

SOME PROGRAMMING BASICS: PERSPECTIVE FROM A SATELLITE LAWYER

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Perhaps the most important obstacle facing any video provider is obtaining the rights to air programming. This paper attempts to briefly outline some of the basic legal structures facing “multichannel video programming distributors” (*MVPDs*) as they attempt to acquire such programming. Because the author has worked most extensively with satellite carriers, the emphasis in this paper may tilt towards issues affecting satellite. But the concepts – and the vocabulary, highlighted in bold italics – will hopefully prove helpful to lawyers engaged in a wider range of representation.¹

Copyright and other legal structures essentially give content owners near-monopolies over their content, so obtaining programming rights has proven to be time consuming and expensive for both cable operators and satellite carriers. MVPDs need to obtain rights to *broadcast programming* (programming distributed over the air by television stations) and *cable programming* (everything that is not broadcast programming). This paper addresses each type of programming in turn.

I. Broadcast Programming

Over the years, Congress has developed a two-tiered legal system governing the airing of broadcast programming on cable systems and the like. MVPDs must obtain both *copyright clearance* and the *broadcaster’s consent* before they can distribute broadcast signals over their systems.

A. Copyright

Broadcasters do not typically hold the copyright in their programming (with the exception of self-produced programming such as news). They instead must obtain copyright rights to *transmit* each program and advertising from networks (CBS, FOX), syndicators (Sony Pictures Television), and elsewhere (local sports teams). For historical reasons, broadcasters do not obtain the right to allow cable operators or other MVPDs to *retransmit* their signals to subscribers.² (In copyright-speak, the first “transmission” of a work, whether over-the-air in the case of broadcast programming, or over a cable system in the case of cable programming, is known as a *primary transmission*. Retransmissions of broadcast primary transmissions by MVPDs are known as *secondary transmissions*.³) Thus, in the absence of a sudden industry-

¹ For reasons of brevity, this paper omits a number of topics related to the distribution of programming, such as, for example, the program carriage rules, leased access, and the recent pushes for *a la carte* distribution. Those interested in learning more about these issues are invited to contact the author directly at (202) 730-1334.

² See generally *A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals*, A Report of the Register of Copyrights (Aug. 1997), available at www.copyright.gov/reports/study.pdf.

³ See, e.g., 17 U.S.C. § 111(f) (describing “secondary transmission” as the “further transmitting of a [broadcaster’s] primary transmission”).

wide change in practice, or of some other copyright authority, such MVPDs would have to obtain permission from each copyright holder of each broadcast program and advertisement. This process is fraught with free-rider problems.⁴ MVPDs have generally considered this impossible as a practical matter, although copyright holders have argued otherwise.⁵

To avoid these free-rider and practicality problems, Congress put a *statutory copyright license* into Section 111 of the Copyright Act (known to copyright holders as a *compulsory license*) allowing cable operators (and, later, overbuilders and Open Video System operators) to retransmit, for a set fee (or no fee), broadcast programming to their subscribers.⁶ Cable operators thus need not obtain clearance from program suppliers in order to retransmit broadcast programming. They need simply comply with applicable rules and make applicable payments to the Library of Congress. Copyright Royalty Judges in the Library of Congress, in turn, *distribute* these payments to the various *claimants* – program suppliers, sports leagues, *etc.* – each year. Distribution proceedings are often highly contentious.

Congress later enacted the Satellite Home Viewer Act of 1988 and its progeny, which gives satellite carriers a similar set of statutory licenses.⁷ Satellite operators thus retransmit broadcast programming pursuant to two licenses. One is the copyright license for *local into local* service – that is, where a carrier retransmits a New York City station into New York (so that, for example, a satellite subscriber in Manhattan can watch the local news).⁸ The second license is for *distant signals* – that is, where a satellite carrier retransmits the New York station into, say, Washington (so that a Manhattan native living in Washington can watch New York’s local news).⁹ One satellite carrier, DISH Network, has been forbidden to retransmit distant signals as the result of a lawsuit bought by the networks and their affiliates, and there remains ongoing litigation concerning DISH Network’s compliance with this order.¹⁰

⁴ See, e.g., *The Cable and Satellite Carrier Compulsory Licenses: An Overview and Analysis*, A Report of the Register of Copyrights at 8 (March 1992) quoting Supplementary Report of the Register of Copyrights at 42-43 (1965), available at www.copyright.gov/reports/cable-sat-licenses1992.pdf (“A particularly strong point [against finding copyright liability for cable operators’ broadcast retransmissions] is the obvious difficulty, under present arrangements, of obtaining advance clearance for all of the copyrighted material contained in a broadcast. This represents a real problem that cannot be brushed under the rug, and it behooves the copyright owners to come forward with practical suggestions for solving it.”).

