



**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of )  
)  
Promoting Innovation and )  
Competition in the Provision of ) MB Docket No. 14-261  
Multichannel Video Programming )  
Distribution Services )

**COMMENTS OF THE  
COMPETITIVE ENTERPRISE INSTITUTE, THE  
INTERNATIONAL CENTER FOR LAW & ECONOMICS, AND  
TECHFREEDOM**

March 3, 2015

## Summary of Comments

On behalf of the Competitive Enterprise Institute (CEI), the International Center for Law & Economics (ICLE), and TechFreedom, we respectfully submit these comments in response to the Federal Communications Commission’s notice of proposed rulemaking (NPRM) in the matter of promoting innovation and competition in the provision of multichannel video programming distribution services.<sup>1</sup> CEI is a nonprofit public interest organization dedicated to the principles of limited constitutional government and free enterprise.<sup>2</sup> ICLE is a global think tank aimed at building an international network of scholars and institutions devoted to methodologies and research agendas supportive of the regulatory underpinnings that enable businesses to flourish.<sup>3</sup> TechFreedom is a nonprofit think tank dedicated to promoting the progress of technology that improves the human condition.<sup>4</sup>

In this proceeding, the Commission proposes to expand the definition of a multichannel video programming distributor (MVPD) to encompass “subscription linear” online video distributors (OVDs), defined as services that make “multiple streams of prescheduled video programming available for purchase” over the Internet.<sup>5</sup> We believe this proposal is unwise as a policy matter and incorrect as a matter of statutory interpretation. Instead, we urge the Commission to affirm the Media Bureau’s Transmission Path Interpretation, which holds that an MVPD must “own or operate the facilities for delivering content to consumers.”<sup>6</sup> We contend that this is the only permissible construction of the term MVPD as used in the Communications Act.<sup>7</sup>

- 
1. Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services, *Notice of Proposed Rulemaking*, 29 FCC Rcd 15995 (2014) [hereinafter MVPD NPRM], available at [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-14-210A1\\_Rcd.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-210A1_Rcd.pdf).
  2. *About CEI*, COMPETITIVE ENTER. INST., <https://cei.org/about-cei> (last visited Feb. 12, 2015).
  3. *About ICLE*, INT’L CTR. FOR LAW & ECON., <http://laweconcenter.org/about.html> (last visited Feb. 25, 2015).
  4. *About TechFreedom*, TECHFREEDOM, <http://techfreedom.org/about> (last visited Feb. 25, 2015).
  5. MVPD NPRM, *supra* note 1, at 16003–04, para. 19.
  6. Sky Angel U.S., LLC Emergency Petition for Temporary Standstill, *Order*, 25 FCC Rcd 3897, 3882–83, para. 7 (2010).
  7. 47 U.S.C. § 522(13)(2012).

Congress added the term to the Act in 1992, contemplating MVPDs as facilities that delivered video programming to subscribers' homes and that might thus wield market power in their respective geographic markets, making them an understandable target for regulation.<sup>8</sup> Congress thus contemplated that the term comprised only facilities-based MVPDs, and the definition of MVPD must include that limitation unless and until Congress amends the statute.

The Transmission Path Interpretation also produces superior policy results. Subjecting certain OVDs to the regulatory privileges and obligations of MVPDs is not only unnecessary given today's thriving Internet video market, but also likely to distort competition among various OVD business models.

If the Commission nevertheless elects to amend its rules by defining the term MVPD to encompass subscription linear OVDs, we recommend that the definition include only those OVDs that are eligible for the statutory license under Section 111 of the Copyright Act.<sup>9</sup> To the extent that the Commission treats certain OVDs as MVPDs, making this treatment contingent on an OVD's eligibility for the Section 111 license is the only coherent way to effectuate the overall statutory scheme Congress crafted to govern the retransmission of broadcast television programming under the Communications and Copyright Acts.

### **I. For a video provider to be an MVPD, it must own or operate the transmission path to subscribers**

At issue in this proceeding is the meaning of the term "multichannel video programming distributor" as defined in the Communications Act.<sup>10</sup> Title VI of the Act defines 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."<sup>11</sup> In the NPRM, the Commission tentatively concludes that "Internet-

---

8. See *infra* notes 22–26 and accompanying discussion.

9. 17 U.S.C. § 111 (2012).

10. Act of June 19, 1934, ch. 652, 48 Stat. 1064 [hereinafter Communications Act] (codified as amended at 47 U.S.C. §§ 151–720 (2012 & Supp. 2013)), available at <http://legcounsel.house.gov/Comps/Communications%20Act%20of%201934.pdf>.

