPDs to control geographically the retransmission of broadcast signals—it is possible that the public policy concerns raised by the Copyright Office more than a decade ago about Internet distribution of video programming may no longer be an issue for those providers with these capabilities.

This same issue was raised in a recent interview of Bob Saunders, president of the broadband DSL cable provider Skitter, which seeks to stream broadcast signals and other programming via the Internet to paying subscribers in rural communities.[42] Saunders claims that Skitter is willing to pay retransmission consent compensation to the local broadcasters whose signals it retransmits and to deploy the equipment (including set-top boxes) needed to ensure that it only retransmits those signals within the local broadcast market, and thus should qualify for the cable compulsory copyright license. But he further argues that other online video distributors, such as ivi.tv, which he alleges do not deploy all the equipment needed to meet the geographic restrictions on cable retransmission, should not qualify for the compulsory copyright license: "Why would they have the rights to be treated as a cable TV system when they haven't made the multimillion dollar investment in the facility that cable TV requires? We made the multimillion dollar investment." Similarly, M3X Media, Inc., which uses Internet Protocol Television to provide multiple channels of live, real time video programming (as well as video on demand) to connected devices and private networks via its Internet platform, argues that "online MVPD 'facilities' must be capable of meeting legitimate geographical requirements associated with the program access [rules]."[43]

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[41] *In the Matter of Public Notice on Interpretation of the Terms "Multichannel Video Programming Distributor" and "Channel" as Raised in Pending Program Access Complaint Proceeding,* MB Docket No. 12-83, Comments of Syncbak, Inc., submitted May 14, 2012, at pp. 3-4.

[42] Harry A. Jessell, "Skitter Chief: 'We Would Be Great Partners,'" *TVNewsCheck*, July 11, 2012, http://www.tvnewscheck.com/article/60695/skitter-chief-we-would-be-great-partners.

[43] *In Re: Media Bureau Seeks Comment on Interpretation of the Terms 'Multichannel Video Programming Distributor" and "Channel" as Raised in Pending Program Access Complaints Proceeding,* MB Docket No. 12-83, Comments of M3X Media, Inc., at p. 7. The program access provision in the Communications Act, at 47 U.S.C. §548(c)(3)(A), states: "Geographic limitations. Nothing in this section shall require any person who is engaged in the national or regional distribution of video programming to make such programming available in any geographic area beyond which (continued...)

These OVDs, of course, would benefit from a requirement that is constructed in a fashion that they could meet but that they allege some of their OVD competitors could not meet. Congress is likely to consider whether the current geographic requirements should remain or be modified.

As explained earlier, the United States is party to a number of free trade agreements that appear to prohibit Internet video distributors from obtaining a compulsory copyright license for the public performance of works on broadcast signals. Interestingly, however, for at least some of these agreements there is a signed side letter to the principal agreement that would allow this provision to be renegotiated if either party believes "that there has been a significant change in the reliability, robustness, implementability, and practical availability of technology to effectively limit the reception of Internet retransmission to users located in a specified geographic area."[44] Given the claims of Syncbak, Skitter, and M3X Media, it is possible that the technological capabilities needed to restrict Internet retransmissions to the geographic areas specified in U.S. statute and regulation already exist.

Should MVPDs be Required to Meet Certain Facilities Requirements?

Since the break-up of the old AT&T monopoly in 1984, there has been a continuing debate—should U.S. telecommunications and media policy foster facilities-based competition or allow multiple service providers to share the same network infrastructure. In 1992, satellite operators were in their infancy, telephone companies were not providing multichannel video distribution services, and there were no broadband networks capable of streaming video. At that time, Congress sought to foster the competitive entry of facilities-based video providers because there was no other potential alternative to cable service. Today, most American households have at least two facilities-based alternatives to cable—the two national satellite carriers—and many also have a telephone-based alternative. Most Americans also have access to broadband networks capable of streaming full channels of programming or on-demand programming.

If online video distribution over the Internet provides an efficient alternative to traditional distribution modes, what is the policy justification for treating it differently simply because the online distributor is not end-to-end facilities-based, but rather requires its subscribers also to use an Internet service provider? Successful online distribution entry does not appear to be the result of some market distortion. Broadband network providers are moving toward usage-based pricing mechanisms that presumably will recover from online video subscribers the costs they impose on the broadband networks they use.[45] Thus there would not appear to be an issue of subscribers of online services being artificially subsidized to the detriment of traditional video distribution services.

(...continued)

such programming has been authorized or licensed for distribution."

[44] See, for example, Letter dated May 18, 2004, from Mark Vaile, Australian Minister for Trade, to Robert B. Zoelick, U.S. Trade Representative, and Letter dated November 22, 2006, from Jorge Humberto Botero, Colombian Minister of Commerce, Industry, and Tourism, to John K. Veroneau, Deputy United States Trade Representative. See, also, the discussion in Robert Burrell and Kimberlee Weatherall, "Exporting Controversy? Reactions to the Copyright Provisions of the U.S.-Australia Free Trade Agreement: Lessons for U.S. Trade Policy," *University of Illinois Journal of Law, Technology, and Policy,* 2008, at pp. 290-291.