⁵ The U.S. Copyright Office recently examined these issues. Comments discussing both sides of this issue can be found at <http://www.copyright.gov/docs/shvera/index.html#comments>.

⁶ See 17 U.S.C. § 111.

⁷ Satellite Home Viewer Act of 1988, Pub. L. No. 100-667, § 201, 102 Stat. 3935, 3949 (1988) (codified as amended in numerous sections of 17 U.S.C. and 47 U.S.C.).

⁸ 17 U.S.C. § 122; 47 U.S.C. § 338.

⁹ This license has historically been limited to *unserved households*. These were (a) *white area households* that could not get a *Grade B Signal* over the air of a same-network local station; (b) households that got a *waiver* from the local station; and (c) *grandfathered* or *Grade B Doughnut* subs. See 17 U.S.C. § 119(d)(10). The new Satellite Home Viewer Extension and Reauthorization Act of 2004 (*SHVERA*) added lots of complication to this, including a *no-distant-where-local* rule – which could be the subject of an entirely different paper. See 47 U.S.C. § 339(a)(2).

¹⁰ *CBS Broadcasting, Inc. v. EchoStar Commc’ns Corp.*, 450 F.3d 505, 525 (11th Cir. 2006); *CBS Broadcasting, Inc. v. EchoStar Commc’ns Corp.*, 472 F. Supp.2d 1367 (S.D. Fla. 2006). Two days before the permanent injunction was scheduled to go into effect, EchoStar announced an arrangement with National Programming

The satellite copyright licenses contain numerous different rules governing different types of broadcast signals. Thus, the rules governing the retransmission of *digital signals* are different than those governing the retransmission of *analog signals*.¹¹ And yet another set of rules governs the retransmission of *significantly viewed* signals (stations from one market that have been determined to be highly viewed over-the-air in a neighboring market, such as New York stations in Hartford, Connecticut).¹²

Making things more complicated yet, these rules cannot be found in a single place. The satellite license for local signals is contained in both Section 122 of the Copyright Act and Section 338 of the Communications Act. Likewise, the license for distant signals is contained in both Section 119 of the Copyright Act and Sections 339 and 340 of the Communications Act. These sections are parallel, but they are not identical, which can lead to difficult interpretive questions.¹³

For brevity's sake, the rest of this section on broadcast programming concerns only local service, which is by far the predominant service provided by cable and satellite providers today.

B. Broadcaster Consent

The Communications Act generally prohibits the retransmission of television signals without the broadcaster's consent, which the broadcaster can express in one of two ways.¹⁴ Each broadcaster must periodically choose, with respect to each MVPD, between *must-carry* (under which the MVPD must carry the broadcaster's programming, but the broadcaster is not permitted

Service, LLC ("NPS"), in which NPS agreed to lease transponder capacity from EchoStar to enable EchoStar's distant signal customers to continue to receive distant network signals from EchoStar's transponder with NPS billing and collecting for the service. Plaintiffs asked the district court to issue an order to clarify that the court's injunction prohibited this arrangement and issue an order to show cause why EchoStar and NPS should not be held in contempt. The district court declined, and the five broadcaster plaintiffs appealed that decision to the Eleventh Circuit, where the issue is now pending.

¹¹ See 17 U.S.C. § 339(a)(2)(D) (governing distant digital signals). See also *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, 23 FCC Rcd. 5351 (2008) (FCC Order implementing "carry-one, carry-all" rules for high definition signals over time).

¹² See 17 U.S.C. § 119(a)(3); 47 U.S.C. § 340.