11. Communications Act tit. VI, § 602(13), 47 U.S.C. § 522(13) (2012) (originally enacted as Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(c)(6), 106 Stat. 1460 [hereinafter 1992 Cable Act] (codified at scattered sections of 47 U.S.C.)).

based distributors of video programming” are MVPDs if they “make available for purchase multiple streams of video programming ... at a prescheduled time.”<sup>12</sup> This proposed definition—the Linear Programming Interpretation—contrasts with the Transmission Path Interpretation, which the Media Bureau tentatively approved in 2010.<sup>13</sup> We believe the latter interpretation is correct: the term MVPD unambiguously encompasses only video distributors that “own or operate the facilities for delivering content to consumers.”<sup>14</sup>

The Act defines a “channel” as “a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel ... .”<sup>15</sup> In the NPRM, the Commission tentatively concludes that it “should not rely on the cable-specific definition of the term ‘channel’ to interpret the definition of ‘MVPD’ ... .”<sup>16</sup> We agree with the Commission that the term “channel” in the MVPD context includes channels that are not cable channels.<sup>17</sup>

Congress added the term “channel,” defined in Section 602(4) of the Act, in the Cable Communications Policy Act of 1984.<sup>18</sup> Yet the term MVPD did not appear in the Communications Act until Congress enacted the 1992 Cable Act,<sup>19</sup> which defined the term in Section 602(13) of the Communications Act.<sup>20</sup> While Section 602(4) uses the terms “channel” and “cable channel” interchangeably, the former term must have a broader meaning as used in the statutory definition of an MVPD in Section 602(13), or else Congress’ enumeration of non-cable MVPDs would be meaningless.<sup>21</sup>

But although a “channel” in the MVPD context surely encompasses something more than a “portion of the electromagnetic frequency spectrum which is used in a *cable system*” (emphasis added), the 1992 Cable Act plainly contemplated non-

---

12. MVPD NPRM, *supra* note 1, at 16000, para. 13.

13. *Id.* at 16002–03, para. 17.

14. Sky Angel U.S., LLC Emergency Petition for Temporary Standstill, *Order*, 25 FCC Rcd 3897, 3882–83, para. 7 (2010).

15. Communications Act tit. VI, § 602(4), 47 U.S.C. § 522(4) (2012).

16. MVPD NPRM, *supra* note 1, at 16004–05, para. 21.

17. *Id.*

18. Pub. L. No. 98-549, § 2, 98 Stat. 2779 (codified at scattered sections of 47 U.S.C.).

19. 1992 Cable Act, *supra* note 11, § 2(c)(6).

20. Communications Act tit. VI, § 602(13), 47 U.S.C. § 522(13) (2012).

21. *See id.* (MVPD definition includes “a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor”).

cable MVPDs as distinct *facilities* that compete against cable systems in the video marketplace.<sup>22</sup>

In 1992 no market existed for online home video distribution, as residential broadband access had not yet emerged.<sup>23</sup> Instead, video distributors competed over separate transmission facilities, such as cable system and satellites. Building such facilities entailed considerable up-front capital expenditures, and few households were served by an MVPD other than a cable system.<sup>24</sup>

With the 1992 Cable Act Congress sought to foster facilities-based video competition—particularly among direct-broadcast satellite (DBS) systems<sup>25</sup>—and thwart what Congress feared was an enduring cable monopoly.<sup>26</sup> Soon thereafter, DBS satellite competitors emerged: DirecTV launched in 1994<sup>27</sup> and Dish Network launched in 1996.<sup>28</sup> By 2012, these two DBS providers collectively had 34 million subscribers, representing over one-third of the nationwide MVPD market.<sup>29</sup> And two “telephone” MVPDs—AT&T and Verizon, which offer video programming over advanced digital subscriber lines and fiber-to-the-home, respectively—had a