[45] There is a related policy issue of whether the ISPs that are imposing these usage based charges are discriminating in favor of their own video distribution services by not including usage of their own video streaming services in the usage calculations of their ISP customers.

Today, Internet Protocol Television (IPTV) is increasingly the technology of choice. It is being deployed both by online video distributors that rely on the Internet to reach their subscribers and by more traditional distributors, such as AT&T with its U-verse, that use their own private networks to reach their subscribers. In this environment, is there a public policy basis for requiring that MVPDs be end-to-end facilities-based and, if so, what facilities or capabilities should be required?

On their face, the MVPD-related provisions in current law do not appear to address policy issues that are affected by whether the MVPD is facilities-based—unless, perhaps, certain facilities or transmission paths are necessary to provide the geographic restrictions required under various statutory and regulatory provisions discussed in the previous section. For example, is it necessary that the transmission path provided be fixed and certain?

Syncbak claims that while all OVDs rely on Internet links for some portion of the transmission path to their subscribers, only some OVDs design and build technical platforms using proprietary hardware and software to create and manage the end-to-end transmission path for each video service they provide, thus ensuring that they meet all the required geographic restrictions in the current statutory and regulatory framework.[46] If the geographic restrictions are in the public interest, then perhaps the relevant standard might be end-to-end management of the transmission path, rather than the provision of an end-to-end facility.

Should Online Video Distributors be Subject to the "Must Carry" Rules That Apply to Cable Companies or the "Carry One, Carry All" Rule That Applies to Satellite Carriers in Order to Qualify as MVPDs?

Approximately 85% of U.S. television households subscribe to MVPD service provided by cable, satellite, or telephone companies. Those households tend not to maintain rooftop antennas and as a result many of them cannot receive broadcast signals over the air. If a local broadcast station is not carried by the MVPDs in its service area, then many households in the service area will not be able to receive its signal. To support localism, the 1992 Cable Act allows a broadcast station that is concerned the cable companies in its service area may not voluntarily carry its signal to require such carriage. This is called "must carry." Similarly, if a satellite carrier wants to offer its subscribers in a local market even one local broadcast television station signal, it must offer those subscribers the signals of all the local television stations ("carry one, carry all"). These rules do not apply to video distributors other than cable or satellite video providers.

There are very few OVDs that currently carry the signals of their local broadcast stations. Thus, the lack of any "must carry" or "carry one, carry all" rule for them currently has minimal impact on local broadcasters. But some day OVDs might enjoy greater market penetration. If OVDs gain MVPD status and the associated access to broadcast and cable network programming, that time may not be far away.

[46] *In the Matter of Public Notice on Interpretation of the Terms "Multichannel Video Programming Distributor" and "Channel" as Raised in Pending Program Access Complaint Proceeding,* MB Docket No. 12-83, Comments of Syncbak, Inc., submitted May 14, 2012, at pp. 3-4.

Would Treating Online Video Distributors as MVPDs Harm the Relationship Between Program Networks and Content Creators?

Discovery Communications, the programmer against which Sky Angel filed the program access complaint described in the **Appendix** to this report, argues that

> Classifying OVDs as MVPDs would have serious repercussions for the video programming market. Giving OVDs program access rights would place programmers in the difficult position of being forced to acquire online distribution rights for all or substantially all of their programming, from content providers who may not wish to sell those rights—either at all or at prices that make sense for programmers to acquire those rights.[47]

This appears to be a subset of a larger business issue that the industry already is facing—how to negotiate distribution rights in the online world. For example, earlier this year Time Warner Cable and Viacom settled a lawsuit regarding Time Warner Cable's streaming of Viacom video content on its iPad application.[48] A programmer that assembles content (some of which it may have created itself) into a full network schedule of programming[49] of course seeks to establish a profit maximizing distribution strategy; this typically involves setting contractual limits on how networks or distributors may use the content.

In the July 24, 2012, House Commerce Committee hearing, Preston Padden, a long-time industry attorney now at the Colorado School of Law, testified that owners of hundreds of cable program networks already act as "rights aggregators," assembling the performance rights to all of the programs shown on their network by negotiating licenses with the copyright holders that include provisions for sublicensing the rights to the MVPDs that carry the program network.[50] With the proliferation of options for consumers to receive their desired video programming, this has become an increasingly complex task, but clearly a feasible one. For example, Scripps Network Interactive Inc., which owns a number of "lifestyle" networks such as HGTV, Food Network, and the Travel Channel, recently announced a multiyear distribution agreement with Comcast that covers linear, on-demand, mobile, and online platforms on many devices, as well as advanced advertising services.[51] To do this, Scripps had to reach licensing agreements with all the underlying content providers.

