



In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent, Report and Order and Further Notice of Proposed Rulemaking

MB Dkt. No. 10-71

Brent Skorup

Research Fellow, Mercatus Center at George Mason University

Federal Communications Commission

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INTRODUCTION

The Technology Policy Program of the Mercatus Center at George Mason University is dedicated to advancing knowledge about the effects of regulation on society. As part of its mission, the program conducts independent analyses that employ contemporary economic scholarship to assess agency rulemakings and proposals from the perspective of the public interest. Therefore, this reply comment does not represent the views of any particular affected party but is designed to assist the agency as it explores these issues.

SUMMARY

The FCC proposes to repeal its syndicated exclusivity and network nonduplication rules,¹ which the Commission first devised in the 1960s and 1970s. The rules were intended to limit cable television growth and to protect the growth of fledgling UHF broadcast stations.² We agree with commenters³ that these rules are vestigial and potentially anticompetitive interventions into television markets from a bygone era.⁴

1. Federal Communications Commission, *In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent, Report and Order and Further Notice of Proposed Rulemaking*, 34, MB Dkt. No. 10-71 (released March 31, 2014), http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0331/FCC-14-29A1.pdf.

2. Megan Mullen, *Television in the Multichannel Age: A Brief History of Cable Regulation* (Malden, MA: Blackwell Publishing, 2008), 69.

3. See United States Telecom Association Comments 14, MB Dkt. No. 10-71, June 26, 2014, <http://apps.fcc.gov/ecfs/document/view?id=7521348627>; Verizon Comments 1-2, MB Dkt. No. 10-71, June 26, 2014, <http://apps.fcc.gov/ecfs/document/view?id=7521349008>.

4. Charles B. Goldfarb, "A Condensed Review of Retransmission Consent and Other Federal Rules Affecting Programmer-Distributor Negotiations," 20, *CRS Report for Congress*, July 9, 2007 (emphasis added).

For more information, contact:

Taylor Barkley, (703) 993-8205, tbarkley@mercatus.gmu.edu

Mercatus Center at George Mason University

3434 Washington Boulevard, 4th Floor, Arlington, VA 22201

Television rules from the past are increasingly socially costly as technologies and business models change—particularly as content moves online—and it is time to start repealing old regulations. Experts view television regulations as “a Rube Goldberg regulatory structure,” a complex system that performs simple tasks in indirect, convoluted ways.⁵ The Copyright Office characterizes the FCC’s network nonduplication and syndicated exclusivity rules as “highly complex” and “a paradox” because FCC rules both encourage and discourage importation of distant broadcast transmissions.⁶ The Congressional Research Service similarly has said that “the negotiations between programmers and distributors, although private, are strongly affected by statutory and regulatory requirements and cannot be properly characterized as free-market.”

Every television industry segment has received some regulatory favors though the decades. However, the Copyright Office notes that there is “a thicket of communications law requirements aimed at protecting and supporting the broadcast industry.”⁷ This thicket arises largely because the FCC has aspirations for broadcast—namely localism, free television, competition, and diverse voices—that are often in tension with each other.⁸ These conflicting goals also tend to disadvantage pay-TV providers, particularly smaller operators.⁹

The existing rules have prevented a freer media market for forty years and should be repealed. As the Commission has said, “If the [exclusivity] rules should ultimately prove unnecessary or need modification in light of the passage of time, congressional action or other factors, they can be modified or rescinded.”¹⁰ Repealing the rules would not be a panacea for what ails television markets, but as one operator noted, eliminating these rules at issue “would be an important step in the right direction”¹¹

DISCUSSION

Broadcast distribution rights can be enforced through contracts and existing law, and these rules are unnecessary. Furthermore, the rules have largely failed to achieve their stated objective of localism in broadcast and are increasingly anachronistic with swift technological innovation. Finally, the rules artificially give leverage to some parties in the television distribution markets and may unnecessarily increase the concentration of the multichannel video programming distributor (MVPD) industry. These rules are part of a complex regulatory system that creates significant deadweight losses. Current FCC rules force television markets to be uneconomically small in many cases and create an arms race for leverage between content producers and distributors. Consumers are the primary losers in this unwieldy system, and, as such, would benefit would their repeal.

