Summary

I am generally in favor of the Commission’s attempts to define some Internet-based video distributors as multichannel video distributors (MVPDs) for the purpose of applying the Commission’s existing regulatory scheme. I propose a third interpretation of the term “channels of video programming” to limit the scope of the Commission’s rules to entities engaged in program redistribution comparable to traditional MVPDs.

Internet-based MVPDs allow for a greater degree of competition than has been possible with more closed systems, such as exist today; for that reason, while I generally support the application of the existing MVPD privileges and obligations to entities that function similarly to existing MVPDs, I comment upon several areas in which Internet-based MVPDs may not require such a high burden.

The rights of content producers when distributing on the Internet are still being developed and clarified. There is an argument that the Copyright Act permits redistribution of broadcast programming by Internet-based MVPDs that operate similarly to other MVPDs. At the current state of the law, there does not seem to be room for the Commission, or anyone else, to compel a non-broadcast network to bargain for Internet redistribution rights, nor to compel a content owner to bargain away those rights. However, when those rights are in play by a cable affiliate, that concern appears to be alleviated and the power to compel fair dealing with the cable system’s competitors becomes useful.

Finally, I generally agree with the Commission’s stance on handling over-the-top services when they are both produced and carried by a cable system. These services, provided that they are kept independent from the more traditional closed cable service, should be treated as MVPD service rather than cable service; if not kept independent, though, they should be treated as an extension of cable service and regulated accordingly.
Introduction

I appreciate the opportunity to comment on the Commission’s proposed rules for Multichannel Video Programming Distributors, especially as I am working to establish a new entrant to the industry right now. This entrant, by the name of the Blueriddle Cooperative Broadcasting Association (“Blueriddle”), intends to operate on a Subscription Linear business model as defined by the Commission, by transmitting a continuous, pre-scheduled stream of programming. The overall intent of opening Blueriddle will be to open a channel that operates on a cooperative basis: its members producing the bulk of the programming for distribution to the cooperative’s members, in return for a substantial share of the subscription/membership fees.

While Blueriddle’s current business model provides for only one stream, placing it squarely outside of the Commission’s definition of a Multichannel Video Programming Distributor, there is no technical, practical, or logical reason to limit its operation to that. Indeed, the trend in the industry has been for a single distributor to add extra streams of programming: the Commission itself cites Disney’s hypothetical offering of Disney Channel, Disney XD, and Disney Junior as an example; there are also several Discovery Channel branches available on any cable system of reasonable size, not to mention the practice of many over-the-air broadcasters of exploiting the multiple streams opened to them by the digital TV conversion of several years ago (for example, the MeTV network, which includes MeToo, This, and perhaps one or two others). Therefore, the Commission’s rulemaking will have a definite effect on the initiation and development of Blueriddle’s business.

As a general prospect, the use of the Internet to deliver video programming represents a tremendous shift in the business of broadcasting that is not well handled by the existing regulatory schemes. Historically, broadcasting was a very geographically constrained business: constrained first by the range of the transmitter, and later, as cable television rose in prominence, by the length over which cables could be laid. It was further constrained by limits in the available channels: in the case of over-the-air broadcasting, the constraint was in the size and allocation of the RF spectrum, and in the case of cable television, the constraint was in the “natural monopoly” that affects any capital-intensive “wires” business. (It is worth noting that, even with the regulatory opening of cable television to competition, these economic obstacles remain, particularly in an environment in which a new entrant must compete against DBS or LEC-delivered services.) These factors combined to limit the reach of any individual broadcaster, in the first instance, and consumer choice, in the second instance. Even with the rise in satellite broadcasting, which overcame the geographical limits, the limits of the RF spectrum remained. It was in such an environment that the Commission’s regulatory authority was established, and where it plays the most effective role. It would seem to be an unassailable position that, where the market is so tightly constrained that the normal interplay of supplier diversity and consumer

Notice, at ¶ 13.

Blueriddle has not yet been organized in any sense. To the extent that an unorganized and embryonic business organization may be permitted to comment in a Commission proceeding, these comments may be taken as those of Blueriddle; for all other purposes, they are my own.

Notice, at ¶ 26.
demand is upset, some degree of regulation is necessary in order to keep supply and demand balanced.