If all (or some subset of) online video distributors were to be categorized as MVPDs, and thus were to gain statutory rights to access the programming on cable and broadcast networks (through the program access and retransmission consent rules), those program networks might have to modify their contracts with their content providers if those contracts did not already include or allow sublicensing to online distributors. But business contracts typically have clauses relating to modifications necessitated by change in law. As discussed earlier, a major concern of content creators and programmers is to retain control over the geographic distribution of their programming. This may not be a problem, however, because the program access provision in the

[47] Comments of Discovery Communications, LLC, at pp. 8-9.

[48] See, for example, Amy Chozick, "Viacom and Time Warner Cable Reach Deal on App for Streaming Programs," *New York Times,* May 16, 2012.

[49] This is sometimes referred to as linear programming.

[50] Testimony of Preston Padden, Senior Fellow, Silicon Flatirons Center, Colorado School of Law, before the Committee on Commerce, Science and Transportation, United States Senate, July 24, 2012.

[51] See Sarah Barry James, "2 opposite approaches to battling programming cost increases," *SNL Kagan,* July 23, 2012, http://www.snl.com/InteractiveX/article.aspx?CDID=A-15327953-12077&KPLT=2.

Communications Act states that "Nothing in this section shall require any person who is engaged in the national or regional distribution of video programming to make such programming available in any geographic area beyond which such programming has been authorized or licensed for distribution."[52]

Discovery's fundamental concern appears to be that providing some or all online video distributors MVPD status could undermine the current profit-maximizing distribution strategy of content creators or network programmers, that is, could harm their prevailing business models, such as TV Everywhere. But as explained at the outset of this report, those business models typically are based on the obligations, prohibitions, privileges, and rights in the statutory and regulatory framework that were created by negotiations among the then-existing providers. To the extent these are technology-specific, they may impede the introduction of new technologies. It may be difficult to justify retaining such impediments unless they demonstrably foster the public policy goals of localism, diversity of voices, competition, and innovation.

Should Online Video Distributors Have Access to a Compulsory Copyright License for the Performance of Works on Broadcast Signals Analogous to Those for Cable and Satellite Video Distributors?

Congress enacted compulsory copyright license provisions for the public performance of works on retransmitted broadcast signals for cable companies (Copyright Act of 1976, P.L. 94-553) and for satellite carriers (Satellite Home Viewer Act of 1988, P.L. 100-667) in large part because cable and satellite were then in their relative infancy and it was viewed as burdensome for them to have to negotiate license agreements with the multitude of copyright holders with works on the broadcast signals. Cable and satellite are now well established, but the compulsory license provisions remain intact. Online video distributors are in their infancy, and compete against cable and satellite video distributors, but currently do not have access to compulsory copyright licenses. Extending compulsory licenses to OVDs would foster the policy goals of competition and innovation.

But most copyright holders, and the Copyright Office, have long criticized compulsory copyright licenses for generating less revenues than would be forthcoming through market negotiations and thus acting as a disincentive for creative works. They oppose any expansion of compulsory licensing and instead would prefer to have all compulsory copyright license provisions eliminated.

In recent years, the United States has entered into a number of bilateral and multilateral free trade agreement that include, largely at the urging of American copyright holders, an article under which "neither party may permit the retransmission of television signals (whether terrestrial, cable, or satellite) on the Internet without the authorisation of the right holder or right holders, if any, of the content of the signal and of the signal."[53] If the compulsory license provision were extended to online video distributors, the copyright holders would not have the authority to keep online video distributors from retransmitting broadcast signals with their creative works. This would violate the terms of the FTA but it is not clear whether the trading partner would have many copyright holders pushing their government to bring a trade complaint. U.S. content

[52] 47 U.S.C. §548(c)(3)(A).

[53] U.S.-Australia Free Trade Agreement, Article 17.4(10)(b). Similar articles appear in other FTAs.

creators likely would argue that enactment of U.S. legislation that violates the intellectual property terms of the agreement would undermine the ability of U.S. firms to enforce their intellectual property rights in the other country.

Should the Broadcast-Related Copyright Laws be Reviewed in Light of Technological Developments That are Changing the Way Broadcast Programming Can be Retransmitted?

