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UPDATING OUR LAWS FOR THE MODERN VIDEO MARKETPLACE

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INTRODUCTION

Video has been a prominent part of American life for over a century and during that time, the video marketplace has changed dramatically. Technological advances in the production and distribution of video content have enabled a variety of new services to enter the market, to the benefit of content creators and consumers alike. And, as the marketplace evolved from "movies" and "talkies" (in the early 1900s) to broadcast and cable television (in the mid-1900s) to VHS tapes and video rental stores (in the 1970s and 80s) to satellite television and DVRs (in the 1990s), the laws governing it have been updated periodically. However, these laws have now remained almost entirely unchanged since the 1990s, despite recent technological advancements that radically reshape the way Americans produce, distribute and consume video content. This is a problem.

An outdated system of laws and regulations governing the video marketplace harms everyone. When video creators and distributors are faced with overly restrictive laws and needless compliance costs, consumers are left with fewer choices and higher prices than the video marketplace could otherwise provide. And when laws or regulations designed for a different era have failed to anticipate changes in the video marketplace, or when they are simply applied unevenly with some business models favored over others, competition and innovation are stifled to the detriment of all. Accordingly, the present study briefly lays out the basics of video law, identifies key areas in which the laws have failed to keep pace with developments in the marketplace, and then offers analysis and suggestions for how to update these laws to better govern the modern video marketplace going forward.

UNDERSTANDING THE BASICS OF VIDEO LAW

As a medium, video was invented in the late 1800s, but it was during the early 20th century that it grew in popularity and became a commonplace fixture in American life. Initially, video production and distribution were extremely expensive, which meant that competition was very limited. Accordingly, since market forces were unable to adequately protect consumers, Congress, the Department of Justice (DOJ) and the Federal Communications Commission (FCC) repeatedly intervened in the market to protect consumers and promote competition. Over time, however, technological advances reduced video production and distribution costs, enabling greater competition in the market and obviating the need for certain regulations and legal restrictions.

Broadly speaking, the history of video law has seen a gradual shift away from a marketplace characterized by high concentration and tight regulation and toward one characterized by increasing consumer choices and decreasing need for regulatory intervention. But the video marketplace today is still founded upon the same core bodies of law that have governed it for decades: copyright, telecom, contracts and antitrust. To understand how and why the laws governing the video marketplace have become outdated, it is important to know the key roles that each of these areas of law play in marketplace governance.

Copyright

Copyright is the primary legal foundation for the video marketplace. It protects all "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[1] Thus, whenever a creator records a piece of video content onto a computer's hard drive (or originally, onto long strips of magnetic tape), that content is protected by copyright and cannot be reproduced or distributed without the creator's permission.[2]

There are limited exceptions to creators' exclusive rights in their copyrighted works, including one for "fair use" that applies to all copyrighted works.[3] Fair use of another's work is determined based upon a variety of factors, including the nature of the underlying work, the purpose and character of the use (including whether it is commercial or non-commercial), the amount of the work used in relation to the work as a whole and the effect of the use on the potential value of the copyrighted work in the marketplace.[4] So, for example, recording a copy of a television program for later home viewing has been deemed to be fair use,[5] and can therefore be done even without the creator's permission. But, if that home copy is then sold to others[6] or even given away free of charge,[7] it may diminish the work's value in the video marketplace and no longer be considered fair use.

The concept of fair use is inherently flexible and fact-specific, which makes it extremely difficult to determine in the abstract whether a given use will be fair or not. However, there are also several copyright provisions that apply specifically to video content broadcast over-the-air (OTA). There is one provision for non-commercial video content (i.e., public, educational or governmental content, often abbreviated as simply PEG content),[8] one provision for cable networks[9] and two separate provisions for satellite networks—one for retransmitting local video signals[10] and one for retransmitting distant video signals.[11] These provisions specific to OTA broadcast video are what form the bridge between the Copyright Act and the Communications Act, the other specific body of law most relevant to the video marketplace.

1. 17 U.S.C. § 102(a).

2. 17 U.S.C. § 106.

3. 17 U.S.C. § 107.