The Rules Are Unnecessary

The network nonduplication and syndicated exclusivity rules are unnecessary because parties can—unlike in the distant past—enforce their broadcast distribution rights through contracts and existing laws. The first nonduplication rules came about in 1965 to give broadcasters control of the use and retransmission of their signals.¹² As the FCC report stated,

5. *Hearing on The Cable Act at 20, Before the Senate Committee on Commerce, Science and Transportation*, 112th Cong., 4 (July 24, 2012) (testimony of Preston Padden, senior fellow, Silicon Flatirons Center), <http://siliconflatirons.com/documents/publications/policy/PaddenTestimony.pdf>.

6. US Copyright Office, *Satellite Home Viewer Extension and Reauthorization Act Section 109 Report* (Washington, DC: US Copyright Office, 2008), 5–6, <http://www.copyright.gov/reports/section109-final-report.pdf>.

7. US Copyright Office, *Satellite Home Viewer Extension*, 2008, 65.

8. Brent Skorup & Adam Thierer, “Video Marketplace Regulation: A Primer on the History of Television Regulation and Current Legislative Proposals” (Mercatus Research, Mercatus Center at George Mason University, Arlington, VA, April 2014, http://mercatus.org/sites/default/files/Thierer_VideoMarketplaceRegulation_v1.pdf); Charles B. Goldfarb, “A Condensed Review of Retransmission Consent and Other Federal Rules Affecting Programmer-Distributor Negotiations,” *CRS Report for Congress*, July 9, 2007, 20.

9. Goldfarb, “Retransmission Consent,” 2007, 10.

10. FCC, *Amendment of Subpart L, Part 11 to Adopt Rules and Regulations to Govern the Grant of Authorization in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems, First Report and Order*, 38 FCC 683, 715 (1965).

11. Verizon Comments 9, MB Dkt. No. 10-71, June 26, 2014, <http://apps.fcc.gov/ecfs/document/view?id=7521349008>.

12. See 38 FCC 683 (1965).

... nonduplication requirements will serve, in part, to achieve the equalization of competitive conditions at which the “rebroadcasting consent” proposal is, in large part, aimed.¹³

At that time, cable companies could freely pull broadcast signals from the air because there were no copyright laws or retransmission rights protecting the signals. In 1976, Congress gave copyright protection to programming transmitted by broadcast signals¹⁴ and in 1992 Congress gave broadcasters retransmission rights.¹⁵ Today, unlike in the 1960s, the duplication of programming would require the bargained-for consent of a broadcaster.

Commenters are incorrect, then, when they contend that without the rules, parties cannot effectively enforce negotiated agreements about nonduplication of programming.¹⁶ Restraints on distribution can be accomplished through private contract and, like most other contractual agreements between firms, upheld by private arbitration or—in certain rare circumstances—the courts.

Moreover, giving networks and broadcasters the ability to enforce these rights through administrative process before the FCC only adds unnecessary rules to dynamic video markets. Any broadcast affiliate or MVPD violating its contractual obligations is presumably in breach of contract or in violation of retransmission laws. Copyright law liability also looms over MVPDs. Though there may be some minor additional contracting costs in the short term, content creators and broadcasters would still maintain control over the distribution of broadcasts. In short order, distribution markets would be freer to efficiently deliver programming to consumers.

Commenters complain that enforcing their distribution rights through the courts is “a slow, inefficient, and impractical remedy.”¹⁷ That characterization is an exaggerated and uncharitable view of the United States court system. The vast majority of firms in every industry—including mass media distributors—seek remedy for contractual breaches and copyright violations through the courts and the well-developed private arbitration system. Further, MVPDs face severe sanctions for violating existing retransmission rules and are unlikely to transmit broadcast signals without permission. Last month, for instance, the FCC slapped a \$2.25 million fine on a small cable company with around 10,000 subscribers for retransmitting signals without broadcaster permission.¹⁸ While traditional remedies may not be as quick as some parties would prefer, that is not an adequate reason to keep these old regulations around.

Some MVPDs allege that if the rules were eliminated and networks could still enforce network nonduplication and syndication exclusivity through contract, it would “make matters worse.”¹⁹ While speculative, it is plausible that unforeseen costs²⁰ to MVPDs would arise with elimination of the rules because of the convoluted regulatory regime governing the television industry. In particular, the FCC-enforced market boundaries and localism efforts create inefficiently small markets not subject to normal competitive forces. Since competition between media companies is strictly policed by the FCC, the net effect of repeal on particular MVPDs is unclear.²¹

For that reason, in addition to repealing the rules at issue, the broadcast ownership rules should also be reexamined and pared back because they create small, local media fiefdoms. While local broadcasters are subject to competition laws, the antitrust agencies naturally shy away from enforcement when there is pervasive regulation

13. 38 FCC 683, 715 (1965).

