Regulation Killed the Video Star: Toward a Freer Market in Broadcast Television

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I. INTRODUCTION

On August 2, 2013, over three million American subscribers to Time Warner Cable lost access to CBS due to a business dispute between CBS Corporation and Time Warner Cable (TWC).[1] This disruption, also referred to as a "blackout," persisted until the companies reached a deal on September 2, 2013—just three days before the National Football League kicked off its 2013 season.[2] During the month-long blackout, TWC subscribers in eight major markets, including New York City and Los Angeles, could not receive their local CBS affiliate's signal through their cable provider.[3] Frustrated by the standoff, thousands of TWC subscribers flocked to Verizon's competing television service, FiOS.[4] TWC lost 306,000 net subscribers during the third quarter of 2013, marking a record quarterly loss for the company.[5]

This blackout is just one of several recent high-profile disputes in which a cable or satellite provider failed to reach an agreement with a broadcaster about how much to pay to redistribute its signal.[6] From 2006 to 2014, these payments from television providers to broadcasters, known as "retransmission fees," increased from $215 million[7] to $4.9 billion[8]—or over twenty percent of broadcast television stations' aggregate revenue.[9] Since 2001, retransmission disputes have caused over 100 blackouts, including

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1. Roger Yu, *CBS, Time Warner Cable Reach Agreement, End Blackout*, USA TODAY, Sept. 3, 2013, *available at* http://www.usatoday.com/story/money/business/2013/09/02/cbs-time-warner-cable-agreement/2755953/.

2. Alex Sherman, *CBS Deal Ends Time Warner Cable Blackout Ahead of NFL*, BLOOMBERG (Sept. 3, 2013), http://www.bloomberg.com/news/2013-09-02/cbs-reaches-accord-to-end-blackout-on-time-warner-cable.html.

3. *Id.*

4. Don Kaplan, *Verizon FiOS Gains Customers as Standoff Continues Between Time Warner Cable and CBS*, N.Y. DAILY NEWS, Aug. 15, 2013, *available at* http://www.nydailynews.com/entertainment/verizon-fios-gains-time-warner-cable-cbs-blackout-continues-article-1.1426909.

5. Jacob Kastrenakes, *Time Warner Cable Lost Record 306,000 Subscribers Amid CBS Blackout*, THE VERGE (Oct. 31, 2013), http://www.theverge.com/2013/10/31/5050698/time-warner-cable-q3-2013-financial-earnings-cbs-blackout-subscriber-loss.

6. *See infra* notes 10–15 and accompanying discussion.

7. *The Satellite Television Law: Repeal, Reauthorize or Revise?: Hearing Before the Subcomm. on Commc'ns. & Tech. of the H. Comm. on Energy & Commerce*, 113th Cong. 10 (2013) (statement of Amy Tykeson, President & Chief Executive Officer, BendBroadband), *available at* http://docs.house.gov/meetings/IF/IF16/20130612/100960/HHRG-113-IF16-Wstate-TykesonA-20130612.pdf.

8. David Lieberman, *Retransmission Consent Payments To Hit $9.3B In 2020: SNL Kagan*, DEADLINE (Oct. 27, 2014, 11:22 AM), http://deadline.com/2014/10/tv-station-retransmission-consent-payments-862748/.

9. Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Sixteenth Report*, FCC 15-41, 30 FCC Rcd 3253, 3341, para. 196 (2015) [hereinafter *Sixteenth Video Competition Report*], *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-41A1_Rcd.pdf.

seventy-three between 2010 and 2013.[10] Given that the typical American adult spends thirty-eight hours each week watching live and time-shifted television,[11] viewers consider the loss of a popular channel quite disruptive.[12]

Americans' frustration with blackouts has drawn considerable attention in Washington, D.C. In recent years, congressional committees have held numerous hearings on television blackouts and surrounding issues.[13] Several members of Congress have introduced bills aimed at alleviating or preventing blackouts.[14] The Federal Communications Commission (FCC), the nation's primary telecommunications regulator, is also following the issue.[15] In August 2013, for instance, then-FCC Acting Chairwoman Mignon Clyburn publicly expressed her disappointment with the TWC-CBS retransmission dispute.[16]

Lawmakers and regulators are focused on the statutory and regulatory provisions that govern how pay-television providers[17] retransmit broadcast television signals to their subscribers.[18] In Washington, the battle lines are drawn: on one side are broadcast networks and their affiliate stations; on the other side are multichannel video programming distributors (MVPDs)—an umbrella term that encompasses distributors of video programming through cable, fiber-optic lines, and direct broadcast satellite (DBS) companies.[19]

Most broadcasters affiliated with a major network are largely content with the existing rules,[20] under which a commercial broadcaster may, if it so elects, demand payment from an MVPD in consideration for permission to

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10. Steven C. Salop et al., *Economic Analysis of Broadcasters' Brinkmanship and Bargaining Advantages in Retransmission Consent Negotiations* 2 (June 3, 2010), *available at* http://97.74.209.146/downloads/broadcaster_brinkmanship.pdf; *see also* American Television Alliance, Broadcaster Retrans Blackouts 2010-2015 (Jan. 7, 2015), http://www.americantelevisionalliance.org/wp-content/uploads/2013/05/ATVA-Comprehensive-List-of-Broadcaster-Retrans-Blackouts-2010-20155.docx.

11. NIELSEN, THE TOTAL AUDIENCE REPORT - Q4 2014 10 (2015), *available at* http://www.nielsen.com/content/dam/corporate/us/en/reports-downloads/2015-reports/total-audience-report-q4-2014.pdf.

12. *Cf.* Kaplan, *supra* note 4 (noting TWC subscribers losses due to CBS blackout).

13. *See, e.g.*, *The State of Video: Hearing Before the Subcomm. on Comm'cns, Tech., & the Internet of the S. Comm. on Commerce, Science & Transportation*, 113th Cong. (2013).

14. *See, e.g.*, Video CHOICE Act of 2013, H.R. 3719, 113th Cong. (2013), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-113hr3719ih/xml/BILLS-113hr3719ih.xml.

15. Katy Bachman, *FCC Acting Chairwoman Threatens to Step Into CBS, Time Warner Cable Standoff*, ADWEEK (Aug. 9, 2013, 3:34 PM), http://www.adweek.com/news/television/fcc-acting-chairwoman-threatens-step-cbs-time-warner-cable-standoff-151797.

16. *Id.*

17. Pay-television providers deliver their subscribers video programming over cable, direct broadcast satellite, fiber, or phone lines. *See Sixteenth Video Competition Report*, *supra* note 9, at 3259, para. 16; *see also* discussion *infra* Part II.C.

18. *See infra* Parts II.B–C.

19. 47 U.S.C. § 522(13) (2012); *see also* 47 C.F.R. § 76.64(d) (2014).

20. *See* John Eggerton, *Nets, Stations Push Back on Retrans Via TVFreedom.org*, MULTICHANNEL NEWS (Feb. 3, 2014, 5:09 PM), http://www.multichannel.com/news/fcc/nets-stations-push-back-retrans-tvfreedomorg/295130.

retransmit the station's signal.[21] If, after negotiating in good faith,[22] a broadcaster and an MVPD cannot agree on retransmission terms, the MVPD must cease retransmitting that station's signal—lest it incur a potentially severe FCC fine.[23] Under this system, blackouts happen on occasion, but network-affiliated broadcasters have largely succeeded in negotiating retransmission agreements with MVPDs—although retransmission fees have risen steadily in recent years.[24]

Many MVPDs, however, argue that the existing regime is skewed in favor of broadcasters, who supposedly overcharge pay-television providers—and, indirectly, their subscribers—for broadcast programming.[25] MVPDs claim that the increasing frequency of television blackouts and mounting retransmission fees are the side effects of an outdated regulatory framework that does not reflect today's hyper-competitive market for video distribution.[26] Moreover, MVPDs contend that broadcasters are insulated from competitive forces by unfair FCC rules.[27] These allegedly unfair rules include the protection of the exclusivity of syndicated programming[28] and the ban on MVPDs "duplicating" a network affiliate's signal—that is, offering their subscribers the signal of a network-affiliated broadcaster based in a distant community.[29] Many MVPDs also criticize the FCC's rule[30] that governs broadcasters' and MVPDs' statutory duty[31] to negotiate retransmission consent agreements with one another in "good faith."[32]

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21. 47 U.S.C. § 325(b)(1) (2012 & Supp. 2014); 47 C.F.R. § 76.64(a)–(b) (2014); *but see* 47 U.S.C. § 325(b)(2) (2012 & Supp. 2014) (listing five limited exceptions to retransmission consent requirement).

22. 47 C.F.R. § 76.65 (2014) (broadcast stations and MVPDs must negotiate "in good faith the terms and conditions of retransmission consent").

23. *See, e.g.,* TV Max, Inc. and Broadband Ventures Six, LLC d/b/a Wavevision et al., *Notice of Apparent Liability for Forfeiture and Order*, FCC 13–86, 28 FCC Rcd 9470, para. 1 (2013), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2013/db0625/FCC-13-86A1.pdf.

24. *Sixteenth Video Competition Report*, *supra* note 9, at 3345, para. 203.

25. *See, e.g.,* AMERICAN TELEVISION ALLIANCE, *About the Issue*, http://www.americantelevisionalliance.org/about-the-issue/ (last visited Jan. 13, 2013) (arguing that consumers are "used as hostages by broadcasters to obtain higher fees" in retransmission disputes).

26. *See, e.g.,* TIME WARNER CABLE, *Conversations: What Others Are Saying*, http://twcconversations.com/what-others-are-saying/ (last visited Jan. 13, 2014) (arguing retransmission rules are outdated and harmful to consumers).

27. *Id.*

28. 47 C.F.R. §§ 76.101, .123 (2014).

29. 47 C.F.R. §§ 76.92, .122 (2014).

30. 47 C.F.R. § 76.65 (2014).

31. 47 U.S.C. § 325(b)(3)(C)(ii)–(iii) (2012 & Supp. 2014).