- 
22. *See, e.g.*, 1992 Cable Act, *supra* note 11, § 2(a)(2) (discussing the “extraordinary expense of constructing more than one cable television system to serve a particular geographic area” and expressing concern that “[w]ithout the presence of another multichannel video programming distributor, a cable system faces no local competition.”).
  23. *See Making the Connections*, FCC (last accessed Mar. 3, 2015), <http://transition.fcc.gov/omd/history/internet/making-connections.html> (explaining that the use of high-speed connections in the home did not happen until after the introduction of the World Wide Web in 1993).
  24. Implementation of Section 19 of the Cable Television Consumer Protection & Competition Act of 1992, *First Report*, 9 FCC Rcd 7442, 7449, para. 13 (1994) (“The market for the distribution of multichannel video programming remains heavily concentrated at the local level, and for most households, cable television is the only provider of multichannel video programming.”).
  25. H.R. REP. 102-862, at 82 (1992) (Conf. Rep.), *as reprinted in* 1992 U.S.C.C.A.N. 1231, 1264 (conference agreement concluded that it would be “premature to require the adoption” by FCC of cross-ownership restrictions for DBS systems “[i]n view of the fact that there are no DBS systems operating in the United States at this time”).
  26. *See* 1992 Cable Act, *supra* note 11, § 2(a)(2) (congressional finding that cable operators held “undue market power ... as compared to that of consumers and video programmers”).
  27. Christopher Stern, *DBS and Cable Square Off at the FCC*, BROAD. & CABLE, July 10, 1995, at 42.
  28. Bill Menezes, *2nd Dish Satellite Launched EchoStar II to Enable TV Service Network to Double the Capacity of Channels it Provides*, ROCKY MOUNTAIN NEWS, Sept. 11, 1996, at 2B.
  29. Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Fifteenth Report*, 28 FCC Rcd 10496, 10507, para. 27 (2013) [hereinafter *Fifteenth Video Competition Report*], *available at* [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-13-99A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-13-99A1.pdf).

combined 11.5 million subscribers by late 2014, amounting to over one-tenth of the MVPD market—and their market share is growing.<sup>30</sup> All told, as of 2011, virtually every U.S. household had access to at least three MVPDs, while over 35% had access to at least four MVPDs.<sup>31</sup> Just as Congress hoped in 1992, incumbent cable companies have long ceased to dominate the market for delivering multi-channel video programming.

The term “channel” as used in the Communications Act in reference to MVPDs must be interpreted in light of this history and Congress’ clear intent to encourage *facilities-based* competition. Doing so requires that the term incorporate not only a programming component, but a transmission path component, as well.

Employing intrinsic aids (those concepts found within the text of the act itself) to better understand the text of the Act<sup>32</sup> bolsters the persuasiveness of the Transmission Path Interpretation as compared to the Linear Programming Interpretation. Congress listed several types of MVPDs—each owning or operating a transmission path to subscribers—in the Act’s statutory definition.<sup>33</sup> This list is non-exhaustive.<sup>34</sup> Therefore, the well-established canons of statutory construction *noscitur a sociis* and *ejusdem generis*<sup>35</sup> suggest that Congress intended the term

---

30. See Brian Santo, *FiOS Growth Solid, if Unspectacular, in Verizon Q2*, CED (Oct. 21, 2014, 1:41 PM), <http://www.cedmagazine.com/news/2014/10/fios-growth-solid-if-unspectacular-in-verizon-q2>; Daniel Frankel, *AT&T Adds 216K U-verse TV Subscribers, Passes 6M Mark*, FIERCECABLE (Oct. 22, 2014), <http://www.fiercecable.com/story/att-adds-216k-u-verse-tv-subscribers-passes-6m-mark/2014-10-22>.

31. Fifteenth Video Competition Report, 28 FCC Rcd at 10512–13, para. 36.

32. Under prong one of *Chevron*, courts often apply canons of statutory construction to ascertain the meaning of a statute. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) (“The judiciary is the final authority on issues of statutory construction . . . . If a court, *employing traditional tools of statutory construction*, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.” (citations omitted) (emphasis added)).

33. Communications Act tit. VI, § 602(13), 47 U.S.C. § 522(13) (2012).

34. *Id.* (an MVPD “means a person such as, *but not limited to*” several examples of MVPDs (emphasis added)).

35. Courts rely on the principle that a word is known by the company it keeps to “avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress.” See *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) (internal quotation marks omitted); see also *United States v. Williams*, 553 U.S. 285, 294 (2008) (“a word is given more precise content by the neighboring words with which it is associated”); 2A SUTHERLAND STATUTORY CONSTRUCTION § 47:17 (7th ed. 2007 & Supp. 2014) (“[W]here general words follow specific words in an enumeration describing a statute’s legal subject, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words. The doctrine applies equally to the

MVPD to encompass only entities similar to those enumerated. OVDs, however, are fundamentally different from the types of MVPDs listed in the Act's definition, all of which own or operate the transmission path to subscribers. Instead, OVDs stream video to their subscribers over facilities owned by broadband providers with whom the OVD typically has no commercial relationship.