This regulation, in the context of broadcasting, has historically taken two forms. First, the FCC was assigned the task of making the limited RF spectrum useful by allocating it among potential broadcasters. In this task, it was also assigned the role of policing those assignments in order to ensure that the public interest was being well served, that the miniature monopolies that resulted were not harmful to the public, and that public resources were being used wisely. As broadcasting shifted more and more to private facilities, the justification for policing the broadcasters declined somewhat, as there were few or no public resources involved. It never disappeared, however, since each broadcaster (and now, cable company) was still subject to the same constraints mentioned above.4

Internet broadcasting, however, is much less subject to these constraints. The Internet is ubiquitous and universal: it reaches to all points, and carries data from anyone to anyone, with no inherent restrictions. An Internet broadcaster faces no geographic restrictions: an Internet broadcast does not become weak and unusable with distance, but can be received as clearly half a world away as it can half a block away.5 At the same time, an Internet broadcaster is not able to dominate the channel in the way that an over-the-air broadcaster can, and has no cables of its own to dominate a geographic market in the way that a cable television provider can. Internet broadcasting, to date, has been dominated primarily by market forces, rather than regulation, and it seems to be finding its way reasonably well. It is for this reason that I am generally opposed to adding regulation to the business of Internet broadcasting. At the least, I would suggest that it’s necessary to let the business mature and find its level, in order that the places needing regulatory control or protection be found rather than assumed to exist. This is the most certain and efficient way to ensure that the Commission’s goals of preserving competition, protecting consumers, and promoting public safety are met.

While it is well and good for the Commission to want to allow Internet MVPDs to get access to broadcast programming or other channels, I would propose that not every Internet MVPD wants or needs that access (including Blueriddle), and that, in the absence of those privileges, imposing the responsibilities of an MVPD is more likely to hurt competition by discouraging entry to the market than it is to help.

**Definition of MVPD**

It is clear from the outset that the Communications Act is handicapped by a circular definition of “channel”: “a portion of the electromagnetic frequency spectrum … which is

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4 Vestiges of this shift may be found in the Commission’s rules on rate regulation for cable television, which is only permitted for systems not subject to effective competition. 47 C.F.R. §76.905(a).

5 I omit any discussion of local or national restrictions on Internet access, as affect the citizens of North Korea or Turkey. While this matter raises some interesting problems of its own, it isn’t relevant to the present discussion.
capable of delivering a television channel ….” While the Commission has furnished a definition of “television channel” that mitigates the circularity slightly, it does so by defining a television channel in terms of a portion of the electromagnetic frequency spectrum (in this case, 6 MHz wide). This hardly seems clear, particularly in this era of digital television where a single channel (i.e., program stream) takes up less than one 6 MHz band. So, it does seem reasonable to update the definitions to reflect more recent technical developments.

Nevertheless, I cannot concur in the Commission’s proposal that all Internet-based distributors of multiple video streams should be defined as MVPDs. The proposed definition is too broad, and, besides sweeping into its reach program providers that have no need nor desire for MVPD status, it would tend to reach providers that do not conform to the business model that the MVPD definition was apparently intended to reach originally. The business model of Blueriddle, for one, does not include collecting and relaying programs from other broadcasters (over-the-air or otherwise). It is, instead, to encourage the production of new programs by its members and to present these programs to its members. Rules that govern access to broadcast programming, then, would be of little use to Blueriddle.

The Commission’s proposed definition of “channels of video programming” to mean any streams of linear video programming, although unexceptional in itself, becomes troublesome when this term is then merged into the Act’s definition of MVPD. That definition then becomes, an entity that “makes available for purchase, by subscribers or customers, multiple streams of linear video programming.” In the case of an entity that retransmits other streams, rather than originating them, this seems reasonable. But, take the case of ESPN or CNN, which the Commission cites as examples of channels for interpreting the Act. ESPN offers nine primary channels (plus regional and overseas options); CNN offers CNN itself, plus CNN Airport and HLN (plus overseas options). Both offer their programming for sale, albeit generally to intermediaries such as cable and DBS providers rather than end users. By the Commission’s proposed definition, then, both ESPN and CNN would qualify as MVPDs if they were to begin to sell their programming to end users.