4. Ibid.

5. See *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417 (1984).

6. See *ABC v. Aereo*, 134 S.Ct. 2498 (2014).

7. See, e.g., *MGM Studios v. Grokster*, 545 U.S. 913 (2005).

8. 17 U.S.C. § 118.

9. 17 U.S.C. § 111.

10. 17 U.S.C. § 122.

11. 17 U.S.C. § 119.

Telecom

Electromagnetic signals that broadcast OTA can qualify for copyright protection, but because these signals use radio spectrum in a way that can cause harmful interference to other spectrum users, they also fall under the regulatory scope of the Federal Communications Commission. The FCC regulates all commercial use of radio spectrum, deciding which frequencies will be used for what types of services, and imposing power limits and other technical limitations on spectrum users. And, where spectrum is rivalrous and in high demand, the FCC sells exclusive operating licenses to the highest bidders through spectrum auctions. Thus, in the earliest days of the video marketplace when viewing was limited to local theaters and cinemas, the FCC had no role to play. But, once companies started broadcasting video content OTA and onto the televisions in Americans' homes, the FCC took an active oversight role.

The FCC has regulated all OTA broadcast video services since its creation in 1934[12] (and the Federal Radio Commission briefly did so before that[13]), but its regulatory scope expanded significantly in response to the rise of cable television in the 1970s and 80s. Originally designed simply to retransmit OTA broadcast video signals—for example, to serve consumers who lived just outside the reach of a broadcast signal and had trouble getting good reception—it soon became clear that the cable systems had extra bandwidth and could support more video content than what was available OTA. This not only allowed the most popular OTA broadcast video creators—like the American Broadcasting Company (ABC), the Columbia Broadcasting System (CBS), the National Broadcasting Company (NBC) and the Fox Broadcasting Company (Fox)—to launch new channels and diversify the video content available to consumers, but it also enabled independent video creators, like Ted Turner, to enter the marketplace and compete head-to-head with the established incumbents.

As cable video services or multichannel video programming distributors (MVPDs), as they came to be called, grew in prominence and importance, Congress amended the Communications Act several times to provide further direction to the FCC and to account for the new competitive dynamics presented by MVPDs in the video marketplace. Incumbent OTA broadcasters were facing new competition from rivals who were almost entirely unregulated, while at the same time facing new opportunities to expand and diversify their

12. Communications Act of 1934, 48 Stat. 1064 (June 19, 1934) (codified at 47 U.S.C. § 151 et seq.).

13. Radio Act of 1927, 44 Stat. 1162 (Feb. 23, 1927).

businesses. MVPDs allowed for more video content to enter the marketplace and, critically, presented a new opportunity for video creators to generate revenue that could cover their production and distribution costs. Congress first sought to account for these changes with the Cable Communications Policy Act of 1984,[14] which established a franchise system for local cable systems to use when negotiating with local governments to access public rights of way and provide service.[15] It also established separate systems to govern commercial[16] and non-commercial video services,[17] and provided some miscellaneous consumer protections, such as privacy safeguards.[18]

And, as MVPDs' technological advancements were creating new opportunities and competition among video creators at the content layer, improvements in satellite and telephone network technologies also enabled new opportunities and competition at the distribution layer. Originally, cable MVPDs enjoyed exclusive rights to the territory in their local franchises, with consumers protected from monopoly price gouging through rate regulation by the FCC.[19] And to ensure MVPDs could make a reasonable profit while still keeping subscription fees low for viewers, Congress also established a system of statutory licenses whereunder MVPDs could retransmit OTA video signals for low rates based on gross receipts.[20]

But, recognizing the possibility of competition among MVPDs, Congress sought to encourage it with the Cable Television Consumer Protection and Competition Act of 1992[21] and the Telecommunications Act of 1996.[22] These laws incorporated satellite and telephone MVPDs into the FCC's regulatory framework, gave it authority to preempt any state or local zoning laws that prohibited consumers from installing the necessary equipment to receive service from satellite MVPDs[23] and, where effective competition arose, directed the FCC to repeal its rate regulations and instead allow market forces to discipline prices and protect consumers at both the content and distribution layer of the video marketplace.[24] Now, with most American consumers having access to two wireline MVPDs (the incumbent cable and telephone companies) in addition to satellite MVPDs, the FCC assumes that MVPD competition is effective (a rebuttable presumption adopted in 2015)[25] and has therefore forborne from almost all MVPD rate regulation. However, OTA broadcasters and MVPDs are still subject to a litany of other FCC regulations that govern things like ownership restrictions, program access, channel placement and exclusive dealing. These remaining regulations are explored below.