## **2. Regulating OVDs as MVPDs will distort the Internet video market and encourage destructive rent-seeking behavior**

Given this situation, excluding all OVDs from treatment as MVPDs is the best way to ensure regulatory clarity and to preserve the Commission's focus on facilities-based video services. We agree with Commissioner O'Rielly that "shoehorning Internet video providers—the quintessential edge providers—into a framework that many people... have deemed in need of review or overhaul is just plain wrong."<sup>36</sup> Imposing on subscription linear OVDs such obligations as program carriage<sup>37</sup> and retransmission consent<sup>38</sup> will deter OVDs from offering pre-scheduled programming. We also share Commissioner Pai's concern that "this proposal will pave the way for more comprehensive regulation of Internet-based services."<sup>39</sup> For instance, as we discuss below, we worry that a future Commission might extend rules that currently apply only to cable systems or satellite providers—such as syndicated program exclusivity,<sup>40</sup> network non-duplication,<sup>41</sup> or must-carry<sup>42</sup>—to subscription linear MVPDs.

Like the Commission, we prefer rules that minimize "regulatory uncertainty."<sup>43</sup> But defining subscription linear OVDs as MVPDs would only exacerbate regulatory uncertainty, raising more questions than it answers. For instance, is a subscription linear OVD still an MVPD if it enables and encourages its subscribers to preschedule recordings of programs—or entire seasons of shows—and stores such content in the cloud, where subscribers can watch programs at their leisure?

---

opposite sequence, i.e., specific words following general ones, to restrict application of the general terms to things that are similar to those enumerated." (citations omitted)).

36. MVPD NPRM, *supra* note 1, at 16051 (O'Rielly, Comm'r, concurring).

37. *Id.* at 16017–18, paras. 48–49.

38. *Id.* at 16018–19, paras. 50–53.

39. *Id.* at 16049 (Pai, Comm'r, concurring).

40. *See* 47 C.F.R. §§ 76.101, 76.123 (2014).

41. *See* 47 C.F.R. §§ 76.92, 76.122 (2014).

42. *See* 47 C.F.R. § 76.56 (2014).

43. *Id.* at 16011–12, para. 31.

Some cable systems already offer such functionality.<sup>44</sup> Or is such an OVD partially an MVPD, insofar as it streams linear programming, but not an MVPD when it streams pre-recorded content? The NPRM does not address these thorny questions.

Similarly, is a subscription linear OVD still an MVPD if it distributes only content in which it has exclusive, but temporally and territorially limited, rights to distribute over the Internet? The Commission tentatively concludes that its definition of an MVPD should not include a “distributor that makes available only programming that it owns.”<sup>45</sup> But the Commission incorrectly assumes that CBS owns all the programming it linearly distributes on its All Access service.<sup>46</sup> In fact, many shows aired on CBS All Access are owned by independent television production companies that license the shows they produce to CBS and other television networks.<sup>47</sup> For instance, the hit CBS show *Person of Interest* is owned by Warner Bros. Entertainment Inc., a subsidiary of Time Warner.<sup>48</sup> Based on the Commission’s tentative conclusion, then, will CBS All Access be subjected to the panoply of MVPD privileges and obligations? We can only wonder what sort of creative program carriage complaints vendors might bring against such a newly minted MVPD—and we fear that even the threat of such litigation might discourage entry into the OVD/MVPD marketplace.

Many traditional MVPDs also stream linear content online to their subscribers. According to the Commission, “[t]he Transmission Path Interpretation seems difficult to apply in certain cases because an entity’s status would change depending on how and where the subscriber receives the content.”<sup>49</sup> We fail to see the difficulty in treating an MVPD as such when it delivers video to its subscribers over its own network, but not when it delivers video to subscribers using third party networks. An MVPD could easily ascertain whether the Commission’s

---

44. For instance, Cablevision’s RS–DVR enables subscribers to record video programming that is stored on remote servers owned by Cablevision. *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 125 (2d Cir. 2008).

45. MVPD NPRM, at 16009, para. 26.

46. *Id.*

47. For an extensive discussion of the various arrangements between major television networks and production companies, see Roni Mueller & Gretchen Wettig, *The “New” Series Co-Production Deal in Network Series Television*, 31 SW. U. L. REV. 627, 685–92 (2002).

48. *See* TIME WARNER INC., ANNUAL REPORT, MANAGEMENT’S DISCUSSION AND ANALYSIS OF RESULTS OF OPERATIONS AND FINANCIAL CONDITION, at 26 (2013), available at <http://goo.gl/gKeW38>.