¹³ Sometimes, the Copyright Act provisions simply incorporate those in the Communications Act. See, e.g., 17 U.S.C. § 119(a)(4)(D) (incorporating Communications Act rules regarding digital distant signals). Other times, however, the provisions are similar, but not exactly the same. Compare, e.g., 17 U.S.C. § 119(a)(4)(F) with 47 U.S.C. § 339(a)(2)(E) (each containing similar waiver provisions).

¹⁴ 47 U.S.C. § 325(b). The FCC also generally prevents a distributor from bypassing the broadcaster through importation of a distant signal (or a national network feed). Broadcasters have the exclusive rights to distribute (or to have redistributed) their programming within a certain geographic area. The provisions granting such rights are called the *network nonduplication* (for network programming) and *syndicated exclusivity* (or *syndex*) rules. See 47 C.F.R. § 76.92 *et seq.* (network nonduplication); 47 C.F.R. § 76.101 *et seq.* (syndicated exclusivity). These rules, however, do not apply to satellite retransmission of distant network signals to so-called "unserved households." 47 U.S.C. § 339(b).

to charge for it) and *retransmission consent* (under which the MVPD does not have to carry the broadcaster's programming and the two sides must negotiate a private carriage agreement).¹⁵

Smaller and independent stations (which have less bargaining power) typically choose must-carry, while network stations (which typically have more bargaining power) typically choose retransmission consent. Often, a MVPD's "payment" for the right to carry valuable network broadcast programming is not cash, but the obligation to carry cable programming produced by the network that otherwise might not be carried.¹⁶ This common arrangement, however, may be changing, as broadcasters are increasingly demanding cash payments. Indeed, the FCC's Media Bureau recently concluded that it was not *per se* unreasonable for a broadcaster to demand retransmission consent payments similar to what the cable operator paid for cable programming – even though the broadcaster demanded payments many times higher than what the cable operator had ever paid other broadcasters.¹⁷

The Communications Act prohibits broadcasters from entering into exclusive retransmission consent agreements – that is, a broadcaster cannot enter into a retransmission consent agreement with the incumbent cable operator that prohibits it from also entering into similar agreements with other MVPDs.¹⁸ Broadcasters and MVPDs must also negotiate retransmission consent contracts in "good faith."¹⁹ Moreover, broadcast programming cannot be deleted during "sweeps weeks," but broadcasters *are* allowed to demand deletion of their signals before "marquee" events such as the Super Bowl.²⁰ This explains why many major retransmission consent deals often get completed in December and January.

Two broadcasters are subject to additional regulation. As a result of the *Hughes/News* transaction, stations owned and operated by FOX have been subject to a significantly more stringent regulatory regime in this regard than are other broadcasters. MVPDs unsatisfied with FOX's retransmission consent offers may submit the matter to binding, *last-best offer*

¹⁵ See 47 C.F.R. § 76.64(f) (rules governing elections of commercial broadcast stations on cable systems); 47 C.F.R. § 76.66(c) (rules governing elections on satellite systems). Please note that such *retransmission consent agreements* are considered to be for the right to retransmit the broadcast signal. The FCC considers this to be a right entirely separate from copyright.

¹⁶ See generally Federal Communications Commission, *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, 2005 FCC LEXIS 4976 (rel. Sept. 8, 2005).

¹⁷ *Mediacom Comm'ns Corp. v. Sinclair Broadcast Group, Inc.; Emergency Retransmission Consent Complaint and Complaint for Enforcement for Failure to Negotiate Retransmission Consent Rights in Good Faith*, 22 FCC Rcd. 35, ¶¶ 16-19 (Med. Bur. 2007).

¹⁸ See 47 U.S.C. § 325(b)(3)(C)(ii) (prohibiting such arrangements until January 1, 2010). On the other hand, no provision of the Communications Act or the Commission's rules affirmatively requires broadcasters to enter into retransmission consent agreements with any party.

¹⁹ 47 U.S.C. § 325(b)(3)(C)(ii)-(iii).