Contracts

In the video marketplace, as in all marketplaces, business is done using contracts. Content creators use them when selling licenses to video distributors. OTA broadcasters use them when selling MVPDs the right to retransmit video signals over their networks. MVPDs use contracts when providing video services to home viewers, usually in the form of subscriptions. And even cinemas and online video distributors (OVDs) use them when dealing with their customers, either on a subscription or à la carte basis. There are some video services, such as OTA broadcast and certain OVD services (like YouTube, TikTok and Pluto TV), that are provided free of cost, but even those are funded via advertising sales that are made using contracts.

These contracts can vary tremendously in their terms. For example, content creators may license their videos to one distributor on an exclusive basis—as some professional sports leagues do with the video recordings of their games[26]—or to multiple different distributors—as the National Football League has done with its games.[27] Payments for video distribution licenses may also be structured in a variety of ways, including lump sums and fees paid on a per-subscriber basis. Parties may also enter into revenue-sharing agreements, which may involve some up-front payments in addition to subsequent royalties paid back to the creators based on how much revenue a distributor earns from their content.

Many deals in the video marketplace are made without any restrictions on prices or terms, but there are some exceptions. Most of these stem from specific provisions written into copyright and telecom law, as discussed above and further explored below, but there are also some restrictions on the video marketplace that stem from another general field of law: antitrust.

14. 98 Stat. 2779 (Oct. 30, 1984).

15. 47 U.S.C. §§ 541–47.

16. 47 U.S.C. §§ 532, 34.

17. 47 U.S.C. §§ 532, 35.

18. 47 U.S.C. § 551.

19. 47 U.S.C. § 543.

20. 17 U.S.C. § 111(c)–(d).

21. 106 Stat. 1460 (Oct. 5, 1992).

22. 110 Stat. 56 (Feb. 8, 1996).

23. 47 C.F.R. § 25.104.

24. 47 U.S.C. § 543(a)(2).

25. Report and Order, "Amendment to the Commission's Rules Concerning Effective Competition," MB Docket No. 15-53 (June 3, 2015). https://bit.ly/2Lm9F1z.

26. See, e.g., Richard Sandomir, "NBC Retains Rights to Premier League in Six-Year Deal," *The New York Times*, Aug. 10, 2015. https://nyti.ms/2UmosNS.

27. See, e.g., Amar Toor, "NFL Renews TV Deals with CBS, Fox, NBC for Nine More Years, Money Reportedly Involved," *Engadget*, Dec. 19, 2011. https://engt.co/2Un3zC6.

Antitrust

Antitrust law is used to police unfair methods of competition used in any marketplace, aside from limited exceptions where Congress deemed competition to be either impossible or wastefully inefficient (in which case those industries are instead regulated as public utilities). Cable MVPD services were once regulated as public utilities but, as detailed above, monopoly regulation of those services has largely given way to a regulatory system based on competition and antitrust. That is not to say MVPD services are unregulated, though, as these and other video services remain subject to numerous legal and regulatory restrictions grounded in antitrust law.

In antitrust, there are three types of conduct that may violate the law: collusion,[28] monopolization[29] and mergers that substantially reduce competition.[30] Using its antitrust authority under the Sherman Act[31] and Clayton Act,[32] the DOJ has intervened in the video marketplace multiple times to punish conduct or review proposed deals that may be unfair to competition. Some of these interventions have been quite recent, such as vertical mergers between video creators and distributors—like Comcast's acquisition of NBC Universal in 2011 or AT&T's acquisition of Time Warner in 2018—as well as horizontal mergers among competing video creators and distributors—like Disney's acquisition of Lucasfilm in 2012 or Charter's acquisition of Time Warner Cable in 2016—that were all approved in the past decade. However, antitrust law has governed the video marketplace for over a century and its influence has been both pervasive and long lasting.