49. MVPD NPRM, at 16011–12, para. 31.



rules applied to its streaming of video to a particular subscriber based on that subscriber's Internet Protocol address. Many OVD platforms, including those offered by traditional MVPDs, already function differently depending on a user's IP address. For instance, a U.S.-based Netflix subscriber sees a different content library when she logs in to the service from an IP address registered to a provider outside the United States.<sup>50</sup> Similarly, if an MVPD wishes to stream linear programming to its subscribers when they authenticate on a third-party network—such as a hotel or coffee shop—it should be free to do so unbound by the privileges and obligations of MVPDs.<sup>51</sup> From the subscriber's perspective, accessing an MVPD's online service on the go might involve a slightly different experience than doing so at home—but users are accustomed to such changes.<sup>52</sup>

The Transmission Path Interpretation offers greater technological neutrality and regulatory parity than the Linear Programming Interpretation. The Commission emphasizes the importance of defining “MVPD” in a broad and technology-neutral way ... .”<sup>53</sup> Yet the Linear Programming Interpretation, while perhaps broad, is hardly technologically neutral. Delivering online video programming at a prescheduled time—especially in conjunction with DVR technology—is quite similar in technological terms to offering a rotating library of on-demand video programming.<sup>54</sup> Both services entail the delivery of video on-demand to subscribers over the Internet through individuated transmissions; the only distinction is that, with the former, subscribers must elect in advance which shows they wish to store for future viewing. Yet the Linear Programming Interpretation would treat these technologically equivalent services differently, making the latter an MVPD but leaving the former unregulated as such.

---

50. Nick Summers, *UK Minister Calls for Netflix to Offer the Same Content When Brits Travel Abroad*, ENGADGET (Jan. 20, 2015, 8:50 AM), <http://www.engadget.com/2015/01/20/vince-cable-netflix-europe/>.

51. The NPRM discusses several of these privileges and obligations in detail. MVPD NPRM at 16014–19, paras. 39–53.

52. For instance, when Comcast launched its Xfinity X1 DVR, subscribers could stream both linear programming and Xfinity's On Demand catalog “while on their home Wi-Fi network,” but not at remote locations. Alex Tretbar, *San Francisco and Houston Get On-the-go Mobile Streaming for Comcast's X1 Cloud DVRs*, DIGITAL TRENDS (Oct. 1, 2014), <http://www.digitaltrends.com/home-theater/comcast-enables-on-the-go-mobile-streaming-for-its-cloud-dvrs/>.

53. MVPD NPRM, *supra* note 1, 16005–06, para. 23.

54. *Cf. Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 125 (2d Cir. 2008) (noting that Cablevision's “RS–DVR ... resembles a VOD service, whereby a cable subscriber uses his remote and cable box to request transmission of content, such as a movie, stored on computers at the cable company's facility.” (citation omitted)).

The Transmission Path Interpretation also provides greater certainty than the “functional equivalency” standard called for by some commenters, “whereby an entity would qualify as an MVPD if it looks and functions like a traditional MVPD from the perspective of consumers.”<sup>55</sup> Such an interpretation provides minimal *ex ante* notice to OVDs of their regulatory status, and would require a great deal of fleshing out by the Commission and the courts. It is unclear how consumers are supposed to tell the difference between MVPDs and other over-the-top services that look very similar when accessed through applications on smart televisions or other dedicated streaming devices—and it would therefore be unclear to OVDs themselves what their regulatory status would be. Again, this uncertainty can serve only to reduce entry into the video programming market, reducing overall innovation and competition to the detriment of consumers.

To date, subscription on-demand OVDs have forged an array of creative commercial arrangements to finance and distribute video programming. Netflix, Amazon Instant Video, and Hulu, among others, are successfully acquiring content from networks and other potential competitors for their online-only products, despite the absence of rules aimed at facilitating OVDs’ access to programming. Many of these arrangements entail an OVD holding exclusive rights to stream certain shows. Yet if the Commission treats subscription linear OVDs as MVPDs, thus subjecting them to program carriage rules,<sup>56</sup> these nascent providers may lose out on business models that have proven beneficial to online video consumers. The importance of the “NFL Sunday Ticket” as an exclusive offering of DirecTV amply illustrates how exclusivity in marquee content can play a crucial role in the development of alternative distribution channels (“transmission paths”).<sup>57</sup>

For instance, Netflix negotiated to have the exclusive right to stream online the popular NBC show *Blacklist* from producer and distributor Sony Pictures TV.<sup>58</sup>

---

55. MVPD NPRM, *supra* note 1, at 16002–03, para. 17.

56. *See* 47 C.F.R. § 76.1301 (2014).