32. *See, e.g.*, Reply Comments of Mediacom Inc. at 2, Amendment of the Comm'n's Rules Related to Retransmission Consent, FCC 11–31, 26 FCC Rcd 2718 (rel. Mar. 3, 2011), *available at* http://apps.fcc.gov/ecfs/document/view?id=7021689912. The FCC amended its retransmission consent rules in May 2014, Amendment of the Commission's Rules Related to Retransmission Consent, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 14-29, 29 FCC Rcd 3351 (2014), and again in February 2015,

As broadcasters and MVPDs wrangle over video regulation, Americans are increasingly turning to non-traditional video platforms, fueled by speedy broadband networks and powerful mobile devices.[33] According to some observers, overhauling the laws and regulations that underlie television broadcasting is the legislative equivalent of rearranging the gramophones on the Titanic.[34] Despite the rise of online video services such as Netflix and Hulu, however, conventional television—including broadcast and cable networks—remains Americans' primary video source, accounting for over ninety percent of U.S. adult consumers' daily video viewing in 2014.[35] As cable networks such as AMC, USA, TBS, and FX have matured, the supremacy of broadcast television has faltered.[36] Nevertheless, most top-rated shows continue to air on broadcast networks, which collectively account for almost one-third of all prime time[37] television hours viewed.[38] Thus, lawmakers' renewed interest in broadcasting is justified, for the industry's future—and the broader video marketplace—depends in large part on the regime that governs the relationships between broadcasters and pay-television providers.[39]

Should lawmakers and regulators listen to MVPDs and act to fix today's supposedly broken retransmission regime? Or should officials instead follow broadcasters' advice and leave existing rules alone, allowing the video marketplace to continue on its current path? This Note evaluates these competing policy prescriptions and their implications for video consumers, concluding that neither MVPDs nor broadcasters have offered a compelling case for their preferred approach to governing the retransmission of broadcast television. Instead, this Note argues that Congress should amend the Communications Act to strip the FCC of the authority to regulate negotiations between MVPDs and broadcasters. In lieu of FCC oversight, this Note proposed that Congress amend the Copyright Act to confer on

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Implementation of Sections 101, 103 and 105 of the STELA Reauthorization Act of 2014, *Order*, FCC 15-21, 30 FCC Rcd 2380 (2015).

33. *See generally* The Video Marketplace & the Internet Transformation: Remarks of Comm'r Ajit Pai, FCC Media Institute Luncheon (2013), *available at* http://www.fcc.gov/document/commissioner-pai-remarks-media-institute-luncheon.

34. *See, e.g.*, Thomas W. Hazlett, *If a TV Station Broadcasts…: An Essay on 21st Century Video Distribution* at 66 (2011), *available at* http://www.americantelevisionalliance.org/wp-content/uploads/2011/05/TV-Future-TWH-5-19-111.pdf (discussing upheaval and creative destruction in video market).

35. *See* NIELSEN, THE TOTAL AUDIENCE REPORT, *supra* note 11, at 11 (live and time-shifted television together account for over 38 hours of U.S. adults' weekly video viewing).

36. *See* Nicholas W. Allard & Theresa Lauerhass, *Debalkanize the Telecommunications Marketplace*, 28 CAL. W. L. REV. 231, 233 (1992) (chronicling the historical dominance of broadcast television).

37. Prime time refers to the most widely viewed—and most commercially valuable—time of day for television networks. *Sixteenth Video Competition Report*, *supra* note 9, at 3332, para. 175 (prime time encompasses 8:00 PM – 11:00 PM, Eastern and Pacific Time; 7:00 PM – 10:00 PM, Central and Mountain Time).

38. *Id.* at 3340, para. 194.

39. *See infra* Part IV.

broadcast programming the same intellectual property rights that inhere in nearly all other types of original creative expression.

Part II of this Note chronicles the history of broadcaster-MVPD interactions, and describes how federal law has influenced this relationship. Part III critically evaluates both sets of incumbent firms' arguments about how to best regulate the video marketplace. Finally, Part IV harnesses the economic principles underlying modern competition and consumer protection law to identify several welfare-enhancing reforms to the regime that governs how MVPDs retransmit broadcast television signals.

In particular, this Note examines the deregulatory approach embodied in the Next Generation Television Marketplace Act (NGTMA), a bill introduced in Congress in 2011 and again in 2013.[40] NGTMA would overhaul the rules governing broadcast television, eliminating many of the ways in which broadcasters—and their transactions with other economic actors—are treated differently from most other creators and distributors of video programming.[41] Notably, NGTMA would repeal a controversial provision of the Communications Act[42] that requires an MVPD to secure permission—usually through a bilateral contract[43]—from a broadcaster whose television signal the MVPD wishes to retransmit to its subscribers.[44] At the same time, NGTMA would eliminate a longstanding exception to the Copyright Act that allows MVPDs to publicly perform broadcast television by paying a government-set fee—regardless of whether the copyright holders of these works consented.[45]

If so revised, U.S. copyright law would for the first time recognize full intellectual property rights in audiovisual programs aired on broadcast television.[46] Whereas broadcaster-MVPD negotiations are currently subject to various provisions in the Communications Act—as administered by the FCC—this bargaining would instead occur under the familiar Copyright Act were NGTMA enacted. Swapping out the legal regime that governs broadcaster-MVPD negotiations may seem insignificant or unnecessary. However, this Note concludes that video reform resembling NGTMA's

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40. Next Generation Television Marketplace Act, H.R. 3720, 113th Cong. (2013) [hereinafter NGTMA], *available at* http://beta.congress.gov/113/bills/hr3720/BILLS-113hr3720ih.pdf. The bill was previously introduced in 2011, *see* S. 2008 and H.R. 3675, 112th Cong. (2011).

41. *Satellite Television Laws in Title 17: Hearing Before the Subcomm. on Cts., Intell. Prop. & the Internet of the H. Comm. on Energy & Commerce*, 113th Cong. 3 (2013) (statement of Preston Padden, former President, ABC Television Network), *available at* http://judiciary.house.gov/_files/hearings/113th/09102013/Padden%20testimony%20091013.pdf.

42. 47 U.S.C. § 325(b) (2012 & Supp. 2014).

43. *See infra* Part II.C.

44. NGTMA, *supra* note 40, § 2(b) (repealing 47 U.S.C. § 325(b)).

45. *Id.* § 3(a)(1) (repealing 17 U.S.C. §§ 119, 122, 510); *id.* § 3(b) (repealing 17 U.S.C. § 111(c)–(e)).

46. *Cf.* Teleprompter Corp. v. CBS, Inc., 415 U.S. 394, 396 (1974); Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 393 (1968) (holding that MVPD retransmissions of broadcast television programs did not implicate copyright protection).

approach would benefit consumers by fostering the successful market-oriented approach to television regulation that public policy has gravitated toward in recent years.[47]

II. BACKGROUND

A. *The Birth of Cable Television*

From the 1930s through the 1950s, watching television meant tuning in to a radio signal broadcasted over the air on the electromagnetic spectrum.[48] In each major U.S. metropolitan area, or "television market,"[49] a handful of stations typically broadcasted video programming over frequencies licensed to them by the FCC.[50] Many of these broadcasters were owned and operated by a national television network, such as the National Broadcasting Company (NBC) or the American Broadcasting Company (ABC),[51] while other stations were independently owned. Some of these independent stations elected to affiliate with a national network.[52] Under these affiliation agreements, the local station would typically broadcast the network's national prime time television programming for several hours daily, airing both local ads (sold by the station itself) and national ads (sold by the network) to the mutual benefit of both parties.[53]

Yet many American homes were too far from the nearest transmitter to receive a reliable broadcast television signal; other homes faced physical obstacles such as mountains or tall buildings.[54] Recognizing a commercial opportunity, in the late 1940s, entrepreneurs began to deploy antennas that received broadcast signals and retransmitted them over copper cables to nearby homes for a fee.[55] And so cable television was born. By the mid-

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47. *See infra* Parts II.B–D.

48. *See* James A. Bello, Turner Broadcasting System, Inc. v. FCC: *The Supreme Court Positions Cable Television on the First Amendment Spectrum*, 30 NEW ENG. L. REV. 695, 697–98 (1996).

49. *Id.*; *see also* James Miller & James E. Prieger, *The Broadcasters' Transition Date Roulette: Strategic Aspects of the DTV Transition*, 9 J. TELECOMM. & HIGH TECH. L. 437, 499 n.163 (2011) (U.S. broadcast media markets are substantially similar to the Census Bureau's standard metropolitan statistical areas).

50. *See* Stephen R. Barnett, *Cable Television and Media Concentration, Part I: Control of Cable Systems by Local Broadcasters*, 22 STAN. L. REV. 221, 231–32 (1970).

51. Roni Mueller & Gretchen Wettig, *The "New" Series Co-Production Deal in Network Series Television*, 31 SW. U. L. REV. 627, 629 (2002)

52. *See* Stuart Benjamin, *Evaluating the Federal Communications Commission's National Television Ownership Cap: What's Bad for Broadcasting Is Good for the Country*, 46 WM. & MARY L. REV. 439, 465 (2004).

53. *Id.*

54. *See* United States v. Southwestern Cable Co., 392 U.S. 157, 162 (1968).

55. *Id.*

1960s, over 1,000 commercial cable providers were operating across the country.[56]

Over time, consumers flocked to cable, and many of the small upstarts of the 1950s and 1960s grew into profitable enterprises—even though cable companies generally did not compensate the broadcasters whose signals they retransmitted.[57] During cable's formative years, broadcasters generally tolerated this state of affairs, as cable systems often expanded the audience capable of receiving a local station's signal.[58] But broadcasters began to sour on cable in 1960s, when some cable systems started carrying so-called "distant signals"—that is, transmitting a signal originating in a remote market to local subscribers who could not otherwise access the signal.[59] By enabling residents of one community to watch national network programming originally transmitted by a station in a remote market, network-affiliated broadcasters feared this "distant signal retransmission" would cause some viewers to tune into faraway affiliates that aired much of the same programming.[60] Broadcasters feared this out-of-market competition would fragment local audiences—and, in turn, undermine advertising revenues, which are based largely on audience measurements.[61]

Due in part to these concerns, in the early 1960s, the FCC began regulating cable systems that used wireless "microwave facilities" to retransmit broadcast signals long distances for redistribution in remote cities.[62] In 1966, the FCC extended its rules to encompass *all* cable systems, reasoning that these companies fell within the agency's statutory jurisdiction to regulate entities "engaged in interstate communication by wire to which

56. *Id.* at 162–63. Notably, in 1970, the FCC promulgated rules that "severely restricted telephone company entry into the cable television market." Eric T. Werner, *Something's Gotta Give: Antitrust Consequences of Telephone Companies' Entry into Cable Television*, 43 FED. COMM. L.J. 215, 217 (1991) (citing 47 C.F.R. §§ 63.54–.58 (1990)).

57. Charles Lubinsky, *Reconsidering Retransmission Consent: An Examination of the Retransmission Consent Provision of the 1992 Cable Act*, 49 FED. COMM. L.J. 99, 102 (1996) (noting that "cable operators had no obligation to pay or negotiate with anyone for the right to retransmit broadcast signals" prior to 1976).

58. *Id.* at 104.

59. *Cf.* In re Carter Mountain Transmission Corp., 32 FCC 459, 465, para. 17 (1962), *aff'd sub nom.* Carter Mountain Transmission Corp. v. FCC, 321 F.2d 359 (D.C. Cir. 1963) (cable system unsuccessfully petitioned FCC for permission install radio transmitter to import distant signals).

60. *See, e.g.*, Amendment of Parts 21, 74 (Proposed Subpart j), & 91 to Adopt Rules & Regulations Relating to the Distribution of Television Broadcasting Signals by Cmty. Antenna Television Sys., *Notice of Inquiry and Notice of Proposed Rulemaking*, 1 FCC 2d 453, 461 para. 21 (1965).