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6 Notice, at ¶ 9.
7 47 C.F.R. §73.681.
8 By the Commission’s rule, a digital over-the-air broadcaster’s program streams (which are, in fact, multiplexed within the broadcaster’s assigned 6 MHz channel) would not themselves qualify as “television channels” for purposes of this rule. The effect of this anachronism I leave for future discussion, but arguably a single program stream, even one originally broadcast by an over-the-air licensee, would not qualify for many of the MVPD regulations in their original context. This seems to contradict the intent of the Act.
9 Notice, at ¶¶ 17 and 24, respectively.
10 http://www.espncms.com/TV/ESPN-Networks (visited Jan. 27, 2015, as were all other sites listed).
Even allowing that neither ESPN nor CNN would qualify as MVPDs under the proposed
definition, on the basis that neither sells its programming to end users, there are other examples
to select from. HBO has made its living by selling its service to end subscribers. Again, this is
done through intermediaries, but those intermediaries in turn typically charge their subscribers
for access to HBO. HBO operates two channels of linear pay-TV programming: HBO, and
Cinemax\footnote{http://www.hbo.com/#/about/index.html}. By the Commission’s proposed definition, were HBO to begin selling its program-
ming directly to end subscribers, rather than to cable and DBS providers, it would be redefined
as an MVPD, and subjected to the MVPD obligations.

This does not seem to be consistent with the purposes of the Act. Certainly, if the purpose
of the Act were to regulate the operations of networks such as ESPN, CNN, and HBO, there has
been plenty of opportunity for it to be applied to these networks: ESPN has been in operation
applicability to multichannel systems that sell to subscribers or customers is intended to exclude
networks such as these\footnote{The Act does not, in fact, limit its applicability to \textit{end} users, but only to entities that make their
programming available to subscribers. Arguably, cable systems and DBS operators could qualify
as subscribers for the Act’s purposes. I do not think this was the intent, however.}, arguing against Congress’s intent to so apply it. It is not clear, however,
why the Act should suddenly become applicable to these networks because they elect to switch
from a wholesale to a retail model of operation. Certainly, preserving their access to broadcast
programming is not important or relevant to their businesses.

Indeed, the effect of such an interpretation seems likely to stifle competition, rather than
encourage it. As the Commission properly notes, television is increasingly moving to Internet-
based platforms, and there doesn’t seem to be any natural reason that the existing “cable
networks” would not follow that trend. It is axiomatic that no business willingly puts itself under
the burden of regulation unless that brings benefits outweighing the burden. Therefore, it seems
unlikely that the incumbent networks would want to move their operations toward an Internet-
based, direct-sales model, if that model places them under the Commission’s definition of an
MVPD with its corresponding obligations.

This brings up another concern. One way to move to an Internet-based model (or to begin
service initially on an Internet-based model, for that matter) without falling afoul of the
Commission’s proposed rule would be to omit the “makes available for purchase” element. In
other words, an Internet broadcaster may bypass the MVPD rules by finding a business model
that does not require it to sell service directly to the end subscriber. The Commission directly
recognizes this situation as outside the scope of the MVPD rules when it discusses the Ad-based

\footnote{Note that HBO has already dipped into this market, albeit as a “Subscription On-Demand” service. http://www.hbogo.com; Notice, at ¶ 13.}
Linear model, and why it does not fall within the statutory definition of an MVPD\(^{17}\). What is not clear on the surface is why a provider of programming would fall under the definition of MVPD by collecting a subscription fee from its customers, but would not by funding its operations through advertising. There cannot be a difference between the same service’s need for broadcast programming access or other benefits of MVPD designation, or the public need for the obligations that attach to MVPD designation, simply on the basis that the service either runs advertising or not. Indeed, many cable and DBS systems make a practice of inserting advertising into the channels that they carry, either for the sake of self-promotion, or as an additional revenue source.