57. *See* Joe Flint, *NFL TV Package May Be Fair Game*, L.A. TIMES, Jan. 1, 2014, available at <http://articles.latimes.com/2014/jan/01/business/la-fi-ct-nfl-sunday-ticket-20140101> (“The Sunday Ticket package was a brilliant play for DirecTV, as it gave the displaced NFL fan an option to watch their team in the comfort of their own home and not be forced to go to the local sports bar,” said Marc Bluestein, president of consulting firm Aquarius Sports & Entertainment. The ‘association with NFL definitely delivered large brand awareness for DirecTV, especially in its early years.’”).

58. *See* Jacob Kastrenakes, *Netflix Reportedly Picks Up NBC’s ‘The Blacklist’ for \$2 million Per Episode*, THE VERGE (Aug. 28, 2014), <http://www.theverge.com/2014/8/28/6078915/netflix-gets-nbc-the-blacklist-for-2-million-per-episode-report>.

Similarly, Amazon has the exclusive right to stream the CBS show *Under the Dome*.<sup>59</sup> If either were an MVPD, such deals might violate the Act's prohibition on "coercing... exclusive rights against any other multichannel video programming distributor."<sup>60</sup> Other examples include Netflix's deal for *House of Cards* with Media Rights Capital,<sup>61</sup> and Amazon's original programming *Alpha House*.<sup>62</sup> Had either been regulated as an MVPD, the financial interest that Netflix or Amazon has in these shows might violate the prohibition on "requir[ing] a financial interest in any program or service as a condition for carriage."<sup>63</sup>

Holding subscription linear OVDs to the retransmission consent requirement could also inadvertently harm consumers, particularly if paired with other requirements that currently apply to cable and satellite video distributors. Under Section 325 of the Communications Act, an MVPD generally may not "retransmit the signal of a broadcasting station" except with that station's "express authority."<sup>64</sup> Although many OVDs currently distribute the same programming as that aired by network-affiliated broadcast stations, these OVDs generally do not access such programs by capturing over-the-air ATSC signals. Instead, they negotiate rights to distribute network shows online with the copyright owners of such shows—or their assignees—and obtain programming pursuant to such arrangements. By itself, therefore, retransmission consent is unlikely to substantially affect subscription linear OVDs, as they are not bound by the requirement insofar as they access programming through alternative lawful means.

If, however, the Commission amends existing rules that bar cable and satellite systems from "duplicating network programming"<sup>65</sup> broadcast by a licensed sta-

---

59. Eriq Gardner & Lacey Rose, *CBS, Amazon Make Deal to Stream 'Under the Dome'*, THE HOLLYWOOD REPORTER (Feb. 11, 2013), <http://www.hollywoodreporter.com/news/under-dome-cbs-amazon-make-420330>. Amazon also has exclusive right to stream the PBS show *Downton Abbey*. *See id.*

60. 47 C.F.R. § 76.1301(b)(2014).

61. Nellie Andreeva, *Netflix To Enter Original Programming With Mega Deal For David Fincher-Kevin Spacey Series 'House of Cards'*, DEADLINE (Mar. 15, 2011), <http://deadline.com/2011/03/netflix-to-enter-original-programming-with-mega-deal-for-david-fincher-kevin-spacey-drama-series-house-of-cards-114184/>.

62. Susanna Lazarus, *John Goodman's Alpha House given full series by Amazon's new pilot scheme*, RADIOTIMES (May 29, 2013), <http://www.radiotimes.com/news/2013-05-29/john-goodmans-alpha-house-given-full-series-by-amazons-new-pilot-scheme>.

63. 47 C.F.R. § 76.1301(a)(2014).

64. Communications Act tit. III, § 325(b)(1), 47 U.S.C. § 325(b)(1)(2012).

65. 47 C.F.R. §§ 76.92, 76.122 (2014).

tion in a community to encompass *all* MVPDs—including subscription linear OVDs—consumers would suffer serious consequences. Under the network non-duplication rule, an MVPD may not distribute network programming if it duplicates that aired “within the geographic zone for [the] network program.”<sup>66</sup> Even if a subscription linear OVD obtained a network television show directly from the copyright owner, therefore, the OVD could not redistribute that program in any community in which a network-affiliated station operated without permission from that station.<sup>67</sup> Thus, if the Commission extended not only retransmission consent but also the network non-duplication rule to subscription linear OVDs, they would face the considerable burden of bargaining with dozens or hundreds of broadcast stations as a prerequisite to distributing network television shows to Internet users nationwide.