For example, in the late 1930s, the DOJ successfully sued Paramount Pictures and seven other major video production studios, alleging that their vertical arrangements with certain cinemas and movie theaters violated Section 1 and Section 2 of the Sherman Act as both collusion and attempted monopolization.[33] After a series of appeals, some of the DOJ's accusations were upheld by the Supreme Court,[34] which led to a series of consent decrees mandating structural separation between certain video producers (studios like Paramount, MGM and 21st Century Fox) and distributors (theaters like AMC and Regal).[35] While the DOJ recently solicited public comment on these consent decrees and suggested that, after over seventy years, such structural limitations may be outdated and in need of revision,[36] they remain in effect and several major video production studios are still prohibited from owning any cinemas.

Similar restrictions were also implemented by the FCC, with multiple structural separation requirements imposed on different layers of the video marketplace to promote both competition and diversity of news and other content sources in local markets. While these restrictions were sensible in the mid-twentieth century when consumers had very few choices when it came to video and news sources, they increasingly look out of place in the twenty-first century. For example, FCC regulations still strictly prohibit common ownership of both an OTA broadcast station (radio or television) and a newspaper in the same local market,[37] despite the fact that alternative news sources (primarily, cable news channels and online news sources) have decimated the local newspaper industry for decades.[38] The FCC sought to eliminate this outdated cross-ownership ban in late 2017, only to have their order overturned in court on administrative grounds.[39]

And there are further ownership restrictions among broadcasters. In addition to restrictions on local ownership, there is a strict cap on national ownership—allowing a single broadcaster to reach no more than 39 percent of Americans with their signals,[40] which has forced the "big four" broadcasters (ABC, CBS, NBC and Fox) to split their operations into complex franchise arrangements. Under this framework, a handful of local stations are owned and operated by their parent companies, while the rest are merely franchisees owned by third parties (companies like Sinclair, Tribune and Nexstar), who pay for the rights to use the big four broadcasters' copyrights and trademarks, but otherwise operate as independent companies, similar to how many fast food chains operate. This may be an efficient way to structure broadcast operations, so it may persist even in the absence of a national ownership cap, but the fact remains that OTA broadcasters are subject to ownership restrictions that extend well beyond what general antitrust law would require, and which do not cover other existing or potential competitors in the video marketplace like cable video channels and OVDs. The FCC's recent efforts to limit these restrictions and modernize media ownership rules have been commendable, but to

28. 15 U.S.C. § 1.

29. 15 U.S.C. § 2.

30. 15 U.S.C. § 18.

31. 26 Stat. 209 (July 2, 1890) (codified at 15 U.S.C. § 1 et seq.).

32. 38 Stat. 730 (Oct. 15, 1914) (codified at 15 U.S.C. § 12 et seq.).

33. *United States v. Paramount Pictures* et al., 334 U.S. 131 (1948).

34. Ibid.

35. See Antitrust Division, "The Paramount Decrees," U.S. Dept. of Justice, updated Oct. 30, 2018. http://bit.ly/34eTGuQ.

36. Ibid.

37. Federal Communications Commission, "FCC Modernizes Broadcast Ownership Rules and Decides to Establish a New Incubator Program to Promote Broadcast Ownership Diversity," Press Release, Nov. 16, 2017. https://bit.ly/2jVlzWB.

38. See, e.g., Elaine C. Kamarck and Ashley Gabriele, "The News Today: 7 Trends in Old and New Media," Brookings Institution, November 2015. https://brook.gs/34kxC1O.

39. *Prometheus Radio Project v. Federal Communications Commission*, No. 17-1107, slip op. (3d. Cir. Sept. 23, 2019). https://on.wsj.com/2mWbJ7U.

40. See Federal Communications Commission, "Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule," Notice of Proposed Rulemaking, MB Docket No. 17-318 (Dec. 18, 2017). http://bit.ly/2UoH93r.

truly update competition laws for the modern video marketplace, an act of Congress is required.