61. Benjamin, *sup*ra note 52, at 454.

62. *See* Amendment of Subpart l, Part 11, to Adopt Rules & Regs. to Govern the Grant of Authorizations in the Business Radio Serv. for Microwave Stations to Relay Television Signals to Cmty. Antenna Sys., *First Report and Order*, 38 FCC 683, 715–30, paras. 80–124 (1965).

the provisions of the Communications Act are applicable."[63] Among the obligations the FCC's 1966 rules imposed on cable systems was a rule known as "network non-duplication," which generally barred cable systems from importing distant signals that duplicated programming carried by local stations.[64] Another rule, known as "must-carry," required cable systems to retransmit local television signals to subscribers residing in the same market upon a broadcaster's request, subject to the cable system's channel capacity.[65]

Soon thereafter, Midwest Television, which owned a CBS-affiliated station in San Diego, California, complained to the FCC that several cable companies were retransmitting certain Los Angeles-based signals to San Diego households, in violation of FCC rules.[66] When the FCC ordered the cable companies to stop distributing Los Angeles signals outside that market, the cable companies sued the agency, arguing that Congress had not authorized the FCC to regulate cable systems.[67] In 1968, the Supreme Court sided with the FCC, upholding the agency's jurisdiction over cable systems in *United States v. Southwestern Cable Co.*[68] Noting that the FCC "reasonably found that the successful performance of [its] duties demands prompt and efficacious regulation of community antenna television systems," the Court affirmed the agency's regulation of cable systems as "reasonably ancillary" to its statutory responsibility to regulate television broadcasting.[69]

During the early 1970s, as several states began to regulate various aspects of cable television, the FCC revisited its cable regulations.[70] In 1972, the FCC adopted several new rules, one of which authorized local franchise authorities to regulate how much cable providers charge for basic services.[71] But neither the FCC nor local governments required cable systems to

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63. 1 FCC 2d at 453, para. 29; *see also* Amendment of Parts 21, 74, and 91 to Adopt Rules and Regs. Relating to the Distribution of TV Broad. Signals by Cmty. Antenna TV Sys., *Second Report and Order*, 2 FCC 2d 725, 733–34, para. 19 (1966).

64. 2 FCC 2d at 746, para. 49.

65. Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1440 (D.C. Cir. 1985).

66. *See* Petition of Midwest Television, Inc., San Diego, Cal., for Immediate Temp. & for Permanent Relief Against Extensions of Serv. of CATV Sys. Carrying Signals of Los Angeles Stations into the San Diego Area, *Memorandum Opinion and Order*, FCC 66–683, 4 FCC 2d 612 (1966).

67. United States v. Southwestern Cable Co., 392 U.S. 157, 159–60 (1968).

68. *Id.* at 181; *see also* 47 U.S.C. §§ 151–152 (2012).

69. *Southwestern Cable Co.*, 392 U.S. at 177–78.

70. *See generally* Robert F. Copple, *Cable Television and the Allocation of Regulatory Power: A Study of Government Demarcation and Roles*, 44 FED. COMM. L.J. 1, 23–24 (1991) (chronicling the rise of state and local regulation of cable).

71. The FCC defined basic services as "services regularly furnished to all subscribers." Amendment of Part 74, Subpart k, of the Comm'n's Rules & Regs. Relative to Cmty. Antenna Television Sys., *Cable Television Report and Order*, 36 FCC 2d 141, 209, para. 183 (1972); *see also* Copple, *supra* note 70, at 31.

compensate broadcast stations in consideration for retransmitting their signals for private commercial gain.[72]

B. *Statutory Copyright License for Broadcast Signal Retransmission*

To some major media stakeholders, the FCC's rules did not go far enough to protect broadcasters.[73] In the 1960s, two companies—United Artists Television, a major film studio and owner of copyrights in several popular motion pictures aired regularly on broadcast television,[74] and CBS, a major broadcaster and owner of copyrights in several hit television series[75]—separately sued two cable system operators: Fortnightly Corporation and Teleprompter Corporation, respectively.[76] In both suits, the plaintiffs alleged the cable system defendants had infringed their copyrights by publicly performing their audiovisual works without permission.[77] In both suits, the cable system defendants prevailed.

First, in 1968, the Supreme Court resolved United Artists' lawsuit in *Fortnightly Corp. v. United Artists Television*, holding that a cable system does not infringe on a copyright holder's public performance right by retransmitting a broadcast signal to an audience residing in that station's local coverage area.[78] Then, in 1974, the Court used similar reasoning in *Teleprompter Corp. v. CBS*, holding that a cable system's retransmission of distant signals was also exempt from copyright infringement liability.[79] Merely installing an antenna that receives a broadcast signal, the Court reasoned, and then connecting that antenna to a person's home—whether one mile or one thousand from the signal's point of origin—did not constitute a "performance" by the cable system operator, no matter how many households received the signal.[80] Examining the copyright provisions then in force, the Court concluded that merely retransmitting a copyrighted work embodied in a public broadcast was not a "performance" as contemplated by the Copyright Act.[81]

Two years later, Congress passed the most significant copyright law overhaul since 1909: the Copyright Act of 1976 (the "1976 Act").[82] With

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72. *See* 36 FCC 2d at 166–67, paras. 63–66 (declining to require cable systems to compensate broadcasters in light of pending legislative efforts to ensure the payment of copyright royalties for broadcast signal retransmission).

73. Lubinsky, *supra* note 57, at 110.

74. Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 393 (1968).

75. Teleprompter Corp. v. CBS, Inc., 415 U.S. 394, 396 (1974).

76. *Id.* at 404; *Fortnightly*, 392 U.S. at 391.

77. *See* 17 U.S.C. § 106(5) (2012).

78. 392 U.S. at 390.

79. 415 U.S. at 394.

80. *Id.* at 409.

81. *See Fortnightly*, 392 U.S. at 398.

82. *See generally* Pub. L. No. 94–553, 90 Stat. 2541 (1976) (codified as amended at 17 U.S.C. §§ 101–810).

Fortnightly and *Teleprompter* fresh in lawmakers' minds, the 1976 Act altered the treatment of broadcast signal retransmission in two significant ways. First, Section 101 of the 1976 Act expressly defined the transmission of a performance of an audiovisual work to the public as an exclusive right held by the holder of the copyright in such audiovisual work, subject to certain exceptions and limitations.[83] Second, Section 111 established a compulsory statutory license for broadcast signals, whereby a cable system operator may retransmit a broadcast signal without permission from the broadcaster or the holder of copyright in the underlying audiovisual work.[84]

To obtain a Section 111 license, a cable system must submit to the Register of Copyrights[85] every six months a statement of account specifying which broadcast signals it retransmitted, how many subscribers received each signal, and where such subscribers resided.[86] The cable system must also remit to the Register of Copyrights a royalty payment determined by a complex formula based on, among other things, a cable system's gross receipts, the number of signals it retransmits to subscribers outside the signal's local service area, and the type of each signal it retransmits (independent, network-affiliated, etc.).[87] Importantly, a cable company that complies with these rules *is not required to secure* permission from the broadcaster or copyright owner of a television program—at least as far as copyright law is concerned.[88]

If a cable system only retransmits signals to subscribers located within each station's respective local service area, it owes a royalty fee[89] that ranges from \$52 (for very small cable companies[90]) to 1.013 percent of a cable system's semi-annual gross receipts (for larger cable companies[91]). If, however, a cable system retransmits a signal to subscribers located outside the station's market, it owes additional royalties,[92] depending on how many "distant signal equivalents" the cable system retransmits.[93] Annually,

83. *See* 17 U.S.C. § 101 (2012).

84. 17 U.S.C. § 111(c) (2012 & Supp. 2014).

85. The Register of Copyrights oversees the Copyright Office, a subdivision of the Library of Congress that administers several aspects of the Copyright Act, such as registration and statutory licensing. 17 U.S.C. § 701(a)–(b) (2012).

86. 17 U.S.C. § 111(d)(1)(A); 37 C.F.R. § 201.17 (2014).

87. 17 U.S.C. § 111(d)(1)(B)–(F).

88. Congress amended the Communications Act in 1992 to afford broadcasters certain property-like rights in their signals. These rights exist independently of the Copyright Act. *See generally infra* Part II.C.

89. 17 U.S.C. § 111(d)(1)(B) (payment of royalties above the minimum fee is owed only upon transmitting a signal beyond its "local service area").

90. Definition of Cable System, *Notice of Inquiry*, Copyright Ofc., Dkt. No. 2007–11, 72 Fed. Reg. 70,529, 70,533 (Dec. 12, 2007) (codified at 37 C.F.R. § 201).

91. *Id.*

92. *See generally* 17 U.S.C. § 111(d)(1)(B)–(F); 37 C.F.R. § 256.2 (2014).

93. Independent non-network stations each count as one distant signal equivalent, while network or noncommercial educational stations each count as one-quarter of a distant signal equivalent. 17 U.S.C. § 111(f)(5)(ii).

Copyright Royalty Judges[94] distribute these royalties among those copyright owners whose works were retransmitted under the statutory license.[95]

C. *Cable Act of 1992: Congress Establishes Retransmission Consent*

Following the enactment of the Copyright Act of 1976, cable systems continued to proliferate across the nation,[96] as Americans increasingly unhooked their television antennas and turned to cable systems for more reliable access to broadcast television programming.[97] Cable gained another major selling point in the 1970s with the emergence of so-called "basic cable networks," which only paid cable subscribers could access.[98] After MTV, CNN, and USA launched in the early 1980s,[99] basic cable uptake grew dramatically: by 1987, four in five U.S. households were wired for cable television, and about half of U.S. households subscribed to it.[100] In 2002, basic cable channels overtook the big four broadcast networks in combined prime time viewership.[101]

As cable continued to grow, however, lawmakers began to fear the dominance of large cable companies in many markets.[102] Reflecting these concerns, in 1992, Congress amended the Communications Act by enacting

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94. The 1976 Act originally provided for Section 111 royalties to be established by the Copyright Royalty Tribunal, an independent legislative branch entity. Pub. L. No. 94-553, § 801(b)(2), 90 Stat. 2541. In 1993, Congress replaced the Copyright Royalty Tribunal with Copyright Arbitration Royalty Panels. Copyright Royalty Tribunal Reform Act of 1993, Pub. L. No. 103-198, § 2, 107 Stat. 2304. Most recently, in 2004, Congress replaced Copyright Arbitration Royalty Panels with Copyright Royalty Judges. Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419, § 3, 118 Stat. 2341.

95. *See* 17 U.S.C. § 111(d)(4); *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.

96. *See* Henry Geller, *The Copyright Controversy: Making Cable TV Pay?*, THE AMERICAN (June 7, 1981), *available at* http://www.aei.org/publication/the-copyright-controversy-making-cable-tv-pay/.