Traditional, facilities-based MVPDs continue to compete against each other, but they are no longer the only means by which consumers can access plentiful streams of video programming. Far from it: dozens of companies now sell vast and diverse video offerings over the Internet, including both prescheduled and on-demand programming. As the Commission’s observed in May 2014, OVD revenues grew 175 percent—from \$1.86 billion to \$5.12 billion—between 2010 and 2013.<sup>68</sup> These services have thrived in an unregulated environment, relying on licensing copyrights directly with content owners on a voluntary basis—and operating outside the Communications Act’s 23-year-old MVPD framework. Many OVDs offer essentially the same network and cable programming that traditional MVPDs also distribute—but, increasingly, firms are producing popular, high-quality original video programming for purely online distribution.<sup>69</sup>

Applying restrictive rules to the thriving OVD marketplace will result in less innovation and investment, harming consumers and OVDs alike. Such a result conflicts with the Commission’s goal in this proceeding to promote competition and protect consumers.<sup>70</sup>

---

66. *Id.* § 76.92(a).

67. *Cf.* Communications Act tit. III, § 325(b)(1), 47 U.S.C. § 325(b)(1) (2012).

68. Protecting and Promoting the Open Internet, *Notice of Proposed Rulemaking*, 29 FCC Rcd 5561, 5572, para. 32 (2014).

69. *See, e.g.*, Geoff Duncan, *Amazon Joins Netflix, Hulu, Google with Original TV Programming*, DIGITAL TRENDS, May 3, 2012, available at <http://www.Digitaltrends.Com/home-Theater/amazon-Joins-Netflix-Hulu-Google-With-Original-Tv-Programming/#ixzz3tndwhrd5>.

70. MVPD NPRM, *supra* note 1, at 15996, para. 1.

### **3. Antitrust laws can address (and deter) anticompetitive conduct involving online video distribution and programming**

The NPRM seems to assume that the only existing legal regime that governs the video distribution market is the FCC's set of MVPD rules. This is false: various state and federal laws, and the common law, offer ample remedies to businesses that suffer injury due to harmful practices by programming vendors or video distributors.

Consumer harms arising from program exclusivity can already be addressed under U.S. antitrust laws, which, among other things, bar “contract[s] ... in restraint of trade or commerce” and exclusive dealing when it “substantially lessen[s] competition or tend[s] to create a monopoly.”<sup>71</sup> Under these laws, exclusive arrangements involving intellectual property, including copyrighted audiovisual works, are subject to the “rule of reason,” whereby courts examine economic arrangements among parties based on whether they result in anticompetitive outcomes.<sup>72</sup>

For instance, if an ISP with market power decided to end a previously profitable arrangement with an OVD in order to privilege its own content, the OVD might be able to bring a Sherman Act Section 2 claim.<sup>73</sup> Antitrust law also protects consumers against tying arrangements that result in substantial foreclosure. Specifically, courts have, in some circumstances in recent years, afforded MVPDs relief

---

71. *See, e.g.*, Sherman Antitrust Act § 1, 15 U.S.C. § 1 (2012); Clayton Antitrust Act § 3, 15 U.S.C. § 14 (2012).

72. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY 27 (1995) (citing *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961) (“In the intellectual property context ... [e]xclusive dealing arrangements are evaluated under the rule of reason.”)). *See also* *Independent Ink v. Illinois Tool Works*, 547 U.S. 28, 45-46 (2006) (“Congress, the antitrust enforcement agencies, and most economists have all reached the conclusion that a patent does not necessarily confer market power upon the patentee. Today, we reach the same conclusion, and therefore hold that, in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product.”).

73. *See* Sherman Antitrust Act § 2; *cf.* *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

for harms resulting from anticompetitive tying.<sup>74</sup> Here, antitrust law could also provide relief for OVDs if program vendors with market power try to bundle desirable content with less-desired programming. And, in general, antitrust’s most important role is also its least visible: deterring anti-competitive conduct in advance, without the need for government enforcement (or much of it).

#### **4. OVDs that distribute network shows should be treated as MVPDs only if they are also eligible for the Section 111 license**

If the Commission rejects the foregoing advice and defines the term MVPD to encompass subscription linear OVDs, we urge the Commission to require that an entity be eligible for the statutory license under Section 111 of the Copyright Act<sup>75</sup> to receive MVPD treatment. Section 111 of the Copyright Act, enacted in 1976, affords “cable systems” a license to retransmit broadcast programming upon payment of a statutory royalty fee to the Copyright Office—which, in turn, distributes these payments to the owners of copyrights in the programs retransmitted under the statutory license.<sup>76</sup>

Importantly, the definition of a “cable system” in Section 111 differs from that in Title VI of the Communications Act. Under Section 111, a cable system is defined as:

[A] facility ... that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the [FCC], and makes secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels to subscribing members of the public who pay for such service ... .<sup>77</sup>

