



VIDEO MARKETPLACE DEREGULATION: THE BATTLE OVER SPECTRUM POLICY & RETRANSMISSION CONSENT REFORM

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Even as viewing options multiply from new sources, America's traditional video marketplace—broadcast television, cable TV, and satellite TV—remains encumbered with many layers of federal regulation. This prevents a truly free market in video programming from developing and simultaneously threatens to extend old regulations to new online platforms and services. A new bill introduced by Sen. Jim DeMint (R-SC) and Rep. Steve Scalise (R-LA), “The Next Generation Television Marketplace Act,” aims to clear the deck of archaic rules.

The federal regulations that would be reformed or eliminated by the DeMint-Scalise bill include: the requirement that cable TV distributors carry broadcast signals even if they don't want to (“must carry” rules); rules that prohibit distributors from striking deals with broadcasters outside their local communities (“network non-duplication” and “syndicated exclusivity” rules); regulations specifying where broadcast channels appear on the cable channel lineup; and prohibitions against carrying sporting events on cable when the local stadium doesn't sell all its seats on game day (“sports blackout” rule). The bill would also reform some of the media ownership rules that artificially limit transactions. All of these rules have proponents and detractors fighting for their retention or repeal.

The most contentious of these battles is over “retransmission consent” rules, which were put in place as part of the [Cable Act of 1992](#) and govern how video distributors carry signals from local TV broadcasters. These contractual “retrans” negotiations are often highly contentious and signal blackouts sometimes occur when parties cannot reach a deal, although that outcome is rare. Cable and satellite television distributors strongly oppose the retrans regime and the other rules listed above, which they claim favor broadcasters and content companies. Broadcasters and most content companies oppose any effort to reform these rules since the current retrans regime provides them with stable (and rapidly increasing) compensation for their programming. They say the current system represents a decent proxy for actual free market negotiations and that the current rule and other corresponding regulations are needed to preserve broadcasting's uniquely important role in local communities. However, it is precisely because of these rules that we have no idea what the market value of programming is.

Further complicating matters is the fact that these video content transactions are governed by the compulsory licensing requirements of the Copyright Act of 1976, which essentially forced a “duty to deal” upon content owners to the benefit of video distributors. This means content owners are not able to determine the actual market value of their programming through unfettered contractual negotiations.

RESEARCH FINDINGS

In a new Mercatus Center working paper, “[Consumer Welfare and TV Program Regulation](#),” Stanford University economist Bruce M. Owen argues that, “Getting rid of obsolete regulation of the broadcast and distribution of video programming is essential for the efficient operation of a market that can greatly increase the benefits to consumers.” Owen notes that, “What distinguishes TV programs from other mass media content, including both traditional print and new online media is the extreme eagerness of Washington to engage in efforts to prevent markets from working freely, often in response to interest group pressures and opportunities for political advantage and with almost complete indifference to the welfare of consumers.”

Parties on all sides of this debate keep finding reasons to maintain or extend the status quo in an attempt to keep the government tilting the playing field in their preferred direction. Few seem willing to embrace a truly free market future for the video marketplace. But Owen says that, “It is past time to stop extending interventions originally intended for old technology to a range of new competitive media,” since “no longer is there any rational public policy basis for a government agency to dictate how much or what content the viewing public can see, any more than there ever has been for printed media.” Moreover, he observes, “There is no market failure to which the current regulatory framework is responding.”

Owen argues comprehensive deregulation is needed and it begins with spectrum reform. The electromagnetic spectrum was



effectively nationalized by the federal government in the 1920s. Unsurprisingly, government ownership and allocation of the spectrum has led to mismanagement of this vital platform for communications and commerce. Federal Communications Commission (FCC) bureaucrats substitute their will for free markets and entrepreneurial experimentation through the rigid “zoning” of wireless services. The FCC’s rules keep innovators from using the spectrum flexibly or rededicating it to different, perhaps more effective, uses.

This regulation was pursued in the name of managing spectrum scarcity, but it is the agency’s own rules on the scope and nature of each license that may in fact be the biggest producer of scarcity. Worse yet, observes Owen, “In making spectrum allocation decisions, the FCC has been heavily influenced by industry interests, both directly and through congressional patrons of the broadcast and broader entertainment industries.”

He argues that there is “no longer any reason for FCC bureaucrats to decide how much of the spectrum should be used for each of many existing and future commercial services,” and he recommends that policymakers “create efficient markets in spectrum rights... to permit licensees to use their assignments for purposes other than the use originally designated, subject to noninterference with adjacent users.” In other words, policymakers should institute strong property rights. “Providing adjacent spectrum users with a legal remedy for interference (trespass) would provide incentives to reallocate spectrum through market transactions,” Owen says.

Owen also recommends the elimination of retransmission consent and compulsory licensing regulations, as the DeMint-Scalise bill proposes. “There was never empirical evidence... justifying the compulsory license,” Owen notes, and “getting rid of obsolete regulation of broadcast and [cable] video programming is essential to the efficient operation of a market that has long been an important (but could have been a much more important) source of consumer welfare.”

Simultaneously reforming both the compulsory licensing and the retransmission consent rules will ensure a truly free market develops. “Program producers, aggregators (cable and former broadcast networks), and local distributors... should be allowed to reach agreements among themselves for the creation and delivery of programs and audiences in competitive markets without regard to which technology is used to produce or deliver their goods,” Owen concludes. “Their freedom of contract will promote an efficient and expanding supply of video content to compete for advertising revenue and viewers’ dollars.”

CONCLUSION

Although broadcasters are vociferously opposing retrans reform, Owen says, “Local broadcasters will have a unique position in offering local content,” especially local news and sports. Even if some broadcasters might not do as well in a deregulated marketplace as they do today, that should not thwart policy reform. The goal of deregulation is not to advance the interests of producers or distributors but to benefit consumers. Reforming archaic video regulations will advance that objective.

RECENT MERCATUS RESEARCH ON THIS TOPIC

- Bruce M. Owen, "[Consumer Welfare and TV Program Regulation](#)," (Arlington, VA: Mercatus Center at George Mason University, May 24, 2012).
- Adam Thierer, "[Toward a True Free Market in Television Programming](#)," *Forbes.com*, February 19, 2012.
- Adam Thierer, "[Continuing Confusion in the Debate over Retrans & Video Marketplace Deregulation](#)," *Technology Liberation Front*, March 29, 2012.
- Jerry Brito and Jerry Ellig, "[Fostering Innovation and Investment in the Wireless Communications Market](#)," (Arlington, VA: Mercatus Center at George Mason University, October 2, 2009).
- Adam Thierer, "[What Do The Titanic And Your Smartphone Have In Common?](#)" *Forbes.com*, April 14, 2012.

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