97. *See* H.R. REP. NO. 102–862, at 2, (1992) (Conf. Rep.), *as reprinted in* 1992 U.S.C.C.A.N. 1231; *see also* Reexamination of the Effective Competition Standard for the Reg. of Cable Television Basic Serv. Rates, *Further Notice of Proposed Rule Making*, FCC 90–412, 6 FCC Rcd 208, para. 23 (1990).

98. Amendment of Parts 73 & 76 of the Comm'n's Rules Relating to Program Exclusivity in the Cable & Broad. Indus., *Report and Order*, 3 FCC Rcd 5299, paras. 27–28 (1988).

99. *Id.* (popular cable networks CNN and USA "did not begin service until spring 1980," while MTV "did not begin until summer 1981").

100. 3 FCC Rcd at para. 26.

101. Allison Romano, *Cable Breaks 50-Share Mark in Prime*, BROADCASTING & CABLE, Sept. 7, 2002, *available at* http://www.broadcastingcable.com/news/news-articles/cable-breaks-50-share-mark-prime/93087 (noting that June 2002 marked "the first month cable has surpassed a 50 share in prime").

102. *See* H.R. REP. NO. 102-862, at 2 (1992) (Conf. Rep.), *as reprinted in* 1992 U.S.C.C.A.N. 1231.

the Cable Television Consumer Protection and Competition Act ("the 1992 Cable Act"), overriding the veto of then-President George H.W. Bush in the only successful veto override during his term in office.[103] Although the 1992 Cable Act is perhaps best known for "re-regulating" the prices charged by cable carriers operating in markets without direct MVPD competition[104]—a reversal of a 1984 federal law[105] that largely proscribed such regulation[106]—the 1992 Cable Act also codified the FCC's longstanding must-carry rules[107] and established a new legal relationship between broadcasters and MVPDs known as "retransmission consent."[108]

Under this regime, which remains in force to this day, each broadcast station must decide every three years whether to elect retransmission consent or must-carry.[109] If a broadcaster elects must-carry, any cable system that serves subscribers in the station's local market must carry that station,[110] assuming the cable system has ample capacity to carry all must-carry signals.[111] Generally, a cable system may not accept payment from a must-carry station in exchange for carriage.[112]

If, however, a broadcaster elects retransmission consent, no MVPD may retransmit that broadcaster's signal without its "express authority."[113] Nearly all popular broadcast stations, including most network affiliates, have elected retransmission consent,[114] as it enables a broadcaster to receive compensation from MVPDs in exchange for permission to carry its signal—in addition to any royalties the broadcaster receives pursuant to the Copyright Act's statutory license.[115] Whether a station elects must-carry or

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103. Pub. L. No. 102-385, 106 Stat. 1460 (1992) [hereinafter Cable Act of 1992] (codified as amended at scattered sections 47 U.S.C.); *see also* THOMAS W. HAZLETT & MATTHEW L. SPITZER, PUBLIC POLICY TOWARD CABLE TELEVISION: THE ECONOMICS OF RATE CONTROLS 59 (1997).

104. Cable Act of 1992, *supra* note 103, § 3 (codified as amended at 47 U.S.C. § 623).

105. Cable Communications Act of 1984, Pub. L. No. 98-549, § 623, 98 Stat. 2779 (codified as amended at 47 U.S.C. § 543).

106. Congress revisited cable rate regulation yet again in the Telecommunications Act of 1996, which among other things ended rate regulation of all cable programming tiers except the basic tier. Pub. L. No. 104–104, 110 Stat. 56, § 301 (codified as amended at scattered sections 47 U.S.C.).

107. Cable Act of 1992, *supra* note 103, § 4 (codified at 47 U.S.C. § 534).

108. *Id.* § 6 (codified at 47 U.S.C. § 325).

109. 47 U.S.C. § 325(b)(3)(B) (2012 & Supp. 2014).

110. 47 U.S.C. § 534(b) (2012 & Supp. 2014).

111. If a cable operator has limited channel capacity, it may be fully or partially exempt from the must-carry rule. 47 U.S.C. § 534(b)(1)–(2).

112. 47 U.S.C. § 534(b)(10).

113. 47 U.S.C. § 325(b)(1)(A).

114. Lubinsky, *supra* note 57, at 99; see also Charles B. Goldfarb, *Retransmission Consent and Other Federal Rules Affecting Programmer-Distributor Negotiations: Issues for Congress*, in PROGRAMMER-DISTRIBUTOR NEGOTIATIONS 23, 25 (2008).

115. *See* discussion *supra*, Part II.B.

retransmission consent,[116] any MVPD carrying that station's signal must retransmit it to every subscriber without modification.[117]

Importantly, the 1992 Cable Act left untouched the Copyright Act of 1976.[118] Therefore, a cable company that wishes to retransmit a broadcast television signal must not only abide by the statutory licensing terms in Section 111 of the Copyright Act,[119] but it must also abide by the Cable Act's retransmission consent provisions.[120] If a cable company retransmits a broadcast signal without complying with Section 111, it is liable for copyright infringement.[121] And if a cable company retransmits a non-must-carry signal without the station's express authority, it is liable for a monetary penalty assessed by the FCC.[122]

In the decade following the 1992 Cable Act's enactment, MVPDs generally did not pay broadcasters for retransmission consent.[123] But beginning in the early 2000s, some broadcasters began to insist that MVPDs pay them so-called "retransmission fees." These fees grew over time, totaling an estimated $4.9 billion in 2015.[124] By 2019, retransmission fees are projected to climb to $8.8 billion—or over one-third of total broadcast station revenue, if broadcast revenue continues to stagnate as it has for the past fourteen years.[125]

Opinions vary about why retransmission fees have increased so rapidly in recent years. Some MVPDs argue the rise is due to broadcasters "leverag[ing] their monopoly position, as each local station generally holds an exclusive geographic license to air and retransmit the programming of the major network with which the station is affiliated."[126] But broadcasters

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116. Implementation of the Cable Television Consumer Prot. & Competition Act of 1992, *Report and Order*, FCC 93–144, 8 FCC Rcd 2965, para. 32 (1993) (citing 47 U.S.C. § 534(b)(7)).

117. *Id.* at paras. 164–71 (citing 47 U.S.C. § 534(b)(3)).

118. *See generally* Cable Act of 1992, *supra* note 103; *see also* discussion *supra*, Part II.B.

119. 17 U.S.C. § 111 (2012 & Supp. 2014).

120. *Compare* 47 U.S.C. § 325(b) (2012 & Supp. 2014), *with* 17 U.S.C. § 111.

121. *See* 17 U.S.C. §§ 501–506 (2012) (affording copyright owners injunctive relief and money damages against copyright infringers).

122. *See* Comm'n's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines, *Report and Order*, FCC 97–218, 12 FCC Rcd 17087, 17115 (1997), *recons. denied*, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80(b) (2014).

123. *See* Katerina Eva Matsa, Pew Research Cent., *Time Warner vs. CBS: The High Stakes of Their Fight Over Fees* (Aug. 21, 2013), http://www.pewresearch.org/fact-tank/2013/08/21/time-warner-vs-cbs-the-high-stakes-of-their-fight-over-fees/.

124. *See* Lieberman, *supra* note 8.

125. *Id.*; *see also Sixteenth Video Competition Report*, *supra* note 9, at 3341, para. 196 (between 2000 and 2013, broadcast station revenue declined from $26.3B to $24.2B).

126. *See, e.g.*, *The Satellite Television Law: Repeal, Reauthorize or Revise?: Hearing Before the Subcomm. on Commc'ns. & Tech. of the H. Comm. on Energy & Commerce*, 113th Cong. 10 (2013) (statement of Amy Tykeson, President & Chief Executive Officer, BendBroadband), *available at* http://docs.house.gov/meetings/IF/IF16/20130612/100960/HHRG-113-IF16-Wstate-TykesonA-20130612.pdf.

contend that retransmission fees are not the main reason for cable rate hikes, pointing out that cable rates rose forty percent from 1997 in 2002—even though retransmission fees did not exist at the time.[127]

Importantly, although broadcast stations negotiate retransmission terms with MVPDs and collect the resulting fees, stations do not necessarily keep all of this revenue for themselves.[128] To the contrary, national networks are increasingly demanding that their network-affiliated broadcasters pay for network programming—a reversal of the traditional network-affiliate relationship, whereby networks paid affiliates to distribute their programming.[129]

D. Similar Rules Govern Satellite Carriers

Importantly, the term MVPD encompasses video providers other than cable systems.[130] The nation's second and third largest MVPDs in terms of subscribers—DIRECTV and DISH Network—compete against one another and cable companies by distributing video programming via direct broadcast satellite.[131] Although the Copyright Act and the Communications Act treat cable and satellite MVPDs in a fairly similar manner, several unique statutory and regulatory requirements apply to satellite carriers.[132] Although many of these distinctions are beyond the scope of this Note, a few are worth discussing.

Like cable systems,[133] satellite carriers may retransmit broadcast television signals to their subscribers pursuant to a compulsory licensing regime.[134] Because direct broadcast satellite service did not emerge until the 1980s, Congress did not mention it in Section 111 of the Copyright Act.[135] Instead, Congress afforded satellite carriers a statutory copyright license to retransmit broadcast television in two separate bills, enacted in 1988 and 1999, respectively.[136] First, Congress gave satellite carriers a statutory license for *distant* signal retransmissions in the Satellite Home Viewer Act

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127. *See, e.g.*, Written Ex Parte of Nat'l Ass'n of Broads. at 2–7, Amendment of the Comm'n's Rules Related to Retransmission Consent, MB Dkt. Nos. 09–182, 10–71 (rel. Mar. 19, 2010) [hereinafter *NAB Ex Parte*], *available at* http://apps.fcc.gov/ecfs/document/view?id=7521095031.

128. *See Sixteenth Video Competition Report*, *supra* note 9, at 3346, para. 203.

129. *Id.*

130. Verizon FiOS and AT&T U-verse both meet the statutory definition of an MVPD and are thus eligible for the Section 111 statutory license, 17 U.S.C. § 111(f)(3), although only FiOS is registered as a cable system with the FCC. Implementation of Section 3 of the Cable Television Consumer Prot. & Competition Act of 1992, *Report on Cable Industry Prices*, 27 FCC Rcd 9326, 9327, para. 1 n.2 (2012).

131. *Id.* at para. 27.

132. *See, e.g.*, 47 U.S.C. § 335 (2012).

133. *See* discussion *supra* Part II.B.

134. *See* 17 U.S.C. §§ 119, 122 (2012 & Supp. 2014).

135. *See generally* 17 U.S.C. § 111 (2012).