HOW OUR VIDEO LAWS HAVE BECOME OUTDATED

As explained above, the laws governing our video marketplace have gone almost entirely unchanged since the 1990s, despite recent technological advancements that are radically reshaping the way Americans produce, distribute and consumer video content. Accordingly, this section highlights four ways in which our video laws appear to be outdated.

Undue Restrictions on Broadcast Ownership

OTA broadcasters still face ownership restrictions that go well beyond what general antitrust would require. Whereas mergers reviewed under the Clayton Act are evaluated based on a variety of factors—including market concentration (usually calculated using the Herfindahl-Hirschman Index, or HHI), as well as things like entry barriers, switching costs, availability of substitutes and marketplace trends—mergers among OTA broadcasters are still reviewed under strict FCC standards that fail to account for many of these factors.

By narrowly defining the relevant market as just OTA broadcasters, the FCC fails to recognize that consumers can and do substitute other video content for what broadcasters distribute OTA.[41] Not only can consumers obtain high-quality news, sports and other popular types of video programming from cable television networks—which MVPDs generally offer alongside OTA broadcast content in a bundle—but OVDs like Netflix, YouTube, Hulu and Amazon Prime Video also make an endless variety of video content available to any consumer with access to broadband Internet service. And indeed, many of the companies offering OVD services are some of the largest in the world, yet it is OTA broadcasters who are subject to heightened antitrust scrutiny. This no longer makes sense.

Unfair Subsidies for Satellite MVPDs

Another relic is an unfair subsidy given to satellite MVPDs. As discussed above, when satellite MVPDs first entered the video marketplace, Congress encouraged their entry in several ways. Part of that was simply cutting red tape and eliminating unnecessary zoning restrictions, but another part was creating a separate licensing scheme for video content that granted satellite MVPDs special privileges not available to wireline MVPDs. Most notable here are the distant-signal licenses.

Satellite MVPDs can import OTA broadcast video signals from a distant market—the FCC recognizes 210 designated market areas (DMAs)—into a local market,[42] which sometimes results in satellite MVPD subscribers having to view weather updates, news reports and advertisements that were intended for other DMAs.[43] But aside from that minor annoyance, the real problem is that satellite MVPDs can acquire licenses to retransmit those distant signals at below-market rates, adjusted annually by the Copyright Royalty Board.[44] This statutory licensing regime, initiated with the Satellite Home Viewer Act of 1988,[45] was originally intended as a temporary subsidy to facilitate satellite MVPDs' initial entry into the video marketplace. However, this regime has been reauthorized five times since then,[46] and it remains in effect today even though increased competition has largely eliminated rate regulation for all other MVPDs.

Thus, the distant-signal license effectively amounts to an unfair subsidy for satellite MVPDs, in a marketplace wherein video creators and distributors otherwise negotiate prices and terms that are mutually beneficial for both parties. And, even in just the last five years since Congress last reauthorized the distant-signal license, competition among MVPDs has increased tremendously. In 2014, for example, many OVDs were already offering a variety of video services online, but now they have begun offering linear streams of OTA broadcast and other popular network programming in a format and pricing structure that is almost indistinguishable from incumbent MVPD services. These OVDs—referred to as virtual MVPDs or vMVPDs—are a true substitute and competitor for incumbent cable, telephone and satellite MVPDs, especially as they are backed by some of the most powerful companies in the video marketplace (e.g., AT&T TV Now, owned by AT&T; Sling TV, owned by Dish; Hulu TV, owned by Disney; YouTube TV, owned by Google; and PlayStation Vue, owned by Sony). With so many vibrant and innovative companies now competing at the distribution layer, distorting the video marketplace by subsidizing one type of MVPD over others is simply no longer sensible.

Potential Loophole for OVDs

Another recent development among OVDs may also show how the extent to which our laws are outdated. Launched in early 2018, a nonprofit organization named Locast began offering an OVD service in New York City that retransmitted

41. See, e.g., Edward Carlson, "Cutting the Cord: NTIA Data Show Shift to Streaming Video as Consumers Drop Pay-TV," National Telecommunications and Information Administration, May 21, 2019. http://bit.ly/2XsfH5D.