The public performance of copyrighted works on broadcast television signals is subject to copyright licensing, but the private performance of such works is not.[54] A cable or satellite operator must obtain a copyright license to retransmit the copyrighted material on broadcast signals to its subscribers, but a consuming household does not have to pay a license fee to capture the same broadcast programming directly over the air with use of a rooftop antenna. Video distributors therefore have the incentive to develop and deploy technologies that mimic the household's rooftop antenna or in some other fashion allow the consuming household to directly capture the broadcast signal. A start-up company, Aereo, now has deployed thousands of mini-antennas, which, though maintained at Aereo's own premises, are assigned to individual subscribers as their personal antennas; these antennas send the broadcast television signal to individual subscribers over the Internet. Aereo therefore claims that it is not a video distributor, but rather a technology rental company, and the programs received by its subscribers are private performances and not subject to copyright licensing requirements. The broadcasters claim otherwise and have sued Aereo for copyright infringement and sought a preliminary injunction.[55] On July 11, 2012, a federal district court judge denied the injunction, concluding "that plaintiffs have failed to demonstrate they are likely to succeed in establishing that Aereo's system results in a public performance."[56] Aereo therefore will be able to continue to offer its service as the copyright infringement case moves forward.

No matter how the courts ultimately rule in the Aereo case, Congress may want to review copyright law as it pertains to the performance of work on retransmitted broadcast signals. Several provisions in the Communications Act refer to provisions in the Copyright Act, and vice versa. Thus uncertainty in one area can create even wider uncertainty. As an example, at least one broadcast industry observer has noted that it is imperative for local broadcasters that online video distributors be classified as MVPDs so that the broadcasters can control the Internet distribution of their programming and be assured of a stream of retransmission consent revenues, in case the court were to rule that OVDs like Aereo are not subject to copyright licensing.[57]

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[54] Section 106(4) of the Copyright Act (17 U.S.C. §106(4)) states that the owner of copyright "has the exclusive rights," in the case of motion pictures and other audiovisual works "to perform the copyrighted work publicly."

[55] *American Broadcasting Cos. et al. v. Aereo Inc.*, U.S. District Court, Southern District of New York, No. 12-01540 and *WNET et al. v. Aereo Inc.*, U.S. District Court, Southern District of New York, No. 12-01543.

[56] A*merican Broadcasting Cos. et al. v. Aereo Inc.*, U.S. District Court, Southern District of New York, No. 12-01540 and *WNET et al. v. Aereo Inc.*, U.S. District Court, Southern District of New York, No. 12-01543, Opinion of Alison J. Nathan, District Judge, July 11, 2012, at p. 37. If the broadcasters are unsuccessful in this case and lose copyright revenues, they are likely to seek alternate compensation, most likely by seeking to make Aereo and similarly situated video distributors subject to retransmission consent requirements. See Harry A. Jessell, "Stations' Online Future Hinges on 'MVPD,'" *TVNewsCheck,* April 20, 2012, http://www.tvnewscheck.com/article/2012/04/20/58897/stations-online-future-hinges-on-mvpd.

[57] Harry A. Jessell, "Stations' Online Future Hinges on 'MVPD,'" *TVNewsCheck,* April 20, 2012, http://www.tvnewscheck.com/article/2012/04/20/58897/stations-online-future-hinges-on-mvpd.

Should the Basic Statutory Framework of Compulsory Copyright Licenses and Retransmission Consent Be Reconsidered?

Under the current statutory framework, local broadcast stations enjoy intellectual property rights that generate two revenue streams when their signals are retransmitted by cable and satellite video distributors. To the extent they hold the copyright for the works incorporated in their local television programming, they receive compulsory license fees under Sections 111, 119, and 122 of the Copyright Act. These compulsory rates, however, are almost certainly below rates that would prevail in an open market. In addition, though, under Section 325(b)(1) of the Communications Act, local broadcast stations can demand compensation from cable and satellite operators (and other MVPDs) before consenting to the retransmission of their signals, and such compensation is determined by market negotiations. Typically, if the local broadcast station is affiliated with a national broadcast network, it shares its retransmission consent revenues with that network. Similarly, the national network is likely to hold some of the copyright for the work on its programming and thus also will receive some compulsory copyright fees.

In the 112th Congress, Representative Scalise and Senator DeMint proposed, in the Next Generation Television Marketplace Act (H.R. 3675 and S. 2008) and in hearings of the House and Senate Commerce Committees,[58] that the three compulsory license provisions in the Copyright Act and the retransmission consent provision in the Communications Act be eliminated. Instead, any video distributor seeking to retransmit a broadcast television signal would have to negotiate with the copyright holders for the public performance rights to the works incorporated in that signal.[59]

This proposal could have several potential benefits. It would eliminate technology-specific provisions in the Copyright Act and Communications Act that may be hindering entry by providers using new video distribution technologies. It also would allow the marketplace to set the copyright value of the works, thus rewarding those content creators (and programmers) who provide the programming most valued by consumers.