The Transmission Path interpretation, though it evades some of these concerns, brings concerns of its own. The Commission highlights one of these in suggesting that an entity’s status would change depending on how its content was received\(^{18}\). Another is in the breadth of the Commission’s proposal. If a video provider does not control some part of its transmission path, then it would not qualify as an MVPD. But, under what practical circumstance would this be the case? Any legally operating program distributor must, at a minimum, control the server that transmits its programming out to its subscribers, and likely would control the cable from that server into its network interface equipment as well. The one exception would be an entirely peer-to-peer based system, and while there have been some arrangements of this sort in the past\(^{19}\), it seems such a special case that the Commission probably does not mean to exclude it specifically. Thus, the proposed Transmission Path interpretation seems to give no more clarity to the situation, aside from any of its other faults.

However, the intent of the Commission in proposing the Transmission Path interpretation, and the intent of the Media Bureau in applying something like it in the Sky Angel case, may lead to a third interpretation that is closer still to the Act’s intent, without the breadth that accompanies the proposed Linear Programming interpretation. Given that the purpose of the Act was to regulate principally cable-television and cable-like enterprises (such as DBS, and so on), it seems like the interpretation that is needed is one that adapts the Act to services like Sky Angel and Aereo, without bringing into its sweep services such as ESPN, CNN, HBO, or BlueRiddle. The common element between Sky Angel and Aereo, and incumbent cable and satellite providers, is that they all are in the business of retransmitting others’ programming, rather than originating their own. Likewise, ESPN, CNN, and HBO originate their own programming; they do not regularly make others’ programming available, or in any case, that is not their primary business.

I propose that the Commission interpret the term “channels of video programming,” for the purpose of the MVPD rule, to mean prescheduled streams of video programming that are scheduled by an entity other than the distributor. I further propose that the term “makes available for purchase, by subscribers or customers” should be interpreted to encompass the independent

\(^{17}\) Notice, at ¶ 14.

\(^{18}\) Notice, at ¶ 31.

\(^{19}\) For example, the series *Pioneer One* (http://en.wikipedia.org/wiki/Pioneer_One) has been distributed chiefly by BitTorrent. Not being an example of linear subscription programming, however, this is of limited relevance.
redistribution of programming streams only, rather than the origination of programming. This interpretation takes a middle road between the Commission’s proposed interpretations: it preserves the “linear programming” elements of the “Linear Programming Interpretation,” and it incorporates some of the intent behind the “Transmission Path Interpretation,” but without the potential overreach that I have identified above.

As applied to existing MVPDs, the proposed interpretation changes little. Cable operators, DBS operators, and like entities, all are in the business of redistributing entire program streams that come from other providers, such as broadcast television stations and cable networks. These streams are scheduled by those providers, not by the MVPDs. New entrants following a similar model, regardless of the means by which the programs are delivered, would likewise fall under this definition. This would make the privileges of MVPD status available to them, and likewise would place on them the burdens that come with that status. Entrants furnishing their own programming, on the other hand, whether because it is all original (such as ESPN or CNN) or because they schedule it themselves (such as HBO or Blueriddle) would fall outside of this definition: the streams are not scheduled by someone other than the distributor, and the entity is originating programming or streams.

At the same time, this definition does not introduce the sort of confusion that the Commission describes as flowing from the Transmission Path Interpretation. The facilities used to deliver content are not relevant to this interpretation, and therefore the situation described by the Commission, in which a subscriber travels from home to a coffee shop, potentially changing the video provider’s status in the process, is not present. Instead, the video provider is an MVPD in the subscriber’s home, and remains so even when the subscriber travels to the coffee shop. Contrariwise, if the subscriber were directly subscribed to ESPN, and were watching it in the same situations, ESPN would not be an MVPD in either case. Finally, in the likely future case of a service that retransmits non-broadcast and Internet-originated program streams, such a service would qualify as an MVPD and be subject to the MVPD rules. This would be directly analogous to the current situation between cable networks and cable or satellite providers, and would therefore be entirely consistent with consumer expectations for such a service.

Further, such a definition eliminates the need for the Commission to consider making the MVPD classification optional, as it describes in the Notice. While this may be a good alternative at this state of the art, while the business models establish themselves, it does open the way for evasion or misuse of the MVPD rules. The proposed definition effectively allows entities to choose whether to follow the MVPD rules or not by selecting their business model accordingly. It is also sufficiently flexible to cover variations in the precise business model selected.