²⁰ See 47 U.S.C. § 534(b)(9) (providing that "[n]o deletion or repositioning of a local commercial television station shall occur during a period in which major television ratings services measure the size of audiences of local television stations"). The applicability of this provision to satellite carriers has not been determined conclusively by the FCC.

arbitration (or *baseball arbitration*).²¹ Liberty Media is now subject to that condition for the handful of broadcast stations it owns.²² FOX has sought to have the condition lifted with respect to its owned and operated stations.²³

Many believe that the retransmission consent regime places new and smaller entrants at a significant disadvantage to incumbent cable *multiple system operators* (or *MSOs*).²⁴ If a station cannot reach a retransmission consent agreement with the dominant MSO in its area, it will not be able to reach most of its viewing audience. The station thus has every incentive to reach such an agreement, and the concessions it can extract from the cable MSO, while significant, are still somewhat limited. The station, however, will care much less if it cannot come to a retransmission consent agreement with a smaller MVPD that has far fewer subscribers. The size of the audience lost is much smaller.

Broadcasters thus sometimes charge different MVPDs different rates for the rights to their programming. In fact, while cable operators have, to date, largely been able to use their market power to avoid paying cash for retransmission consent, satellite carriers have not had that luxury. They have instead been forced to pay cash for some of the larger station groups.

Some people, however, believe that new entrants have significant advantages in such negotiations. Non-cable MVPDs, such as those deploying fiber optic systems, often have significant capacity, which gives them chips to bargain with (*e.g.*, carriage of a station's secondary, *multicast* over-the-air channels, or of affiliated cable networks) that traditional cable operators may not have.

II. Cable Programming

As a strictly legal matter, it is far simpler for MVPDs to obtain cable programming than it is for them to obtain broadcast programming. For cable programming, there is no legal distinction between obtaining copyright and obtaining the programmer's consent to distribute the copyrighted material. This is because cable operators and other MVPDs are the primary, not secondary, transmitters of the programming in question. (As discussed above, a broadcast station's "primary transmission" is over the air, while a cable channel's "primary transmission" is through an MVPD.)

The Communications Act contains a set of *program access* rules designed to counteract perceived imbalances in the marketplace for cable programming.²⁵ Cable networks and cable

²¹ *General Motors Corp., Hughes Electronics Corp., and The News Corporation Limited*, 19 FCC Rcd. 473 app. F.4 (2004) ("*News/Hughes*").

²² *See News Corporation, The DIRECTV Group, Inc. and Liberty Media Corporation*, 23 FCC Rcd. 3265, app. B.4 (2008) ("*Liberty/DIRECTV*").

²³ *See* Petition of News Corp., MB Docket No. 03-124 (filed Mar. 11, 2008).

²⁴ *See, e.g.*, Comments of the American Cable Association, MB Docket No. 07-198 (filed January 3, 2008) (arguing that small cable operators pay much higher retransmission consent fees than do larger cable operators).

²⁵ 47 U.S.C. § 548.

operators have tried to scale back or eliminate many of these rules, but have been unsuccessful to date in doing so.²⁶

To understand the rationale for the program access rules, consider a hypothetical cable company that owns numerous cable systems and several popular cable channels. That cable company is thought to have the incentive to either distribute its programming on an *exclusive basis* on its cable systems (*e.g.*, give itself exclusive access to its own programming), or to *discriminate* against non-affiliated MVPDs (*e.g.*, charge them a higher price to carry its own programming).²⁷ Alternatively, the cable company might engage in collective action with channels affiliated with *other* cable companies. Under such an agreement, all the participating cable channels would offer lower prices to other cable operators that themselves own popular cable programming while charging higher prices to those MVPDs with no such assets. Such an arrangement can be attractive to cable companies because cable operators generally do not compete with one another.

In 1992, Congress enacted, and the FCC has since twice extended, a series of rules designed to prevent such abuses. These include the following:

- Cable operators may not engage in “unfair methods of competition or unfair or deceptive acts and practices” the purpose or effect of which is to hinder significantly or prevent any MVPD from providing cable programming to subscribers.²⁸
- ***Vertically integrated*** cable operators (that is, those that have invested in their own cable channels) may not unduly or improperly influence the decision of affiliated programmers to sell, or the prices, terms and conditions of sale of, cable programming.²⁹
- Vertically integrated cable programmers (that is, those in which cable operators have invested) may not discriminate among MVPDs in the prices, terms, and conditions of the delivery of cable programming.³⁰ They can, however, take into account such factors as economies of scale, cost savings, *etc.*³¹ These exceptions allow significant real-world price differences.