14. 17 USC § 111.

15. 47 USC § 325.

16. See Association of National Advertisers and American Association of Advertising Agencies Joint Comments 2, MB Dkt. No. 10-71, June 26, 2014, <http://apps.fcc.gov/ecfs/document/view?id=7521348565>; Buffalo General Managers Comments 2, MB Dkt. No. 10-71, June 26, 2014, <http://apps.fcc.gov/ecfs/document/view?id=7521347847>.

17. Walt Disney Company Comments 8, MB Dkt. No. 10-71, June 26, 2014, <http://apps.fcc.gov/ecfs/document/view?id=7521349029>.

18. Cindy George, “Charge against Houston cable provider could take it off air,” *Houston Chronicle*, June 28, 2014, <http://www.houstonchronicle.com/news/houston-texas/houston/article/Charge-against-Houston-cable-provider-could-take-4637548.php>.

19. APPA Comments 18, MB Dkt. No. 10-71, June 26, 2014, <http://apps.fcc.gov/ecfs/document/view?id=7521347588>.

20. The Copyright Office has noted that complications arose in 1981 when the FCC repealed its network nonduplication and syndicated exclusivity rules. US Copyright Office, *Satellite Home Viewer Extension*, 2008, 7, <http://www.copyright.gov/reports/section109-final-report.pdf>. Those complications would be significantly lessened because broadcasters received retransmission rights from Congress in 1992. See 47 USC § 325.

21. Verizon Comments 8, MB Dkt. No. 10-71, June 26, 2014, <http://apps.fcc.gov/ecfs/document/view?id=7521349008>.

by another agency. With repeal of ownership rules, antitrust agencies can better analyze the competitive state of television distribution.

The Rules Need Modification with the Passage of Time

Supposing the repeal of the rules would have an appreciable effect on broadcast retransmission negotiations, the rules need elimination because competitive dynamics have changed substantially since the 1960s and 1970s. The original justifications arose from anachronistic goals of mass media industrial policy: to protect independent UHF broadcasters from competition. A prominent scholar remarked at the time that the nonduplication rules “attempt both to protect local stations from [cable] competition and to prevent [cable] from developing into a nationwide wire-TV system.”²² These narrow goals—supporting independent broadcast media sources and slowing cable entrants—are inapposite in an era of hundreds of television channels and innumerable websites. Despite this inauspicious justification, nonduplication rules have survived to the present.

Localism is a worthwhile objective but the current methods—including syndicated exclusivity and network nonduplication—that ostensibly lead to local content production are ill suited for the task and inject substantial and pervasive regulation in television markets.²³ Further, localism is very tenuously enhanced by syndicated exclusivity and network nonduplication. Contrary to the FCC’s intent,²⁴ national network broadcasts and syndicated programs—not local programming—are the content primarily protected by the rules, as commenters point out.²⁵ The current rules are a clumsy and inefficient way of furthering localism goals.

The Rules May Distort MVPD Market Concentration and Competition

These rules benefit broadcast networks and their affiliates in retransmission negotiations, as a cursory review of submitted comments reveals. Having leverage in negotiations is not problematic by itself, but regulator-provided leverage here threatens to increase MVPD market concentration, perhaps unnecessarily.

Smaller MVPDs have stated that they are particularly sensitive to these regulatory privileges provided to broadcasters.²⁶ This could be dismissed as self-interested advocacy, but the Congressional Research Service likewise concluded that²⁷ smaller MVPDs have little leverage in retransmission negotiations:

One group of distributors—small and mid-sized cable companies—has been placed in a particularly difficult position by . . . structural market change[s]. . . . These cable companies . . . when negotiating with [broadcast] programmers typically do not pose a serious risk to the programmers if there is an impasse and the programming is not carried . . .²⁸

Traditionally, only smaller cable companies were affected by the increasing leverage that networks have, and many of operators merged. However, as last year’s CBS-Time Warner Cable dispute shows, even large cable companies are losing the ability to combat network leverage and rising broadcast retransmission fees. Unlike earlier eras of cable dominance in pay-TV, cable operators face substantial competition from satellite and telephone companies. As FCC reports show, cable operators have lost over 10 million subscriber households, around 17 percent of current subscribers, since 2002.²⁹

22. Edward Greenberg, “Wire Television and the FCC’s Second Report and Order on CATV Systems,” *Journal of Law & Economics* 10 (1967): 182.