136. Satellite Broad. and Commc'ns Ass'n v. FCC, 275 F.3d 337, 347–49 (4th Cir. 2001).

of 1988 (SHVA).[137] then, in 1999, Congress passed the Satellite Home Viewer Improvement Act of 1999 (SHVIA) to provide satellite carriers a statutory license for certain retransmissions of *local* signals.[138] Under SHVA, as amended, a satellite carrier may generally retransmit a television station's signal to subscribers who live in homes located too far away from the nearest television station to reliably receive its signal over a conventional antenna.[139] Like cable systems, each satellite carrier must submit a statement of account and a formula-based royalty fee to the Register of Copyrights,[140] which in turn distributes these royalties to copyright holders.[141]

Under SHVIA, as amended,[142] a satellite carrier may generally retransmit a television station's signal to subscribers who either reside in that station's local service area, or in any other community in which that station's signal is "significantly viewed," as determined by the FCC.[143] This statutory license, unlike that which governs distant signal retransmissions, does not require a satellite carrier to pay any royalty fee for most retransmissions.[144]

Satellite carriers that retransmit television signals also face several obligations under the Communications Act. The 1992 Cable Act's retransmission consent provision applies to all MVPDs, including satellite carriers.[145] In other words, like a cable company, a satellite carrier may not retransmit the signal of a broadcaster that has elected retransmission consent without first obtaining the station's authorization.[146] This is so even if the satellite carrier otherwise complies with the requirements to retransmit a television signal pursuant to a statutory license under the Copyright Act.[147]

Unlike cable systems, however, satellite carriers are not necessarily required to carry stations that elect must-carry.[148] Instead, a satellite carrier must carry a television station's signal to subscribers residing in that station's local market only if the station elects must-carry *and* the carrier already carries one or more local television stations in that market.[149] This

137. Satellite Home Viewer Act of 1988, Pub. L. No. 100-667, § 202(2), 102 Stat. 3935 (1988) (codified as amended at 17 U.S.C. § 119).

138. Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113, § 1002(a), 113 Stat. 1501 (1999) (codified as amended at 17 U.S.C. § 122).

139. 17 U.S.C. § 119(a)(2)(B).

140. *Id.* § 119(b)(1).

141. *Id.* § 119(b)(5).

142. Congress amended SHVA and SHVIA in the Satellite Home Viewer Extension and Reauthorization Act of 2004. Pub. L. No. 108-447, tit. IX, 118 Stat. 2089 (2004) (codified as amended at scattered sections, 17 and 47 U.S.C.). Congress extended both statutory licenses in the Satellite Television Extension and Localism Act of 2010, Pub. L. No. 111–151, 124 Stat. 1027 (2010) (codified as amended at scattered sections, 17 and 47 U.S.C.).

143. 17 U.S.C. § 122(a)(1)–(2) (2012).

144. *Id.* § 122(c).

145. 47 U.S.C. § 325(b) (2012 & Supp. 2014).

146. *See* discussion *supra* Part II.C.

147. *See* 17 U.S.C. §§ 119, 122 (2012 & Supp. 2014).

148. *See* 47 U.S.C. § 534 (2012 & Supp. 2014).

149. 47 U.S.C. § 338 (2012 & Supp. 2014).

requirement, colloquially known as "carry one, carry all,"[150] reflects the limited channel capacity of satellite carriers relative to their cable competitors.[151] Satellite carriers are also subject to network non-duplication and syndicated program exclusivity rules that are substantially similar to those governing cable systems.[152]

III. MVPDS AND BROADCASTERS GO HEAD-TO-HEAD IN WASHINGTON

In the late 2000s, as retransmission fees swelled, several major MVPDs and allied organizations launched a major offensive in Washington, D.C., aimed at persuading lawmakers and regulators to revisit the rules governing broadcast television signal retransmission. In 2010, critics of the existing retransmission consent framework launched the American Television Alliance (ATVA), a coalition of companies and nonprofit groups that purports to "give consumers a voice and ask lawmakers to protect consumers by reforming outdated rules that do not reflect today's marketplace."[153] Broadcast networks and affiliated stations, represented by the National Association of Broadcasters (NAB), countered this offensive in 2013 by launching their own campaign to defend retransmission consent: TVfreedom.org.[154]

In recent years, groups and individuals on both sides of this debate have advanced a variety of arguments through opinion essays, fact sheets, and position papers.[155] As is often the case with Washington policy disputes, the reality of retransmission consent is more nuanced than either set of self-interested companies would have consumers, lawmakers, and regulators believe. In this Part, this Note will assess the case for and against today's retransmission regime.

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150. *See, e.g.*, Kim Dixon, *U.S. Lawmaker Wants Satellite Companies to Carry Local TV*, REUTERS (Feb. 10, 2009), http://www.reuters.com/article/2009/02/10/us-satellites-congress-idUSTRE5196V720090210 ("Satellite TV companies operate under a 'carry one, carry all' requirement that if they carry even one local station in a market, they must carry all local stations in that market.").

151. Satellite Broad. and Commc'ns Ass'n v. FCC, 275 F.3d 337, 347 (4th Cir. 2001).

152. *See* 47 C.F.R. §§ 76.122–.123 (2014).

153. *See* AMERICAN TELEVISION ALLIANCE, *About the Issue*, http://www.americantelevisionalliance.org/about-the-issue/ (last visited Jan. 20, 2014).

154. John Eggerton, *Nets, Stations Push Back on Retrans Via TVFreedom.org*, MULTICHANNEL NEWS (Feb. 3, 2014, 5:09 PM), http://www.multichannel.com/news/fcc/nets-stations-push-back-retrans-tvfreedomorg/295130.

155. *Compare* AMERICAN TELEVISION ALLIANCE, *Media Center*, http://www.americantelevisionalliance.org/media-center/ (last visited Jan. 20, 2014) (supporting reform of retransmission consent), *with* NATIONAL ASSOCIATION OF BROADCASTERS, *Protect TV Viewers and Allow Broadcasters to Continue Negotiating in the Free Market* http://www.nab.org/advocacy/issue.asp?id=1891 (last visited Jan. 20, 2014) (supporting current retransmission consent rules).

A. Mandatory Carriage Requirement

According to many MVPDs and several market-oriented economists, the must-carry requirement that MVPDs carry broadcast stations that elect mandatory carriage gives broadcasters an unfair advantage. The must-carry rule has been called a "'heads we win, tails you lose' proposition for the broadcast industry," as it effectively gives smaller broadcasters whose programming MVPDs are unwilling to pay to retransmit a free pathway to consumers' homes.[156] "It is difficult to imagine a more one-sided arrangement," argues Stanford University economist Bruce Owen.[157]

Persuasive as these criticisms of must-carry may be, they tell us little about whether retransmission fees are unreasonably high due to the disparate regulatory treatment of broadcasters and MVPDs. This is because the availability of must-carry rarely, if ever, affects the outcome of retransmission consent negotiations. Recall that a television station must choose between retransmission consent and must-carry once—and only once—every three years.[158] Once a station elects retransmission consent, it is no longer entitled to must-carry for three years, thereby losing the "threat" of must-carry as a bargaining chip in the negotiations. Conversely, if a station elects must-carry, it loses the right to demand payment from an MVPD.

As such, no rational network-affiliated broadcaster would elect must-carry if it believed it could persuade one or more MVPDs to carry its signal for a nontrivial fee.[159] This explains why network-affiliated broadcasters elect retransmission consent over must-carry by an overwhelming margin.[160] Must-carry does not provide a station with meaningful leverage in retransmission negotiations, because most MVPDs would be very pleased to receive the right to retransmit a popular station's signal for free. If Congress eliminated the must-carry requirement, there is little reason to believe that MVPDs and broadcasters of popular programming would reach noticeably different bargaining outcomes.

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156. *See* Thomas W. Hazlett, *If a TV Station Broadcasts…: An Essay on 21st Century Video Distribution*, at 15 (2011), *available at* http://www.americantelevisionalliance.org/wp-content/uploads/2013/07/TV_Future_TWH_4-20-11-X.pdf.

157. BRUCE M. OWEN, THE INTERNET CHALLENGE TO TELEVISION 114 (1999).

158. 47 U.S.C. § 325(b)(3)(B) (2012 & Supp. 2014).

159. *See, e.g.*, Fred Campbell, *Understanding the False Equivalency of the Free State Foundation's Views on Retransmission Consent and the Free Market*, TECH. LIBERATION FRONT (Dec. 20, 2013), http://techliberation.com/2013/12/20/understanding-the-false-equivalency-of-the-free-state-foundations-views-on-retransmission-consent-and-the-free-market/ (arguing that must-carry does not provide a broadcaster "any pricing advantage in negotiations with for-pay video distributors, whose goal is to carry the programming at the lowest possible cost").

160. Christopher S. Yoo, *Rethinking the Commitment to Free, Local Television*, 52 EMORY L.J. 1579, 1658 (2003); *see also* Amendment of the Comm'n's Rules Related to Retransmission Consent, *Notice of Proposed Rulemaking*, FCC 11–31, 26 FCC Rcd 2718, 2721, para. 5 (2011).

B. Network Non-Duplication and Syndication Exclusivity Rules

Critics of the current regime also contend that broadcasters enjoy an unfair advantage under the FCC's longstanding network non-duplication and syndicated program exclusivity rules.[161] Under the network non-duplication rule, if a local station has secured exclusive rights to air certain programs in a market, an MVPD may only retransmit those programs to subscribers residing in that market if the station has so authorized.[162] In other words, if the CBS affiliate in New York has exclusive rights to air CBS prime time programming in New York, Time Warner Cable cannot import a distant CBS affiliate's signal to its New York subscribers—even with consent from the distant station. Similarly, under the syndicated program exclusivity rules, an MVPD may not transmit a syndicated program in a market wherein a local television station holds exclusive rights to that program.[163]

These rules, critics argue, confer upon each network-affiliated broadcaster a de facto monopoly in its local market, as they bar an MVPD that is dissatisfied with a local broadcaster's retransmission consent terms from "importing" an out-of-market signal on more favorable terms.[164] Yet neither the network non-duplication nor the syndicated programming exclusivity rule *grants* any broadcaster an exclusive right to distribute programming in its local market.[165] Rather, these rules merely provide broadcasters a means of *enforcing* those exclusive rights they have previously secured through contract from a network or a vendor of syndicated programming.[166]

Even if these FCC rules were eliminated, a broadcaster would be entitled to judicial recourse for breach of contract against a network or vendor that abrogated its exclusive distribution agreement with that broadcaster.[167] Conversely, if an MVPD were to reach an agreement with a local affiliate to serve as the exclusive local distributor of that affiliate's programming, that MVPD would run afoul of an FCC rule that prohibits[168] exclusive retransmission agreements.[169]

161. *See, e.g.*, Hazlett, *supra* note 156, at 57 (criticizing non-duplication and syndication exclusivity rules).

162. 47 C.F.R. §§ 76.92, .122 (2014).

163. 47 C.F.R. §§ 76.101, .123 (2014).

164. *See, e.g.*, Seth Cooper, *Understanding the Un-Free Market for Retrans Consent Is the First Step for Reforming It*, FREE ST. FOUND. BLOG (Dec. 17, 2013), http://freestatefoundation.blogspot.com/2013/12/understanding-un-free-market-for_17.html.

165. 47 C.F.R. §§ 76.92, .101, .122, .123 (2014).