But these changes in compulsory licensing and retransmission consent also could harm some video distributors by removing two protections they currently enjoy and by imposing on them the costs associated with negotiating payment with the large number of copyright holders whose works are incorporated in broadcast signals. Cable and satellite operators (though not other video distributors) now are guaranteed a below market price copyright license and thus cannot be denied access to the copyrighted material. Similarly, all MVPDs currently have the implicit right created by the "good faith negotiations" clause in the retransmission consent provision in the Communications Act[60] to retransmit broadcast signals at market negotiated prices. Under the proposed legislation, broadcasters could no longer demand compensation for the retransmission of their signals, but they and/or other copyright holders could refuse to negotiate a license agreement with a video distributor. A copyright holder might find it advantageous to employ a business model that restricts program access to a limited number of video distributors. One

[58] House Energy and Commerce Subcommittee on Communications and Technology hearing on "The Future of Video," June 27, 2012, and Senate Commerce, Science, and Transportation Committee hearing on "The Cable Act at 20," July 24, 2012.

[59] In the absence of a statutory compulsory copyright license, Section 106(4) of the Copyright Act (17 U.S.C. §106(4)) gives the owner of copyright the exclusive right to authorize the public performance of the copyrighted work.

[60] 47 U.S.C. §325(b)(3)(C)(ii).

possible business strategy would be to limit licensing to incumbent MVPDs, through a TV Everywhere-type distribution strategy that expands the array of devices consumers can use to access programming but limits the number of distributors given access to the programming.

Martin Luther King III, of Bounce TV, a new African American-oriented broadcast network, reportedly has criticized the proposal as a threat to diversity of voices because it would be damaging to economically fragile broadcast stations that are serving minority communities. He reportedly claimed the elimination of retransmission consent would harm small-market broadcasters that "lack the leverage to negotiate equitable carriage agreements with the giant pay services" and that "broadcasters will lose the financial flexibility to fund diverse programming, both on a broadcaster's prime channel as well as the digital sub-channels that are allowing Bounce TV to entertain and inform previously neglected African American viewers."[61]

Empirically, it is uncertain how the replacement of the current combination of retransmission consent and compulsory copyright license with a negotiated copyright license would affect the flow of revenues from video distributors to content providers, broadcast networks, and local broadcast stations. It would seem likely, however, that the elimination of the property right for retransmission of a broadcast signal and the strengthening of the property right for copyright holders would result in a more revenue flowing to content providers and less to broadcast stations and networks.

The Scalise-DeMint legislation in the 112th Congress would have conformed with the provision in a number of free trade agreements that does not permit the retransmission of broadcast signals without the authorization of the right holders of the content on the signal, since it would eliminate any possibility of a compulsory copyright license for Internet video distributors. But it would not have conformed with the provision that does not permit the retransmission of broadcast signals without the authorization of the right holders of the signal, since it would eliminate retransmission consent.

[61] Dave Seyler, "Bounce TV sees DeMint dereg bill as existential threat," *Radio & Television Business Report,* August 8, 2012, reporting on a letter from Martin Luther King III, Bounce TV, to Jay Rockefeller, chairman, Senate Commerce Committee.

Appendix. The Legal Issue Currently Before the FCC and the Courts

The Current Definition of MVPD

As noted above, multichannel video programming distributors (MVPDs) are subject to many requirements by the Communications Act, as amended, but also receive many statutory rights and privileges as a result of their status as MVPDs. The question of which entities are MVPDs, therefore, becomes important, and, in the rapidly changing market for the delivery of video programming, potentially ambiguous. The FCC is presently engaged in proceedings to determine whether certain online video programming distributors could be considered MVPDs under the current statute. The question has arisen because an online video programming distributor known as Sky Angel has attempted to claim program access rights, described above, in the course of a dispute over access to programming owned by Discover Communications (owner of the Discovery Channel, and other cable programming channels).

Program Access Statute and Definitions

The Communications Act, as amended by the 1992 Cable Act, prohibits cable operators and cable-affiliated program networks from engaging in unfair methods of competition that could hinder or prevent other MVPDs from providing satellite cable or satellite broadcast programming to their customers.[62] The statute also directed the FCC to promulgate rules to prohibit discrimination by satellite and cable programming vendors when those entities negotiate with MVPDs to provide those entities access to programming.[63] The regulations require owners of programming that are affiliated with cable operators to make that programming available to all MVPDs on a non-discriminatory basis.[64]

MVPDs that believe that these regulations were violated in the course of attempting to obtain rights to programming from an owner affiliated with a cable operator may file a complaint with the FCC to enforce the rules.[65] Congress directed the FCC to provide expedited review for these complaints.[66] In implementing this requirement, the FCC set a goal of resolving typical program access complaints within five months of their receipt by the Media Bureau of the FCC.[67]

[62] 47 U.S.C. §548(b) ("It shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.")

[63] 47 U.S.C. 548(c)(2)(B).

[64] 47 C.F.R. 76.1001-1002.

[65] 47 U.S.C. §548(d).

[66] 47 U.S.C. §548(f)(1).

[67] Implementation of the Cable Television Consumer Protection and Competition Act of 1992, 22 FCC Rcd 17791 (2007).