23. See Skorup and Thierer, “Video Marketplace Regulation,” 2014.

24. FCC, *Amendment of the Commission’s Rules Related to Retransmission Consent*, 2014, 38, (“ . . . the exclusivity rules were based in part on the Commission’s concern that a cable system’s duplication of local programming via the signals of distant stations was not a fair method of competition. . . .”).

25. APPA Comments 18, MB Dkt. No. 10-71, June 26, 2014, <http://apps.fcc.gov/ecfs/document/view?id=7521347588> (“The only kinds of programming that the exclusivity rules protect are network programming and syndicated programming, not locally-originated programming.”); CenturyLink Comments 4, MB Dkt. No. 10-71, June 26, 2014, <http://apps.fcc.gov/ecfs/document/view?id=7521349076>.

26. APPA Comments 11-13, MB Dkt. No. 10-71, June 26, 2014, <http://apps.fcc.gov/ecfs/document/view?id=7521347588>; CenturyLink Comments 4, MB Dkt. No. 10-71, June 26, 2014, <http://apps.fcc.gov/ecfs/document/view?id=7521349076>.

27. Goldfarb, “Retransmission Consent,” 2007, CR-12.

28. *Ibid.*

29. Compare FCC, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 11,

While substantial cable subscriber losses are a compelling signal of competition in television distribution, regulatory distortions like the rules at issue may pressure cable companies to merge when they otherwise wouldn't. Certainly, there is nothing inherently objectionable about horizontal mergers as a competitive response to gain more leverage in negotiations with downstream or upstream suppliers. But if these nonduplication rules give broadcasters leverage they would not have in a deregulated market, as commenters contend,³⁰ those regulations are contributing to greater MVPD industry concentration and undermining FCC efforts to increase MVPD competition.

Given today's competitive landscape, where wireline MVPDs typically offer triple-play services—broadband, television, and phone—the effect of these rules may even be leaking into broadband competition. The FCC should not allow rules from a bygone era to affect modern broadband policy negatively. The relationship between television and broadband provision is complex, but if the rules increase the benefits of cable consolidation, the rules may be limiting future broadband competition as MVPDs face more powerful program suppliers and higher operating costs.³¹ Because consumers prefer a television-broadband bundle, unnecessary high costs for programming can divert investments from broadband upgrades and expansion.³²

CONCLUSION

It is encouraging to see the FCC consider elimination of these and other anachronistic television regulations. The current proceeding indicates that this FCC, in a trend stretching two decades and administrations from both political parties, is focusing more on competition and less on favoring certain television distributors over others.

The network nonduplication and syndicated exclusivity rules are holdovers from a bygone era. They are unnecessary interventions into television markets and should be repealed promptly. First, copyright and retransmission consent laws render the rules redundant. After repeal of the rules, programmers could still limit the distribution of their content through contract. Second, localism is only tenuously enhanced by the nonduplication and syndicated exclusivity rules. Finally, there is evidence in the record that increasing leverage for networks—in part enhanced by these FCC regulations—is having an adverse effect on MVPD competition. The FCC should not let antiquated rules negatively affect modern television distribution and broadband markets. Repeal of the rules would result in a freer media distribution market and consumers would benefit from the enhanced competition between cable operators, satellite operators, and broadcasters.

From time to time the FCC must reexamine the justifications for its rules. In light of the many industry changes since these rules were promulgated, the FCC should repeal these rules and others.³³ The FCC cannot fix all of the regulatory distortions in the video marketplace, but repealing network nonduplication and syndicated exclusivity rules is an excellent first step.

MB Dkt. No. 02-145 (released December 31, 2002), http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-02-338A1.pdf (recording 68.8 million cable households) with FCC, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 60, MB Dkt. No. 12-203 (released July 22, 2013), http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-13-99A1.pdf (recording 57.3 million cable households).

30. Verizon Comments 1-2, MB Dkt. No. 10-71, June 26, 2014, <http://apps.fcc.gov/ecfs/document/view?id=7521349008>.

31. CenturyLink Comments 5, MB Dkt. No. 10-71, June 26, 2014, <http://apps.fcc.gov/ecfs/document/view?id=7521349076>.

32. APPA Comments 13-14, MB Dkt. No. 10-71, June 26, 2014, <http://apps.fcc.gov/ecfs/document/view?id=7521347588>.

33. See Skorup and Thierer, "Video Marketplace Regulation," 2014.