42. 17 U.S.C. § 119; 47 U.S.C. § 325(b)(2)(B)–(C).

43. See, e.g., Michael Balderston, "Satellite License Denies Access to Local Content, Per Rep. Golden," *TV Technology*, May 13, 2019. http://bit.ly/2UmH949.

44. 17 U.S.C. § 119(b)–(c).

45. 102 Stat. 3949 (Nov. 16, 1988).

46. Satellite Home Viewer Act of 1994, 108 Stat. 3477 (Oct. 18, 1994); Satellite Home Viewer Improvement Act of 1999, 113 Stat. 1536 (Nov. 29, 1999); Satellite Home Viewer Extension and Reauthorization Act of 2004, 118 Stat. 3393 (Dec. 8, 2004); Satellite Television Extension and Localism Act of 2010, 124 Stat. 1218 (May 27, 2010); STELA Reauthorization Act of 2014, 128 Stat. 2059 (Dec. 4, 2014).

OTA broadcast signals without the broadcasters' permission to consumers in the local market via an app or web browser entirely free of charge.[47] And since then, Locast has expanded operations into twelve other markets, including major cities like Los Angeles, Chicago and Denver.[48]

At first glance, Locast's service may look at lot like Aereo, another service that retransmitted local OTA broadcast signals via the Internet without the broadcasters' permission, but which went defunct after the Supreme Court ruled that it was violating the broadcasters' copyrights.[49] However, the Copyright Act provides that retransmission consent is not required if:

> the secondary transmission is not made by a cable system but is made by a governmental body, or other nonprofit organization, without any purpose of direct or indirect commercial advantage, and without charge to the recipients of the secondary transmission other than assessments necessary to defray the actual and reasonable costs of maintaining and operating the secondary transmission service.[50]

Locast has designed its service to fit within that exception, although OTA broadcasters recently filed a lawsuit to challenge its operation.[51] If Locast's operation were judged under the general "fair use" factors,[52] it may constitute infringement—for even though it is offered at no cost,[53] it could still have an adverse impact on the value of OTA broadcast signals in the video marketplace[54]—but it will not be. Locast's operation will instead be judged under the specific provisions for retransmission of OTA broadcast signals, which means it may survive where Aereo did not. If it does, the effect Locast may have on the video marketplace could be disruptive, particularly in an age wherein consumer data and targeted advertising can potentially generate more revenue than subscription fees. Whether Locast will go the way of Aereo or survive judicial review, the modern video marketplace could change dramatically based on one small exception in the Copyright Act. If that exception turns into a loophole for OVDs to exploit, and if that exploitation harms the video marketplace, it may represent another way in which our laws are in need of revision.

UPDATING OUR LAWS FOR THE MODERN VIDEO MARKETPLACE

Given the ways in which video marketplace laws are outdated, the question for Congress is how and when to update them. The House[55] and Senate[56] both held hearings on the matter in early June but, at this point, it is still unclear whether any legislative action will be taken this year. However, there has been one noteworthy video reform bill introduced in the House: the Modern Television Act of 2019.[57]

Introduced by Rep. Steve Scalise (R-La.) and co-sponsored by Rep. Anna Eshoo (D-Calif.), the bill is noteworthy not only for its scope, but also for its bipartisan support among two key figures on the Energy and Commerce Committee. Accordingly, this section analyzes the bill and offers suggestions for additional changes Congress should consider

Analyzing the Modern Television Act of 2019

Representatives Scalise and Eshoo have been actively considering updates to our video laws for years, so it is no surprise to see them offering legislative proposals in this area once again. However, it is somewhat surprising to see them co-sponsoring the same piece of legislation, given that they introduced separate bills in 2013—Rep. Scalise's Next Generation Television Marketplace Act[58] and Rep. Eshoo's Video CHOICE Act[59]—that were significantly different from one another. But, with the Modern Television Act of 2019, they appear to have reached a compromise that both can live with. Here is what it would do.