One matter that the proposed definition does not address adequately has to do with the case of an Ad-based Linear Programming model. The traditional cable television model redistributes existing programs to paying subscribers, complete with any advertisements they may contain (which do not normally pay the distributor, but the originator). There is little room in this model for distributor-originated advertising, except as an incidental matter: the chief

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20 Notice, at ¶ 31.

21 Notice, at ¶ 37.
source of revenue is from subscriber fees. Today, however, it is completely feasible (and even expected) to embed a video frame into a Web page containing the distributor’s advertisements. In this situation, it is completely plausible that revenue from the distributor’s advertising would be enough to support the service, without customer subscriptions. This sort of a service could easily be an MVPD in all other respects but the fact that the programming is not made available for purchase. There does not seem to be any reasonable interpretation of the Act that would define this sort of arrangement as “making available for purchase” streams of programming; therefore, such services would be statutorily ineligible for MVPD status. Whether this should be the case or not is a matter for legislative consideration rather than Commission rulemaking; the scenario is worthy of note, however, as potentially allowing a distributor to evade MVPD obligations, a concern raised by the Commission in its Notice.22

The Commission requests comment on whether Congress intended to promote only facilities-based competition, and cites for that proposition a passage from the Conference Report accompanying the Cable Act: that the “conferees intend that the Commission shall encourage arrangements which promote the development of new technologies providing facilities-based competition to cable and extending programming to areas not served by cable.”23 The Commission should note the second half of the quoted passage, however, regarding “extending programming to areas not served by cable.” Clearly, an area not served by cable is not prime for facilities-based competition, as there are no existing facilities with which to compete. Reading the passage as a whole, it seems likely that the term “facilities-based” is not being used in precisely the manner that the Commission reads it to mean. Recall that the state of the art in 1992 included primarily cable television and similar technology. The popularization of the Internet was still several years in the future, and the widespread deployment of broadband Internet several more years beyond that. It seems likely that the committee’s reference to “facilities-based competition” was meant to focus the Commission’s attention on systems of television distribution that used private facilities, rather than over-the-air television broadcasting. It was not intended to limit the applicability of the Act to cable-to-cable competition, for example; the committee’s concern with the “development of new technologies” would otherwise be meaningless, since cable television (at its state in 1992) hardly qualified as a new technology itself. I would propose that, by adapting its rules to cover Internet-based services that act like traditional cable television systems, the Commission is furthering Congressional intent rather than thwarting it.

Privileges and Obligations of Internet MVPDs

The Commission next goes on to consider some of the specific privileges and obligations of MVPDs as they would apply to Internet-based distributors. As I have said above, as a general prospect, the entities that wish to operate like cable and satellite providers of today likely would benefit most from the privileges that come with MVPD status; the ones that do not, likely would

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22 Notice, at ¶ 35.

23 Notice, at ¶ 30.
not. It is for this reason that I propose a somewhat narrower definition of MVPD above than that proposed by the Commission.

In general, the existing MVPD privileges and obligations seem to be designed on the theories that (a) an incumbent cable television provider has enough market power to block incoming competitors, particularly if it is able to convince both the local broadcasters and national cable networks not to deal with the upstarts, who in turn need that programming in order to compete; and (b) that any cable provider, once established, holds its audience semi-captive: that is, a cable customer is most likely to get all of its television programming through that provider, rather than picking and choosing among several providers at a time. The first theory has powerful effect, even—perhaps especially—with the rise of Internet-based systems. The second, on the other hand, becomes less and less relevant with the move to Internet-based systems. This shift should inform the Commission’s application of the MVPD rules to Internet video distributors.

Again as a general prospect, the Blueriddle Cooperative would more likely be harmed by the MVPD obligations than helped by the MVPD privileges, as its business model is now designed. I discuss some of the particular reasons for this below. However, because it does not need access to existing broadcast and cable programming for its operations, the rules dealing with the first theory mentioned above are not particularly relevant. And, because it does not exert any exclusive dominance over its subscribers—or, put another way, because it does not hold a captive audience, but is one provider out of many on the Internet—the rules dealing with the second theory above are also not relevant.