However, the FCC reserved the right to extend that time period when the complaint presented more complex issues.[68]

Before moving on to the Sky Angel complaint, it is important to note, again, that the rights to access programming apply only to MVPDs under current law. The statute defines a multichannel video programming provider (MVPD) as "[A] person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming."[69]

The terms "channel" and "video programming" are also statutory terms that may differ in important ways from the common understanding of those words. Channel is defined as "a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel," as further defined by FCC regulation.[70] FCC regulation defines a television channel as "a band of frequencies in the 6MHz wide in the television broadcast band and designated either by number or by extreme lower or upper frequencies."[71] Video programming is defined as programming provided by or generally considered comparable to programming provided by a television broadcast station.[72] Therefore, an MVPD must be a person who makes available for purchase multiple channels of video programming as those terms are defined by statute and regulation. Ambiguity has arisen regarding whether programming providers that deliver programming online, but do not provide the transmission pathway for that programming, in other words, do not provide broadband Internet access along with programming, can be considered MVPDs under the current definition.

Sky Angel Case

Sky Angel provides programming to its subscribers over the Internet.[73] The subscriber must purchase a broadband Internet connection from a third-party provider of that service. Sky Angel then provides the subscriber with equipment to watch Sky Angel's programming over the subscriber's existing broadband connection. The user experience, according to Sky Angel, is similar to cable programming providers in the way in which the programming is displayed, except Sky Angel does not provide subscribers access to local broadcasting stations over its service.

In 2007, Sky Angel entered into an agreement with Discovery Communications for access to its programming.[74] In July 2010, Discovery terminated the agreement, although the agreement was not set to expire until 2014. After failure to negotiate a new deal for program access with Discovery, Sky Angel filed a program access complaint with the FCC on March 24, 2010.[75] Sky

[68] *Id*. at 15843.

[69] 47 U.S.C. 522 (13).

[70] 47 U.S.C. 522(4).

[71] 47 C.F.R. 73.681.

[72] 47 U.S.C. 522(20).

[73] Sky Angel U.S., LLC, http://www.skyangel.com/?aid=00010&gclid=CMqA_e_g57ECFQjc4Aod6VoAeA.

[74] See Sky Angel U.S., LLC v. Discovery Communications LLC, *et al.*, Program Access Complaint, MB Docket No. 12-80, File No. CSR-8605-P (March 24, 2010). [Sky Angel Complaint]

[75] *Id*.

Angel alleged that Discovery had discriminatorily denied access to programming to Sky Angel. In conjunction with its complaint, Sky Angel also filed a "standstill" request to prevent Discovery from denying Sky Angel access to Discovery's programming while the program access complaint was being considered by the FCC.[76] Discovery opposed both the standstill petition and the program access complaint, on the grounds that Sky Angel is not an MVPD and does not qualify for the protections the 1992 Cable Act provides to MVPDs.

Media Bureau Decision

On April 21, 2010, the Media Bureau issued its decision denying the standstill petition.[77] The Bureau found that Sky Angel had not shown a likelihood of success on the merits of the question of whether it is an MVPD entitled to avail itself of the program access complaint process. While Sky Angel had asserted that it was an MVPD, it had not demonstrated to the Media Bureau's satisfaction, at that point in the proceedings, how Sky Angel met the elements of being an MVPD. In particular, Sky Angel argued that it provides multiple "channels" of video programming to its subscribers. However, the Media Bureau noted that Sky Angel appeared to be referring to "channels" in the sense that the company provides different streams of programming, but ignored the technical definition of channel that appears in the Communications Act.

As noted above, the definition of "channel" in the act is "a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel," as further defined by FCC regulation. [78] The Media Bureau read this definition of channel to include not just the programming stream, but also a transmission pathway for that programming.[79] Sky Angel does not provide the transmission pathway for its programming; the subscriber's broadband Internet provider does. Furthermore, the Bureau claimed that the illustrative list of entities considered to be MVPDs in the current statutory definition all provide both programming and the transmission pathway for that programming to their subscribers.[80] As a result, the Media Bureau found that Sky Angel was unlikely to succeed on the merits of its program access complaint because Sky Angel had not met its burden of demonstrating that it was an MVPD.

It is important to note that though Sky Angel's standstill petition was denied, no decision was issued regarding Sky Angel's original program access complaint. The Media Bureau stated specifically that its decision should not be read as a statement regarding the Commission's

[76] Sky Angel U.S., LLC, Emergency Petition for Temporary Standstill (March 24, 2010).

[77] In the Matter of Sky Angel U.S., LLC Emergency Petition for Temporary Standstill, Order, DA 10-679 (April 21, 2010). [Media Bureau Order]

[78] 47 U.S.C. 522(4).

[79] Media Bureau Order, *supra* note 16, at para. 7.