First, the bill would eliminate several provisions that are currently due to expire in 2020. These include a prohibition on OTA broadcasters striking exclusive carriage deals with MVPDs,[60] a requirement that OTA broadcasters and MVPDs both negotiate carriage deals "in good faith"[61] and a prohibition on multiple independent OTA broadcasters coordinating with each other (i.e., colluding) during carriage negotiations.[62] The bill would then replace those latter two provisions with permanent ones, prohibiting collusion during carriage negotiations[63] and requiring all parties to negoti-

47. See, e.g., John Eggerton, "Nonprofit Launches NY TV Station Streaming Service," *Broadcasting & Cable*, Jan. 11, 2018. http://bit.ly/2ntJ0aM.

48. "About," Locast, accessed Sept. 26, 2019. http://locast.org/about.

49. ABC v. *Aereo*, 134 S.Ct. 2498 (2014).

50. 17 U.S.C. § 111(a)(5).

51. See, e.g., Eriq Gardner, "ABC, CBS, Fox and NBC Sue Over Locast, a Free Streaming App," *Hollywood Reporter*, July 31, 2019. http://bit.ly/34ho47Y.

52. 17 U.S.C. § 107.

53. 17 U.S.C. § 107(1).

54. 17 U.S.C. § 107(4).

55. House Committee on Energy and Commerce, "STELAR Review: Protecting Consumers in an Evolving Media Marketplace," June 4, 2019. http://bit.ly/2wAZz62.

56. Senate Committee on Commerce, Science, and Transportation, "The State of the Television and Video Marketplace," June 5, 2019. http://bit.ly/2XrVwog.

57. H.R. 3994, 116th Cong. (introduced July 25, 2019). http://bit.ly/34hO0jR.

58. H.R. 3720, 113th Cong. (introduced Dec. 12, 2013). http://bit.ly/2UqHHWp.

59. H.R. 3719, 113th Cong. (introduced Dec. 12, 2013). http://bit.ly/34jQoGE.

60. 47 U.S.C. § 325(b)(3)(C)(ii).

61. 47 U.S.C. § 325(b)(3)(C)(ii)–(iii).

62. 47 U.S.C. § 325(b)(3)(C)(iv).

63. To be codified at 47 U.S.C. § 325(f)(1)(A)(ii).

ate carriage deals "in good faith."[64] Helpfully, the bill would also clarify the meaning of the latter provision by offering several examples of conduct that would, and would not, violate that good-faith requirement.[65]

None of that is especially noteworthy or controversial, but other provisions of the bill are more sweeping in their changes. For example, it would direct the FCC to repeal several of its existing rules, regarding things like territorial exclusivity and network non-duplication. The bill would also establish a new interim carriage requirement that OTA broadcasters and MVPDs must adhere to during negotiations, which would prevent signal blackouts and require continued carriage of OTA broadcast signals by MVPDs for up to sixty days after a prior carriage deal expires.[66]

Beyond interim carriage, the entire process of negotiating carriage deals would change significantly. The bill would repeal the retransmission consent regime for wireline MVPDs[67] and satellite MVPDs,[68] as well as the distant-signal license,[69] the FCC's process for certifying MVPDs[70] and a handful of other minor provisions.[71] It would then incorporate satellite and wireline MVPDs into a new regime governing marketplace agreements for signal carriage.[72] Under this regime, OTA broadcasters and MVPDs would be forced into binding arbitration if they cannot reach a carriage agreement within sixty days of a prior deal's expiration,[73] if all parties agree to declare an impasse[74] or if the FCC finds that one or more party has violated the good-faith requirements.[75] This arbitration process would follow the same model used by the FCC following the Comcast-NBC Universal merger in 2011—sometimes referred to as baseball-style arbitration—wherein both parties submit proposed bids to the arbitrator who then must pick one of those two bids without modification.[76]

The remainder of the bill comprises mainly technical fixes and conforming edits, including updates to the FCC's quadrennial reports on the communications marketplace and an effective date of 42 months following enactment. Thus, the core features of the bill are the elimination of outdated satellite provisions, the establishment of regulatory parity among MVPDs, and a replacement of the old retransmission-consent regime with a new one that includes interim carriage and mandatory arbitration. These changes would surely be welcomed by some participants in the video marketplace, but likely opposed by others. Most notably, the National Association of Broadcasters was quick to voice its displeasure with the bill,[77] suggesting that OTA broadcasters would be getting the short end of the stick if the Scalise/Eshoo bill were to pass in its current form. Given their important role in the video marketplace and the slim likelihood of passing sweeping video reform without support from all key stakeholders, it is worth considering whether additional changes could be made to garner their support as well.