166. Amendment of the Comm'n's Rules Related to Retransmission Consent, *Notice of Proposed Rulemaking*, FCC 11–31, 26 FCC Rcd 2718, 2740–41, para. 42 (2011) (network non-duplication and syndication exclusivity rules "do not create [exclusive] rights but rather provide a means for the parties to the exclusive contracts to enforce them through the Commission rather than through the courts").

167. *Id.*

168. 47 C.F.R. § 76.64(l) (2014).

169. Congress mandated that the FCC enforce this provision until a fixed date, currently codified as January 1, 2015. 47 U.S.C. § 325(b)(3)(C)(ii) (2012 & Supp. 2014).

When critics attack the network non-duplication and syndication exclusivity rules, therefore, they are ultimately criticizing the longstanding custom whereby national networks harness local affiliate stations to distribute network programming on an exclusive basis in each market.[170] These voluntary agreements,[171] however, are the result of private ordering—that is, private voluntary interactions among individual economic actors[172]—not the byproduct of FCC rules that unfairly advantage broadcasters at the expense of MVPDs. Similar contracts involving a product supplier designating exclusive geographic zones for each of its distributors are often referred to as "intrabrand vertical agreements."[173] These arrangements, which are commonplace in the nation's economy, have been the subject of extensive study in law and economics scholarship.[174] In general, these agreements tend to "produce significant economic benefits by facilitating the distribution of products to consumers."[175] There is no reason to believe the television marketplace works any differently.

C. *How Broadcasters "Earn" Their Retransmission Consent Rights*

Another common criticism of the current retransmission regime argues that it confers upon broadcasters a de facto property right in their signals, even though most broadcasters do relatively little to "earn" this right.[176]

170. *See* Comments of Broad. Ass'ns at 24–25, Amendment of the Commn's Rules Related to Retransmission Consent, MB Dkt. No. 10–71 (rel. Mar. 19, 2010), *available at* http://www.nab.org/documents/advocacy/retransmissionConsent/RetransComments051810.pdf ("Advertisers on local broadcast stations expect and, indeed, pay for that exclusivity . . . .").

171. *Id.*

172. For a comprehensive discussion of private ordering, see F. Scott Kieff, *Coordination, Property, and Intellectual Property: An Unconventional Approach to Anticompetitive Effects and Downstream Access*, 56 EMORY L.J. 327, 437 (2006), and Oliver E. Williamson, *The Evolving Science of Organization*, 149 J. INSTITUTIONAL & THEORETICAL ECON. 36, 47 (1993).

173. *See* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE § 11.1, at 441 (1999) ("These restraints are described as 'intrabrand,' because they regulate a dealer's sales of a single brand without creating limitations on its sales of brands made by other suppliers."); *see also* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 54 (1977) ("Vertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products.").

174. *See* ANDREW I. GAVIL ET AL., ANTITRUST LAW IN PERSPECTIVE 412 (2d ed. 2008).

175. Alan J. Meese, *Property Rights and Intrabrand Restraints,* 89 CORNELL L. REV. 553, 556 (2004) (citing ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 290–91, 435–39; HOVENKAMP, *supra* note 173, § 11.7a, at 485; RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 171–84 (2001); OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING 185–89 (1985).

176. *See, e.g.*, Bruce Owen, *The FCC and the Unfree Market for TV Program Rights*, 6 FREE ST. FOUND. PERSPECTIVES 3 (2011), *available at* http://www.freestatefoundation.org/images/The_FCC_and_the_Unfree_Market_for_TV_Program_Rights_030111.pdf.

Because network-affiliated broadcasters create very little of the programming they air, the argument goes, the "economic value of a retransmission right comes solely from the ability of its owner to extract cash . . . from cable systems and other [MVPDs]."[177] Bolstering this claim, the FCC noted in its first cable rulemaking following the 1992 Cable Act's enactment that "Congress created a new communications right in the broadcaster's signal, completely separate from the programming."[178] And, as discussed above, the retransmission consent right exists in addition to, not in lieu of, the exclusive rights in audiovisual works recognized by the Copyright Act.[179]

This critique of retransmission consent, though compelling at first glance, also misses the mark. To be sure, scholars have long understood the potentially serious downside of granting complex, idiosyncratic property rights to owners valuable assets—a principle known in the civil law as the "numerus clausus."[180] However, a broadcaster's property right in its signal is attenuated,[181] because unlike traditional property rights, it is not "good against the world."[182] Retransmission consent recognizes property rights solely in a readily identifiable asset class—broadcast signals—against a discrete set of firms—MVPDs—that are otherwise subject to pervasive regulation at all levels of government.[183] The resulting frustration and measurement costs are seemingly negligible.[184]

As for retransmission consent enabling broadcasters to enjoy an undeserved windfall, the existing regime gives broadcasters no assurance they will retain any of the compensation they receive from suppliers of television programming.[185] When an MVPD negotiates retransmission consent with a network affiliate, the MVPD values that broadcast signal not only for the affiliate's local programming, but far more importantly, for

177. *Id.*

178. Implementation of the Cable Television Consumer Prot. & Competition Act of 1992, *Report and Order*, FCC 93–144, 8 FCC Rcd 2965, 3004–05, para. 173 (1993).

179. *See* discussion *supra* Part II.B; *cf.* 17 U.S.C. §§ 111, 119, 122 (2012 & Supp. 2014).

180. Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 4 (2000) (explaining that in the civil law, "the principle that property rights must conform to certain standardized forms . . . . is called the numerus clausus—the number is closed.").

181. Retransmission consent is considered an "attenuated" right because its limits are operational, rather than temporal, as Prof. Shyamkrishna Balganesh observed in *The Social Costs of Property Rights in Broadcast (and Cable) Signals*, 22 BERKELEY TECH. L.J. 1303, 1347 (2007).

182. Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 358 (2001).

183. *See* Copple, *supra* note 70, at 28–29; *see also* discussion *supra* Parts II.A–C.

184. *Cf.* Merrill & Smith, *Optimal Standardization*, *supra* note 180, at 24 (the numerus clausus seeks to avoid "bargaining difficulties" that create "large transaction-cost barriers to any exchange of the property, creating an undue restraint on alienation").

185. *See Sixteenth Video Competition Report*, *supra* note 9, at 3345–46, para. 203.

network programming—chiefly, prime time content.[186] Well aware of this dynamic, the networks are increasingly demanding a major cut of their affiliates' retransmission consent revenue.[187] To a significant extent, therefore, broadcast affiliates now act as middlemen who simply broker deals between MVPDs and television networks.

The FCC has observed this trend in recent years, noting in its Sixteenth Video Competition Report that "[n]etwork compensation to television broadcast stations has all but disappeared, and today, television stations instead commonly pay compensation to networks in order to air their programming."[188] This trend will likely persist, according to research firm SNL Kagan, which recently projected that local stations will soon pay nearly sixty percent of the retransmission fees they receive to their respective national networks.[189] As local affiliates garner higher retransmission fees, stations and their national network partners must decide how to divvy up the spoils. Each party's leverage in these negotiations will likely depend largely on its respective contributions to the economic value of the station's overall programming lineup.

IV. GOVERNING A PRO-COMPETITIVE, PRO-CONSUMER VIDEO MARKETPLACE

Although critics of the retransmission status quo have not shown that broadcasters benefit—or consumers suffer—to any substantial degree due to unfair or lopsided federal regulations, the existing framework is flawed in two important respects. First, existing law subjects broadcasters and MVPDs to needlessly cumbersome rules, imposing on both sets of firms an array of idiosyncratic rights and obligations lacking a policy justification in the modern video marketplace. Second, the laws now governing broadcast signal retransmission—which Congress has left largely untouched since the 1992 Cable Act and the 1976 Copyright Act[190]—give federal agencies too much discretion to regulate the television market. To fix these problems, lawmakers should end the disparate regulatory treatment of broadcasters and MVPDs. Instead, Congress should simplify television licensing by aligning it with the many other forms of media that have flourished under a voluntary, copyright-based licensing scheme. This reform would also advance

186. *See, e.g.*, Owen, *The FCC and the Unfree Market for TV Program Rights*, *supra* note 176, at 3.

187. *Sixteenth Video Competition Report*, *supra* note 9, at 3345–46, paras. 202–03.

188. *Id*. at 3345, para. 202.

189. *See* Tony Maglio, *U.S. TV Station Retransmission Fees Will Hit $9.3 Billion by 2020, SNL Kagan Projects*, THE WRAP (Oct. 27, 2014, 8:02 AM), http://www.thewrap.com/u-s-tv-station-retransmission-fees-will-hit-9-3-billion-by-2020-snl-kagan-projects/.

190. *See* discussion *supra* Parts II.B–C.

Congress' lofty goals in the Telecommunications Act of 1996,[191] which embraced consumer welfare as paramount in U.S. communications policy.[192]

A. *The Case for a Level Playing Field in Video*

The Copyright Act and the Communications Act reflect many assumptions regarding the nature of video competition that are no longer true.[193] For instance, when lawmakers wrote the Cable Act, they assumed cable companies would remain the only viable option for consumers to access multiple channels of video at home.[194] Fast forward twenty-three years, however, and cable companies face intense competition from MVPD rivals that did not even exist in 1992.[195] Cable companies' share of MVPD subscribers declined to 53.9% at the end of 2013, after declining steadily for several years.[196] Cable companies now vie for customers against satellite carriers such as DIRECTV and DISH—with a combined 33.9% share of MVPD subscribers[197]—and against AT&T U-verse and Verizon FiOS, which collectively account for 11.2% MVPD subscribers.[198] And while a typical U.S. household had access to just one MVPD in 1992, virtually all of them are now served by at least three MVPDs—and a fast-growing number of households can access four or more MVPDs.[199]

Competition has likewise intensified in the *creation* of video programming. Although the "Big Four" broadcast networks—ABC, CBS, NBC, and Fox—remain the four most-viewed channels in America, basic cable channels including ESPN, USA, and TBS attract many more combined viewers than major broadcast networks.[200] Basic cable also faces competitive threats as consumers flock to Internet-based video platforms. Perhaps most notably, the online video distributor Netflix, which counts forty-one million

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191. *See generally* Telecommunications Act of 1996, Pub. L. No. 104–104, 110 Stat. 56 (codified at scattered sections of 47 U.S.C.).

192. Jerry A. Hausman & J. Gregory Sidak, *A Consumer-Welfare Approach to the Mandatory Unbundling of Telecommunications Networks*, 109 YALE L.J. 417, 451 (1999) ("Congress . . . emphasized in the Telecommunications Act that the improvement of consumer welfare was the new legislation's overarching purpose.").

193. *See* The Video Marketplace & the Internet Transformation, Remarks of Comm'r Ajit Pai, FCC Media Institute Luncheon (2013) [hereinafter Pai Remarks], *available at* http://www.fcc.gov/document/commissioner-pai-remarks-media-institute-luncheon (discussing vibrant, competitive nature of modern video marketplace).