[80] This assertion has been question in comments by a number of industry participants. For example, DirecTV pointed out in its comments that the illustrative list in the definition includes "television receive-only satellite program distributors." These providers, according to DirecTV, "do not provide any transmission path for the delivery of video programming." Comments of DirecTV, LLC, In the Matter of Interpretation of the Terms "Multichannel Video Programming Distributor" and Channel" as Raised in Pending Program Access Complaint Proceeding, FCC MB Docket No. 12-83 (May 14, 2012). If this assertion is found to be true, it may undermine the Media Bureau's interpretation that in order to be an MVPD an entity must offer a transmission pathway.

ultimate decision on the issue of whether Sky Angel is an MVPD.[81] Sky Angel's program access complaint remains pending before the FCC.

Mandamus Petition

Sky Angel filed its program access complaint on March 24, 2010, and the Media Bureau issued its denial of the standstill petition a month later, but the program access complaint remained pending. At the beginning of 2012, it had been nearly two years since the FCC had taken any action regarding Sky Angel's program access complaint.

As a result, on February 27, 2012, Sky Angel filed a petition for a writ of mandamus in the United States Court of Appeals for the District of Columbia Circuit.[82] The petition asked the court to order the FCC to issue a final ruling on the merits Sky Angel's program access complaint within 30 days of the court's decision.

Mandamus is an "extraordinary remedy reserved for extraordinary circumstances."[83] Courts generally will only interfere with agency proceedings by issuing a writ of mandamus where the court has found a clear violation of an agency's statutory duties, including an unreasonable delay on the part of an agency to act where the governing statute requires action.[84] Here, Sky Angel argued that the FCC's failure to act on its program access petition for nearly two years (at the time the petition was filed) was an unreasonable delay so egregious as to warrant a court order to force action. The delay, according to their argument, had harmed and continues to harm Sky Angel and the public interest in competition among distributors of video programming, particularly those that would challenge the dominance of incumbent cable operators. Furthermore, Sky Angel pointed to the statutory requirement that the FCC provide expedited adjudicatory proceedings to program access complaints, and the FCC's own implementing regulations of that section that state that program access complaints would be resolved within 5 months, as evidence that the agency's delay in ruling on the complaint was unreasonable.[85] Importantly, Sky Angel is not asking the court to rule on whether it is an MVPD. Sky Angel is arguing only that the FCC's delay in addressing its complaint is unreasonable and is asking the court to order the FCC to render a decision.

On March 30, 2012, about one month after Sky Angel filed its petition, the FCC issued a notice seeking public comments on the definitions of multichannel video programming distributor and channel in the Communications Act.[86] The proceeding is intended to clarify the definitions in order for the FCC to proceed on Sky Angel's program access complaint. Following the issuance of the notice, the FCC filed its opposition to Sky Angel's petition for a writ of mandamus on April 5, 2012.[87] The FCC argued that Sky Angel had not shown that the FCC's delay was unreasonable.

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[81] *Id*. at para. 10.

[82] In re Sky Angel U.S., LLC, Pet. for Writ of Mandamus, Case No. 12-1119, D.C. Cir. (February 27, 2012). [Mandamus Petition].

[83] In re American Rivers and Idaho Rivers United, 372 F.3d 413, 418 (D.C. Cir. 2004).

[84] Telecomm. Research & Action Ctr. v. FCC, 750 F.2d 70, 79-80 (D.C. Cir. 1984).

[85] Mandamus Petition at 14.

[86] Public Notice DA 12-507 (Media Bur. March 30, 2012), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-12-507A1.pdf. [Public Notice]

[87] In re Sky Angel U.S., LLC, Opposition of the Federal Communications Commission to Sky Angel's Pet. for a Writ of Mandamus, Case No. 12-1119, D.C. Cir. (April 5, 2012).

The FCC argued that its self-imposed five month timeframe for ruling on program access complaint applied only to typical complaints and that Sky Angel's complaint is not typical, because it poses novel questions of law and policy. The FCC claimed that it has always reserved the right to spend more time reviewing "cases that 'involve numerous issues requiring legal, economic, and accounting expertise.'"[88] In the Commission's opinion, Sky Angel's complaint presents one of the more complicated cases that would require more time to resolve. Furthermore, answering the questions presented by the complaint could have effects that resonate throughout the Internet video distribution industry. The FCC pointed out that it had issued a public notice to begin to address these questions.[89] For that reason, among others, the FCC asked the court to deny Sky Angel's mandamus petition. The court has yet to issue its decision.[90]

Current FCC Proceedings to Clarify the Definition of MVPDs

As noted above, the FCC has issued a public notice seeking comments regarding the scope of the statutory definitions of MVPD and channel, as well as other statutory terms. The way in which the FCC answers these questions could have far-reaching effects on the video programming distribution industry. The questions posed by the FCC ultimately meld complicated questions of law and policy. However, the decision the FCC renders necessarily will be constrained by the language of a statute that was written before technology employed by companies by Sky Angel was contemplated.