Program Access

To begin with, the program access privilege, which, in summary, prohibits a cable operator from using its market power to gain exclusive access to programming. For the Internet-based MVPD market to flourish, this would seem to be essential. There are several networks that are nearly ubiquitous on existing distribution systems (e.g., Discovery Channel, ESPN, and CNN), and it therefore seems to be essential that an Internet-based MVPD would likewise have access to these in order to construct a reasonably marketable package of programming. It does not seem to be a reasonable use of market power for an incumbent cable operator to pick and choose which MVPDs would be permitted to enter the market, and which should be excluded; therefore, I would support application of this rule to Internet-based distributors. Discovery’s concerns are well-founded, but also reflect the fundamental reality of an open market: that when the supply increases, the prices decrease. The compensating factor, however, is that, though wide availability of a given network may tend to decrease its value to any given incumbent MVPD, it simultaneously increases the need to carry that network in order for a given MVPD to be competitive. Far from diminishing the market power of a popular network, this would seem to maintain or even increase it, as the focus moves from using a given network to attract customers toward not giving it up in order to keep them. In other words, and with all due respect to Discovery, no MVPD today will attract customers away from another by advertising that it has

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24 Notice at ¶ 41 (footnote 114), citing Discovery Comments at 13.
The Discovery Channel, because so does everyone else; that’s nothing remarkable. But for the same reason, an MVPD certainly will fail to attract them by not having Discovery Channel.\textsuperscript{25}

Of course, in an Internet-based distributor’s world, there is little to stop a given customer from subscribing to multiple MVPDs and picking up multiple different packages of channels. One well-known virtue of the Internet is its open framework, and this means that it would no longer be necessary (as a general premise, anyway) to have installed equipment that locks a customer into one given distributor. Rather, it would be perfectly possible for an MVPD to offer only a partial channel lineup, with the idea that a given customer would subscribe to several of these to make up the desired program package. By using commonly-available Internet protocols and methods, the same subscriber equipment and broadband connection could allow any Internet-based MVPD to reach any subscriber at any time. In this model, the need for a given MVPD to pick up the ubiquitous channels becomes less: for example, an MVPD that sells itself as a children’s network would have little need to include CNN, while one that sells itself as the news addict’s network would likely not include Nickelodeon. This model does not diminish the need for each of these to have access to its relevant cable networks in order to thrive, but it probably would tend to decrease the number of new MVPDs demanding access to a given network’s programming, and this would tend to reduce the concerns raised by Discovery.

In this regard, Cablevision is correct in its contention that existing cable operators would find it difficult to match the services and flexibility offered by Internet-based providers.\textsuperscript{26} Cablevision fails to note that a part of this stems from the cable provider’s historical ability to exclude alternate distributors from their television system. It is safe to say that few, if any, cable subscribers take service from multiple systems at one time, even in the areas where cable competition exists, and likewise for DBS and other existing systems. This means that cable operators have historically sold their services on the basis of providing a whole package of channels at once. For the potential subscriber, this is important, because while subscribing to cable brings access to many channels, as a practical matter it also closes access to competing options (including, in most cases, over-the-air reception). In a world where stacking several providers is feasible, the need for the consumer to obtain a whole package of channels at once diminishes: what is missing from the first provider’s package may turn up in the second, or third, or fiftieth. I suggest that this represents progress in bringing competition to the world of television distribution. That current business practices do not adapt themselves well to this is no

\textsuperscript{25} This factor has raised the profile of several contract disputes between MVPDs and networks. For example, the recent dispute between Fox News and Dish Network drew many thousands of complaints after the former was dropped from the latter. See Joyella, Mark, “Fox News Fans Send 36,000 Emails, Make 32,000 Calls over Dish—Just on Sunday,” TVNewser, Dec. 22, 2014, http://www.adweek.com/tvnewser/fox-news-fans-send-36000-emails-make-32000-calls-over-dish-just-on-sunday/250739?red=tn.

\textsuperscript{26} Notice at ¶ 42 (footnote 119), citing Cablevision Comments at 2.
argument at all against it: the times change, and we all must change with them. That existing rules may prevent a cable operator from competing with Internet MVPDs is a more relevant concern, and I would recommend that the Commission, in connection with the rulemaking at hand, give careful attention to any rules that may turn out to give Internet-based MVPDs unnatural market strength compared to incumbent MVPDs.