194. *See* H.R. REP. NO. 102–862, at 2 (1992) (Conf. Rep.), *as reprinted in* 1992 U.S.C.C.A.N. 1231.

195. *Sixteenth Video Competition Report*, *supra* note 9, at 3311–12, para. 133 (Table 7: MVPD Video Subcribers).

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* at 3267, para. 31 (Table 2: Access to Multiple MVPDs).

200. *Id.* at 3340–41, para. 194 (ad-supported cable enjoys twice the audience share of broadcast network affiliates); *see also* Jethro Nededog, *Nickelodeon, USA Network Are 2013's Most-Watched Basic Cable Channels*, THE WRAP (Jan. 2, 2014, 4:35 PM), http://www.thewrap.com/2013-most-watched-basic-cable-rankings.

U.S. subscribers,[201] has developed dozens of original television series, including *House of Cards*, *Daredevil*, and *Orange Is the New Black*.[202] Overall, Netflix is expected to invest over $450 million on "original programming" in 2015, or nearly twice as much as the company spent in 2014.[203] Other non-traditional sources of original video programming include Hulu and Amazon Prime, both of which are growing rapidly in viewership and revenue.[204] Meanwhile, consumers can pay to watch nearly every network and cable show soon after it airs from "over-the-top" services such as Apple iTunes, Google Play, and Xbox Video.[205]

The myriad firms that compete to create, finance, and distribute video programming come in all shapes and sizes, relying on technologies ranging from 1940s-era analog television to HTML5 Internet video distribution.[206] Despite the hyper-competitive state of the modern video marketplace, however, broadcast television is still regulated under statutory provisions that largely predate the World Wide Web—let alone ubiquitous online streaming video.[207] From a consumer's perspective, watching network television over a cable MVPD's service is not too different from watching the same content on Hulu. Yet these two methods of watching broadcast television are governed very differently in both the Copyright and Communications Acts.[208] The following pages present an ambitious yet focused proposal to level the regulatory playing field with respect to broadcaster-MVPD negotiations.

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201. David Lieberman, *Netflix Shares Soar On Q1 Report Showing Strong Sub Growth And Stock Split Plans*, DEADLINE (Apr. 15, 2015, 1:19 PM), http://deadline.com/2015/04/netflix-q1-earnings-reed-hastings-1201410558/.

202. Emily Steel, *Netflix Is Betting Its Future on Exclusive Programming*, N.Y. TIMES, Apr. 20, 2015, at B1, *available at* http://www.nytimes.com/2015/04/20/business/media/netflix-is-betting-its-future-on-exclusive-programming.html.

203. Emily Steel, *Netflix, Amazon and Hulu No Longer Find Themselves Upstarts in Online Streaming*, N.Y. TIMES, Mar. 25, 2015, at B1, *available at* http://www.nytimes.com/2015/03/25/business/media/netflix-amazon-and-hulu-no-longer-find-themselves-tvs-upstarts.html?smprod=nytcore-iphone&smid=nytcore-iphone-share.

204. Brian Stelter, *Taking a Page from Netflix, Hulu Promotes Original Shows for 2014*, CNN MONEY (Jan. 8, 2014), http://money.cnn.com/2014/01/08/technology/hulu/.

205. *The Satellite Television Law: Repeal, Reauthorize or Revise?: Hearing Before the Subcomm. on Commc'ns. & Tech. of the H. Comm. on Energy & Commerce*, 113th Cong. 13–14 (2013) (statement of Geoffrey Manne, Executive Director, International Center for Law & Economics) [hereinafter Manne Statement], available at http://democrats.energycommerce.house.gov/sites/default/files/documents/Testimony-Manne-CT-Satellite-TV-Law-2013-6-12.pdf.

206. *Cf.* Pai Remarks, *supra* note 193.

207. Manne Statement, *supra* note 205, at 23–24.

208. *See, e.g.*, Media Bureau Seeks Comment on Interpretation of the Terms "Multichannel Video Programming Distributor" and "Channel" as Raised in Pending Program Access Complaint Proceeding, *Public Notice*, DA 12–507 (2012).

B. *If Retransmission Consent Isn't Broken, Why Fix It?*

If the current retransmission regime is generally well-functioning, as this Note has argued so far,[209] why overhaul it? After all, if Congress legislates, it might err—perhaps leaving the video market in worse shape than the status quo.[210] Echoing this sentiment, former FCC Commissioner Robert McDowell has urged lawmakers to "be patient," warning that "unintended consequences are sure to ensue" if "Washington tries to 'outsmart' the marketplace."[211] Yet this skepticism toward video reform, while understandable, underestimates the risk that the FCC will reinterpret its statutory authority to play a much more interventionist role in retransmission negotiations.

Since the 1992 Cable Act's passge, the FCC has largely taken a hands-off approach to retransmission consent negotiations to date, resisting numerous calls to intervene in carriage disputes.[212] Section 325(b)(3)(C)(iii) of the Communications Act tasks the FCC with issuing regulations that "prohibit a television broadcast station that provides retransmission consent from . . . failing to negotiate in *good faith*."[213] Accordingly, the FCC's rules require broadcasters and MVPDs to designate representatives empowered to negotiate retransmission consent terms, meet with their counterparts at reasonable times and locations, offer more than one unilateral proposal, and respond to counter-proposals, among other duties.[214] These rules reflect a common sense understanding of negotiating in good faith, but do not foreclose the possibility that parties acting in good faith might simply reach an insurmountable impasse.

Yet, as several commentators have noted,[215] nowhere in the Communications Act is "good faith" defined—even though the term appears in several other sections of the Act.[216] Congress did, however, specify that "it shall not be a failure to negotiate in good faith if [a broadcaster or MVPD]

209. *See* discussion *supra* Part III (critiquing MVPDs' arguments against existing retransmission rules).

210. *See* Robert McDowell, *Should the Government Try to 'Fix' Retransmission Consent?*, THE HILL CONGRESS BLOG (Nov. 22, 2013, 2:00 PM) [hereinafter McDowell Op-Ed], http://thehill.com/blogs/congress-blog/technology/191201-should-the-government-try-to-fix-retransmission-consent#ixzz2yG3rcrmx.

211. *Id.*

212. Statement of Comm'r Robert M. McDowell at 1, Amendment of the Comm'n's Rules Related to Retransmission Consent, *Notice of Proposed Rulemaking,* FCC 11–31, 26 FCC Rcd. 2718, 2766 (2011).

213. 47 U.S.C. § 325(b)(3)(C)(ii)–(iii) (2012 & Supp. 2014) (emphasis added).

214. *See* 47 C.F.R. § 76.65(b) (2014).

215. *E.g.*, Reply Comments of Mediacom Inc. at 1–2, Amendment of the Comm'n's Rules Related to Retransmission Consent, FCC 11–31, 26 FCC Rcd 2718 (rel. Mar. 3, 2011) [hereinafter *Mediacom Comments*], *available at* http://apps.fcc.gov/ecfs/document/view?id=7021689912.

216. Thomas B. Romer, *Negotiate in Good Faith As to What? An Analysis of the Good Faith Negotiation Clause of the Telecommunications Act of 1996,* 69 U. COLO. L. REV. 257, 261 (1998).

enters into retransmission consent agreements containing different terms and conditions, including price terms, with different [MVPDs or broadcasters] if such different terms and conditions are based on competitive marketplace considerations."[217] Thus, although the statute plainly bars the FCC from directly regulating how much broadcasters charge MVPDs for retransmission consent, the statute is sufficiently ambiguous as to afford the FCC considerable latitude as to how it regulates retransmission consent negotiations.[218]

Under the reigning administrative laws of the United States, courts defer to rules promulgated by federal agencies under a doctrine known as *Chevron* deference, which refers to a 1984 Supreme Court decision holding that a court should defer to an agency's "permissible construction of [an ambiguous] statute."[219] Although the FCC's most recent inquiry regarding retransmission consent concluded that the agency has limited authority to intervene in retransmission impasses, the FCC's pronouncements today cannot bind the Commission tomorrow.[220] "An initial agency interpretation is not instantly carved in stone."[221] An agency can always change its mind so long as it offers a reasoned explanation for doing so and abides by applicable laws of administrative procedures.[222] Thus, if the FCC someday decides to change its course regarding retransmission consent, it will enjoy the same considerable deference from courts as in the agency's other rulemakings.

Seizing on this legal wiggle-room, several MVPDs and media advocacy organizations have implored the FCC to revisit its rules governing retransmission consent negotiations. For instance, Free Press, Parents Television Council, and Consumers Union jointly urged the FCC to require that each MVPD disclose to its subscribers the precise amount of retransmission fees it paid for each broadcast station.[223] And Mediacom, a major cable company, urged the FCC to revise its rules to impose interim carriage requirements when a "good faith" complaint is pending,[224] criticizing the FCC's conclusion that it "lacks authority to order carriage in

217. 47 U.S.C. § 325(b)(3)(C)(ii)–(iii) (2012 & Supp. 2014).

218. *See Mediacom Comments*, *supra* note 215, at 8.

219. Chevron USA, Inc. v. NRDC, 467 U.S. 837, 842–43 (1984).

220. In *Chevron*, the agency at issue had changed its mind about how to best administer a federal statute. *Id.* at 863.

221. *Id.*

222. Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983).

223. Comments of Free Press, Parents Television Council, and Consumers Union at 2, Pet. for Rulemaking to Amend the Comm'n's Rules Governing Retransmission Consent, FCC 11–31, 26 FCC Rcd 2718 (rel. Mar. 3, 2011) [hereinafter *Free Press et al. Comments*], *available at* http://www.freepress.net/sites/default/files/fp-legacy/Retrans_Petition_Filing_FP_PTV_CU.pdf.

224. *Mediacom Comments*, *supra* note 215, at 2.

the absence of a broadcaster's consent due to a retransmission dispute."[225] Contrasting the FCC's "apparent resignation to its powerlessness" to regulate retransmission consent negotiations with the agency's "herculean . . . efforts in other contexts to find a legal basis for regulatory initiatives that have a statutory foundation that . . . can be called debatable,"[226] Mediacom emphasized that Congress expressly empowered the commission to "establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent."[227]

Mediacom has a point: although Congress set forth certain specific rules regarding retransmission consent—such as broadcast stations' triennial election of must-carry or retransmission consent[228]—Section 325 does not address the specifics of how the FCC chooses to govern the right of broadcasters to retransmission consent.[229] As such, the FCC seems to possess considerable authority under current law to amend its retransmission rules and adopt a far more interventionist approach to carriage disputes, perhaps by imposing a retransmission fee disclosure obligation[230] or an interim carriage requirement[231] in the event a broadcaster and an MVPD reach an impasse in retransmission negotiations. Moreover, a broad group of MVPDs, including Time Warner Cable, the American Cable Association, DISH Network, and DIRECTV—along with several advocacy groups—even urged the FCC to amend its rules to provide for the arbitration of retransmission consent disputes.[232]

In March 2014, the FCC amended its retransmission consent regulations to bar broadcast stations from engaging in "joint negotiation" with MVPDs over retransmission consent terms.[233] Under these rules, a broadcaster would violate its duty to negotiate in good faith if it colluded with, or delegated authority to, rival network affiliates in the same market with respect to retransmission negotiations.[234] In February 2015, the FCC broadened these rules in response to new legislation, in which Congress directed the agency to prohibit independently owned stations in the same

225. Amendment of the Comm'n's Rules Related to Retransmission Consent, *Notice of Proposed Rulemaking*, FCC 11–31, 26 FCC Rcd 2718, 2728–29, para. 18 (2011).