However, under Section 602(7) of the Communications Act, a cable system generally means a facility “consisting of a set of closed transmission paths and asso-

---

74. *See, e.g.*, *Paramount Pictures Corp. v. Johnson Broad, Inc.*, No. Civ. A.H. 04 03488, 2006 WL367874 at \*2, n.2 (S.D. Tex. Feb. 15, 2006) (claim that Paramount unlawfully tied rights to *Becker* and *The Parkers* to the distribution of *Judge Judy* and *Judge Joe Brown*); *MCA TV Ltd. v. Public Interest Corp.*, 171 F.3d 1265, 1277–78 (11th Cir. 1999) (claim that MCA conditioned the licensing of several first run shows on the distribution of a first-run series called *Harry and the Hendersons*).

75. 17 U.S.C. § 111 (2012).

76. 17 U.S.C. §§ 111(d)(3)–(4) (2012); *see also* Cable and Satellite Carrier Statutory License: Hearing Before the Subcomm. on Courts, the Internet, & Intellectual Property of the H. Comm. on the Judiciary, 108th Cong. 1 (2004) (statement of Marybeth Peters, Register of Copyrights), available at <http://www.copyright.gov/docs/regstat022404.html>.

77. 17 U.S.C. § 111(f)(3) (2012).

ciated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community.”<sup>78</sup>

In practice, therefore, some MVPDs that the Commission does not consider to be cable systems—such as AT&T’s U-verse video service—have nonetheless enjoyed the statutory license afforded by Section 111 of the Copyright Act.<sup>79</sup> The Copyright Act defines a “cable system” more broadly than the Communications Act does. This is not an accident. In 1992, the Copyright Office determined that Multichannel Multipoint Distribution Services—explicitly defined as MVPDs by the 1992 Act—were ineligible for the statutory license.<sup>80</sup> In 1994, Congress responded by adding the word “microwave” to the definition of “cable system” in Section 111,<sup>81</sup> thereby repudiating the Copyright Office’s previous interpretation.<sup>82</sup>

As this legislative history indicates, Congress intended the scope of the Section 111 license to be coterminous with non-satellite MVPDs. Under the overall statutory framework, any entity considered a “cable system” under the Copyright Act would also be treated as an MVPD under the Communications Act—and vice versa. This is the only logical synthesis of the two laws. Under a contrary interpretation, a video provider could be required not only to voluntarily negotiate copyright licenses with respect to network programming, but also to secure retransmission consent rights. Imposing on MVPDs so duplicative and costly a mandate is at odds with any reasonable construction of the Copyright and Communications Acts.

## 5. Conclusion

For the foregoing legal and policy reasons, we respectfully urge the Commission to limit the definition of an MVPD to entities that “own or operate the facilities for delivering content to consumers.” This will mean relying on antitrust and other generally applicable laws to address concerns about competition rather than prescriptive FCC regulation—but this is a feature, not a bug. But if the Commis-

---

78. Communications Act tit. VI, § 602(7), 47 U.S.C. § 522(7)(2012).

79. *See, e.g.*, Reply Comments of AT&T Services Inc., in Section 109 Report to Congress of the Copyright Office, *Notice of Inquiry*, Docket No. 2007-1, 72 Fed. Reg. 19,039 (2007), available at <http://www.copyright.gov/docs/section109/replies/att-reply.pdf>.

80. Cable Compulsory License, 57 Fed. Reg. 3284, 3296 (Jan. 29, 1992).

81. Satellite Home Viewer Act of 1994, Pub. L. No. 103-369, § 3(a), 108 Stat. 3477.

82. Cable Compulsory License, 59 Fed. Reg. 67,635 (Dec. 30, 1994).

sion must expand the definition of an MVPD to encompass subscription linear OVDs, it should apply only to those OVDs that are eligible for the statutory license under Section 111 of the Copyright Act.<sup>83</sup> This is the only coherent way to implement the Commission's preferred redefinition of the term "MVPD."

Respectfully Submitted,

Geoffrey Manne  
Ben Sperry  
INTERNATIONAL CENTER FOR  
LAW & ECONOMICS  
2325 E. Burnside Street, Suite 301  
Portland, OR 97214  
gmanne@laweconcenter.org

Ryan Radia  
COMPETITIVE ENTERPRISE INSTITUTE  
1899 L Street NW,  
Floor 12  
Washington, DC 20036  
(202) 331-1010  
ryan.radia@cei.org

Berin Szoka  
Tom Struble  
TECHFREEDOM  
110 Maryland Ave. NE, Suite 407  
Washington, DC 20002  
bszoka@techfreedom.org

---

83. 17 U.S.C. § 111 (2012).