²⁶ See, *e.g.*, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC Rcd. 17791 (2007) (extending prohibition on exclusive contracts for five years).

²⁷ See, *e.g.*, Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(5), 106 Stat. 1460-1 (1992) (“1992 Cable Act”) (“The cable industry has become vertically integrated; cable operators and cable programmers often have common ownership. As a result, cable operators have the incentive and ability to favor their affiliated programmers. . . . Vertically integrated program suppliers also have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and program distributors using other technologies.”).

²⁸ 47 U.S.C. § 548(b).

²⁹ 47 U.S.C. § 548(c)(2)(A).

³⁰ 47 U.S.C. § 548 (c)(2)(B).

³¹ 47 U.S.C. § 548 (c)(2)(B)(i)-(iii).

- Cable operators generally may not enter into exclusive contracts with vertically integrated cable programmers.³²

As in the case in the broadcast context, the FCC has adopted similar, and sometimes more stringent, rules as a result of mergers. Thus, when News Corp. invested in DIRECTV, it became subject to these rules even with respect to non-cable operators such as DIRECTV.³³ Moreover, its *regional sports networks* (or *RSNs*) were subject to mandatory baseball-style arbitration.³⁴ Liberty is now subject to this condition by virtue of its investment in DIRECTV,³⁵ as are Comcast and Time Warner by virtue of their purchase of systems from Adelphia.³⁶ News Corp. has petitioned for relief from this condition.³⁷

Non-cable MVPDs such as satellite carriers believe that, without these rules, they would never have been able to obtain many of the most desirable cable networks. Cable operators and vertically integrated programmers, for their part, believe that these rules are a relic of the past and have no place in competitive markets. The FCC recently ruled against the cable industry and extended the exclusive practices provision for another five years, although that decision has been appealed by the cable industry.³⁸

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The pay television industry stands at a crossroads. The prices that broadcast and non-broadcast programmers charge MVPDs continue to increase. The resulting increase in subscriber bills has not gone unnoticed. Yet broadcasters, in particular, seem to be convinced that the market has shifted fundamentally and intend to seek retransmission consent fees many times higher than they have sought in the past.

At the same time, broadcasters will be required to cease analog transmissions next February, a transition that will continue to receive much attention from policy makers.³⁹ And key parts of the Satellite Home Viewer Act expire at the end of 2009 and will need to be

³² 47 U.S.C. § 548(c)(2)(D) (for areas served by a cable operator); *see also* 47 U.S.C. § 548(c)(2)(C) (for areas unserved by a cable operator).

³³ *News/Hughes*, app. F.2.

³⁴ *Id.*, app. F.3.

³⁵ *Liberty/DIRECTV*, app. B.3.

³⁶ *Adelphia Commc'ns Corp., Time Warner Cable Inc., and Comcast Corp.*, 21 FCC Rcd. 8203, app. B.3 (2006).

³⁷ *See* Petition of News Corp., MB Docket No. 03-124 (filed Mar. 11, 2008).

³⁸ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, *supra* note 26 (extending prohibition on exclusive contracts for five years).

³⁹ *See* Digital Television and Public Safety Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (2006) (contained in Deficit Reduction Act of 2005, § 3001 *et seq.*) (codified in 47 U.S.C. §§ 309(j)(14) and 337(e)). Section 3002(a)(1)(B) of that Act amends Section 309(j)(14) of the Communications Act to establish February 17, 2009, as a new hard deadline for the end of analog transmissions by full-power stations. 47 U.S.C. § 309(j)(14)(A).

extended.⁴⁰ In the past, Congress has considered such extensions to be “must pass” legislation. If this holds true, we can expect Congress to broadly examine a wide range of issues as part of next year’s reauthorization process.

Congress thus may well modify many of the provisions described in this paper. In addition, the FCC may well have occasion to consider retransmission consent challenges under the existing rules. Lawyers practicing in this space will want to follow Congressional and regulatory activity very closely in the coming months.

⁴⁰ *See, e.g.*, Satellite Home Viewer Act of 1994, Pub. L. No. 103-369, § 4(a), 108 Stat. 3477, 3481 (codified in 17 U.S.C. 119 note) (providing that certain provisions of the distant signal compulsory license expire on December 31, 2009).