226. *Mediacom Comments*, *supra* note 215, at iii.

227. 47 U.S.C. § 325(b)(3)(A) (2012 & Supp. 2014).

228. *Id.* § 325(b)(3)(B).

229. *Mediacom Comments*, *supra* note 215, at 17.

230. *See Free Press et al. Comments*, *supra* note 223, at 2.

231. *Mediacom Comments*, *supra* note 215, at 2.

232. Petition for Rulemaking to Amend the Comm'n's Rules Governing Retransmission Consent at 31, MB Dkt. No. 10–71 (filed Mar. 9, 2010), *available at* http://www.fhhlaw.com/PublicKnowledgeetalPetitionforRulemaking.2010.03.09.pdf.

233. Amendment of the Commission's Rules Related to Retransmission Consent, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 14-29, 29 FCC Rcd 3351, 3368–69, paras. 24–26 (2014).

234. *Id.*

market from coordinating retransmission negotiations.[235] However, the FCC stopped short of adopting many of the rules advocated by various commenters. FCC Commissioner Ajit V. Pai praised this move, noting that the FCC "carefully remains within its limited authority over retransmission consent."[236] Commissioner Pai added that the FCC's new rules do not not give it the "power to mandate the substantive outcome of retransmission consent negotiations."[237]

Still, although the FCC may continue to possess the authority to promulgate more interventionist rules, whether the agency *should* do so is another question. As former Commissioner McDowell has argued, "[a]ttempted government arbitration of retrains[mission] disputes is likely to result in more blackouts, not fewer."[238] "When regulators intervene," McDowell explains, "negotiations stop and the companies have to pivot to accommodate the new third party to their talks: Uncle Sam."[239] Even if mandatory arbitration or similar regulatory interventions succeed in reducing the frequency of blackouts, there is little to reason to believe the resulting retransmission consent terms would mean better outcomes for consumers in the long run. If the FCC begins to intervene in retransmission disputes, MVPDs and broadcasters will face a different calculus in retransmission negotiations, particularly if the FCC is perceived as friendlier to one set of firms than another—as the FCC has reportedly been on several past occasions.[240] Injecting political considerations into the process by which market participants determine the price of broadcast television programming is unlikely to produce an economic outcome superior to the status quo. If, on the one hand, FCC intervention pushes retransmission payments downwards, the quality of broadcast programming might suffer as a result,[241] even if MVPDs pass along some of the savings to their subscribers. In the alternative, FCC intervention might have the opposite effect, leading to higher retransmission fees and, in turn, higher cable and satellite prices. In either scenario, consumers stand to suffer from a suboptimal mix of prices and quality in television programming. In light of these potentially costly

235. Implementation of Sections 101, 103 and 105 of the STELA Reauthorization Act of 2014, *Order*, FCC 15-21, 30 FCC Rcd 2380, 2381, para. 4 (2015); *see also* STELA Reauthorization Act, Pub. L. No. 113-200, § 103(a), 128 Stat. 2059 (2014).

236. Amendment of the Commission's Rules Related to Retransmission Consent, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 14-29, 29 FCC Rcd 3351, 3429–30 (2014) (Pai, Comm'r, concurring).

237. *Id.*

238. McDowell Op-Ed, *supra* note 210.

239. *Id.*

240. *See, e.g.*, Ted Hearn, *Comcast Cites Martin's 'War On Cable' To Appeals Court*, MULTICHANNEL NEWS (Feb. 6, 2008, 9:38 AM), http://www.multichannel.com/news/courts/comcast-cites-martin-s-war-cable-appeals-court/295042.

241. *See NAB Ex Parte*, *supra* note 127, at 1.

errors,[242] the FCC can serve consumers best by staying out of retransmission negotiations.

C. Simple Rules for Retransmission Consent: The Next Generation Television Marketplace Act

To resolve these ambiguities and simplify the rules that govern the video marketplace, the NGTMA[243] would eliminate the 1992 Cable Act's retransmission consent provision[244]—including its good faith bargaining requirement—along with the Act's mandatory carriage rules regarding commercial broadcast stations.[245] In so doing, the bill would strip the FCC of the authority it seemingly possesses to meddle with retransmission negotiations. In lieu of the retransmission consent regime, the NGTMA would scrap the compulsory licensing system that currently governs the retransmission of broadcast programming by MVPDs, thereby conferring full copyright protection on works televised by broadcasters.[246] Therefore, the NGTMA would, for the first time, afford the owners of copyrights in broadcast television programs the right to freely negotiate rates with MVPDs, instead of relying on the royalties set by Copyright Royalty Judges.[247]

As discussed above, MVPDs currently pay two entities in exchange for the right to retransmit broadcast television programming: the Copyright Office[248] and each broadcast station itself.[249] The Copyright Office royalty is based not on the real-world market value of copyrighted works aired on television, but by a complex statutory scheme that was "hammered out" among media stakeholders over four decades ago.[250] Conversely, the retransmission consent payment is determined by a market negotiation—at least under current rules.[251] By sweeping away both of these regimes, NGTMA would establish a unified system of market-based negotiation for

242. *Cf.* Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 15 (1984) (arguing that governmental errors "on the side of excusing questionable [business] practices are preferable" to the other kind of errors).

243. Next Generation Television Marketplace Act, H.R. 3720, 113th Cong. (2013) [hereinafter NGTMA], *available at* http://beta.congress.gov/113/bills/hr3720/BILLS-113hr3720ih.pdf.

244. *Id.* § 2(b) (repealing 47 U.S.C. § 325(b)–(c)).

245. *Id.* § 2(a)(6) (repealing 47 U.S.C. § 534); *id.* § 2(c)(1) (amending 47 U.S.C. § 338 to eliminate "carry one, carry all" rule for commercial stations).

246. *Id.* § 3(a)(1) (repealing 17 U.S.C. §§ 119, 122, 510); *id.* § 3(b) (repealing 17 U.S.C. §§ 111(c)–(e)).

247. *See* 17 U.S.C. § 111(d)(3)–(4) (2012 & Supp. 2014).

248. *See supra* Part II.B.

249. *See supra* Part II.C.

250. Peter S. Menell, *In Search of Copyright's Lost Ark: Interpreting the Right to Distribute in the Internet Age*, 59 J. COPYRIGHT SOC'Y USA 1, 32 (2011); *see also* Padden, *supra* note 41, at 4–5.

251. *See supra* Part III.C; *but see supra* Part IV.B (discussing potential FCC intervention in retransmission disputes).

broadcast television programming: traditional copyright negotiations.[252] The bill's elegant simplicity evokes "simple rules for a complex world," a phrase coined by legal scholar Richard Epstein to describe his vision of modest and limited regulation as a superior alternative to complex laws and rules.[253]

How would this system work in practice? In many ways, it would closely resemble the current process by which MVPDs negotiate for cable networks such as ESPN and USA, paying each network a per-subscriber rate pursuant to voluntary carriage agreements. The transaction costs of these negotiations are not prohibitive, as illustrated by MVPDs' ability to "secure broad performance rights from copyright owners as hundreds of cable networks have demonstrated."[254] Because broadcast stations do not hold copyrights in many of the programs they air, however, many contracts would likely need to be rewritten—perhaps borrowing language from cable channel carriage agreements—if NGTMA was enacted.

Perhaps each broadcast station would acquire a nonexclusive right to sublicense network and syndicated programming to MVPDs under terms similar to existing retransmission consent agreements.[255] In this regime, MVPDs would continue to bargain with broadcasters on a market-by-market basis, albeit for copyright licenses instead of retransmission consent.[256] Or, MVPDs might obtain copyright licenses directly from national networks, dealing with broadcast stations only to access their original content, including local news. Insofar as broadcasters add real value to network programming, they have little to fear from this regime; after all, national networks are free to sever their affiliate agreements, become cable networks, and deal with MVPDs under traditional copyright laws—yet no network has done so.[257]

How would NGTMA affect the amount that MVPDs pay for broadcast television programming? Overall, the amount should not change substantially, as retransmission consent affords networks and broadcasters a "safety valve" around price controls. Whereas copyright royalties are set by statute,[258] retransmission consent fees are wholly unregulated.[259] If copyright royalties were set too high, therefore, MVPDs would only retransmit broadcast signals in premium markets—or not at all. Instead, retransmission

252. Dan Garon, *Poison ivi: Compulsory Licensing and the Future of Internet Television*, 39 J. CORP. L. 173, 186 (2013).

253. RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD (1997).

254. Garon, *supra* note 252, at 187.

255. *Id.*

256. *Id.*

257. In 2013, Fox threatened to become a cable channel if Aereo, an Internet video company, continued to retransmit Fox's programming online without paying the network or its affiliates. However, the Supreme Court held that Aereo infringed Fox's copyright, so Fox remains a broadcast network. *Sam* Gustin, *Murdoch's News Corp. Threatens to Pull Fox Off the Air in Aereo Dispute*, TIME (Apr. 9, 2013), http://business.time.com/2013/04/09/news-corp-threatens-to-pull-fox-off-the-air-in-aereo-dispute/.

258. *See* 17 U.S.C. §§ 111, 119, 122 (2012 & Supp. 2014).

259. *See* 47 U.S.C. § 325(b)(3)(A) (2012 & Supp. 2014).

fees are growing steadily.[260] This strongly suggests that copyright owners usually *earn too little* from copyright royalties alone, and thus augment royalties with "reverse retransmission" payments.[261] If anything, because copyright owners themselves receive royalties from television programs,[262] NGMTA would likely improve the *distributional* allocation of MVPDs' payments for access to broadcast programming among copyright owners, while leaving the overall amount of these payments essentially unchanged.

V. CONCLUSION

As Congress and the FCC work to improve how the airwaves are allocated and ensure spectrum is put to its most highly valued uses, a day may come when television broadcasting as we know it ceases to exist. Meanwhile, however, policymakers would be loath to lose sight of the basic principles that underlie free markets—voluntary exchange, property rights, and regulatory parity—in governing the television marketplace. This market has evolved dramatically just over the past decade; it will surely continue to change rapidly in the years hence. Congress can best bring this market into the twenty-first century by liberalizing it—and the NGTMA would mark an excellent first step.

260. *Sixteenth Video Competition Report*, *supra* note 9, at 3345–46, para. 203.
261. *See id.* at para. 208.
262. *See* 17 U.S.C. § 111(d)(3)–(4).