The FCC posed a number of questions regarding whether Internet video distributors could be considered to be MVPDs under the current statutory language.[91] As discussed above, the Media Bureau found that the definition of channel in the Communications Act appeared to encompass both the stream of programming and the transmission pathway for that programming.[92] The FCC asked for comment on this interpretation specifically.[93] The FCC pointed out that the definition of channel relied on by the Media Bureau was adopted by Congress as part of the 1984 Cable Act and refers to portions of the electronic spectrum, *which is used in a cable system*.[94] The Commission noted that this could be read to mean that the definition of channel in the statute was only meant to define channels as they applied to cable systems.[95] The definition of MVPD was not added to the statute until 1992, it lists entities that are not cable systems as examples of MVPDs, and it uses the term "channels," rather than the singular to define the video programming that should be offered. These facts could support an argument that the word "channels" in the definition of MVPD was not intended to be understood to have the statutory meaning previously given to the word "channel" in the 1984 Cable Act.

The Commission asked commenters whether Congress intended to incorporate the previous statutory definition of "channel" when it used the plural of the word as part of the definition of

[88] *Id*. at 16.

[89] Public Notice, *supra* note 24.

[90] FCC, List of Pending Appellate Cases, http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0802/DOC-315545A1.pdf (August 1, 2012).

[91] Public Notice, *supra* note 24.

[92] Media Bureau Order, *supra* note 16, at para. 7.

[93] Public Notice, *supra* note 24.

[94] Cable Communications Policy Act of 1984, P.L. 98-549 §2 (emphasis added).

[95] Public Notice, *supra* note, 24 at para. 7.

MVPDs. In other words, the Commission asked whether Congress meant that MVPDs had to be offering "channels" of programming in the colloquial sense of simply offering multiple streams of programming, or if MVPDs must offer "channels" in the statutory sense, which would seem to include not only the offering of streams of programming, but also the pathway for that programming. The Commission noted that it has previously held that an entity does not need to own the facilities over which it distributes video programming in order to be considered an MVPD, and may use a third party's facilities for distribution.[96] However, each of the examples in the non-exhaustive list of MVPDs contained in the statutory definition offers both a transmission pathway and multiple video programming networks.[97] The Commission queried to what extent the distribution pathway and programming streams must be packaged together in order to qualify an entity to be an MVPD. In other words, assuming that in order to be an MVPD an entity must offer a pathway in conjunction with the programming, the Commission has asked to what extent those two attributes must be packaged together for an entity to be an MVPD.

The Commission then went on to request comment on whether the definitions of MVPD and channel could be interpreted to include entities that offer multiple video programming networks without regard for whether the entity also offered a transmission path for the programming.[98] This is the precise question presented by the Sky Angel complaint. Sky Angel offers multiple programming streams, but its customers' broadband Internet providers offer the transmission pathway. The Commission inquired as to whether the agency has leeway under the statutory language to interpret the offering of "multiple channels of video programming" in the more common understanding of the term, such that a company, like Sky Angel, that is offering a user experience not unlike the experience of flipping through cable "channels" could be considered an MVPD.

The Commission also inquired about the extent to which the statutory term "video programming" might constrain the types of entities that may be considered to be MVPDs.[99] The definition of "video programming" was added to the Communications Act, by the 1984 Cable Act. Video programming is defined as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station."[100] The Commission noted that programming comparable to that of a television broadcast station might be understood to mean prescheduled, "linear" programming; however, the Commission had previously found that video-on-demand, which is not linear, constituted "video programming."[101] The Commission asked for comment regarding whether an entity that offered programming only on an on-demand basis could "make available" programming as defined by the act.

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[96] *Id*. at para. 9 (citing In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996 Open Video Systems Second Order on Recon., 11 FCC Rcd 20227, 20301 (1996)).

[97] As noted *supra* note 76, this assertion has been questioned in comments by a number of industry participants. DirecTV pointed out in its comments that the illustrative list in the definition includes "television receive-only satellite program distributors." These providers, according to DirecTV, "do not provide any transmission path for the delivery of video programming." Comments of DirecTV, LLC, In the Matter of Interpretation of the Terms "Multichannel Video Programming Distributor" and Channel" as Raised in Pending Program Access Complaint Proceeding, FCC MB Docket No. 12-83 (May 14, 2012). It is thus possible that the Commission may decide that the non-exhaustive list does include entities that do not provide both programming and a transmission pathway to customers.

[98] Public Notice, *supra* note 24, at para. 11.

[99] *Id*. at para. 13.

[100] 47 U.S.C. §522(20).

[101] Public Notice, *supra* note 24, at para. 13.

The Commission has yet to reach a decision on these important questions. Any decision the FCC makes regarding whether online video programming providers are MVPDs may be subject to court challenge. Such proceedings may take months or years to resolve. Congress has the option to clarify the status of online video distributors under the Communications Act, keeping in mind the complex policy issues described in this report.

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