Additional Changes to Consider

The Scalise/Eshoo bill would change many things, including by amending some of the core foundations of the video marketplace and clearing away much of the statutory and regulatory deadwood that has accumulated over the years. However, there are other outdated laws that it fails to address. Additional changes that address them could help boost support for legislative reform.

For example, while the bill removes some of the outdated antitrust restrictions governing OTA broadcasters, such as the prohibition on exclusive carriage deals, it does not address the egregiously outdated ownership restrictions. As discussed above, it no longer makes sense to subject OTA broadcasters to heightened ownership restrictions when competing participants in the video marketplace are subject only to general antitrust law. So, eliminating—or at least relaxing—those restrictions could be both worthwhile and a way to garner further support for legislative reform.

Addressing the potential loophole for OVDs, also discussed above, could be another simple way to boost support among OTA broadcasters. However, striking a fair balance between all parties would be critical for the passage of meaningful video reform, and with these suggested changes on top of elimination of satellite MVPDs' distant-signal license, there may be other reforms that could also be included to secure support from MVPDs. For example, the Scalise/Eshoo bill would leave the existing "must carry" regime in place, which forces MVPDs to carry PEG broadcasters' video content and include it in their service offerings regardless of whether

64. To be codified at 47 U.S.C. § 325(f)(1)(A)(i).

65. To be codified at 47 U.S.C. § 325(f)(1)(B).

66. To be codified at 47 U.S.C. § 325(f)(2).

67. 47 U.S.C. § 325(b).

68. 47 U.S.C. § 325(e).

69. 47 U.S.C. § 339.

70. 47 U.S.C. § 342.

71. 47 U.S.C. §§ 340–42, 532, 612.

72. To be codified at 47 U.S.C. § 325(f).

73. To be codified at 47 U.S.C. § 325(g)(1)(A)(i)(III).

74. To be codified at 47 U.S.C. § 325(g)(1)(A)(i)(I).

75. To be codified at 47 U.S.C. § 325(g)(1)(A)(i)(II).

76. To be codified at 47 U.S.C. § 325(g)(1)(A)(ii).

77. See Dennis Wharton, "NAB Statement on Introduction of Retransmission Consent Legislation," National Association of Broadcasters, July 25, 2019. http://bit.ly/34imvGY.

they want it or not.[78] This compels MVPDs to carry the speech of others against their wishes, a provision that was only narrowly upheld by the Supreme Court when MVPDs argued that it violated their First Amendment rights.[79] These must-carry provisions were deemed to be content-neutral and were therefore subjected to only intermediate scrutiny by the courts, which requires that the provisions further important governmental interests and do not burden substantially more speech than necessary to do so.[80] These provisions were upheld by a slim 5-to-4 margin in 1997,[81] but they may be struck down upon further review given the significant changes the marketplace has experienced during the past two decades—most notably, the rise of OVDs and the ability for almost anyone, including PEG communities, to reach potential viewers over the Internet at little or no charge. Thus, Congress should consider limiting or even repealing the must-carry regime as part of its efforts.

CONCLUSION

The modern video marketplace is governed by a wide array of laws and regulations, some recent and some quite old. Many of these remain relevant and prudent today, but many others have become outdated and counterproductive. And while the FCC and the Copyright Office have some leeway to update and amend them over time, it will take an act of Congress to truly modernize them in a lasting and meaningful way.

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78. To be codified at 47 U.S.C. § 325(f)(5).

79. *Turner Broadcasting System v. FCC*, 520 U.S. 180 (1997).

80. Ibid., p. 185.

81. Ibid.