Retransmission Consent

Many of the same points can be made with equal force to the topic of retransmission consent. The nature of the privilege is roughly the same, though the nature of the players is different, and the effect on those Internet-based distributors that act like traditional MVPDs is about the same as it is for national cable networks. The major differences come from the very definite geographic reach of a broadcast station. There is a definite market to be made in carrying a broadcast station outside of its licensed area. However, there are definite content licensing concerns that arise from exploiting this market, as the Commission rightly recognizes.

Blueriddle, for its part, gains nothing from the retransmission consent rules, just as it gains nothing from the program access privilege. Our goal is not to act as a retransmitter of broadcast programming. At the most, we might transmit a particular program, rather than a whole broadcast channel. For this reason, we would benefit little from being designated an MVPD. On this basis, I would repeat my recommendation that only those distributors in the business of redistributing existing program streams should be brought under the definition of MVPD and subjected to the corresponding rules.

For those entities affected by the retransmission consent privilege, as I describe above, while there is the potential that a broadcaster would be obligated to negotiate with thousands of Internet-based distributors, a more likely development, given the non-exclusive nature of an Internet-based MVPD, would be that a few distributors would take up the business of relaying a

27 To the extent that Cablevision may be making a subtle complaint against the practice of bundling channels at the wholesale level, I agree that the practice would tend to harm cable companies and the like compared to a hypothetical Internet-based MVPD that could obtain individual channels rather than a (presumably pricier) package. It is not clear that an Internet-based MVPD would be able to get individual channels, though, if the prevailing practice is to furnish them as a part of a package. On the other hand, if this does come to pass, it is arguable that Cablevision, et al., could have grounds for a program access complaint in that the Internet MVPDs were given more favorable terms than the cable providers. The question of how wholesale channel bundling affects program access for MVPDs generally is outside the scope of the Notice, though, so I leave that discussion for another day.

28 This, itself, is an incidental, general argument for imposing the obligations of traditional MVPDs on Internet-based ones. However, I refer more to other non-MVPD rules that may work to the disadvantage of cable and DBS providers, and the like, compared to Internet-based distributors: for example, those mentioned in the Notice at footnote 107. Some of these, such as the broadcast “must-carry” rules (47 U.S.C. §§ 338, 534, 535) will have continuing relevance to a system with exclusionary aspects such as a cable system but not to a non-exclusionary Internet-based provider. Others may be worthy of review and elimination in a newer and more competitive market.
given broadcaster’s signal. Granted, this may include distributors such as Aereo, who would take up the business of aggregating broadcast signals and redistributing them in bulk; but in the presence of such an entity, it seems reasonably likely that the profit to be had in imitating that model would be relatively limited, and not attractive. So, the risk of a particular broadcaster being overwhelmed by thousands of demands for retransmission consent seems limited by the realities of the market.

Aside from market forces, as the Commission points out, another hurdle faced by an Internet-based entity that chose to redistribute broadcast signals would be obtaining rights to transmit the programs within those signals. With the prevalence of syndicated programming in the broadcast world, this may not be so difficult to achieve for a large enough entity: licensing a given program once may be enough to cover all its appearances across all that entity’s channels. On the other hand, the prevalence of syndicated programming owes much to the limited reach of existing broadcasters: it’s simply necessary for a given program to be distributed to multiple broadcasters in order to build a national audience. That concern is eliminated if licensing a program to one broadcaster can, by way of that broadcaster’s retransmission through an Internet-based MVPD, reach a national audience. As discussed above regarding the consequences of licensing national networks to Internet-based distributors, a possible consequence would be a decrease in the value of syndicated programming to broadcasters. It is also possible, as discussed above, that syndicated programming would become an essential tool for a broadcaster to compete against Internet-based MVPDs, offsetting the loss in value. It is a little hard to predict at this date which way the market will go.

The more pertinent question is how to address the problem of a syndicated program that is licensed on the basis of exclusive rights in a territory. If a given program is licensed to multiple broadcasters, each on the assurance that it will have the exclusive right to transmit a program within its service area, how does this affect the ability of an Internet-based entity to import that program on a channel from a different service area? This is a question of copyright licensing, and may be out of the reach of the Commission. It seems unlikely that the Commission has the power to bar such exclusive licensing arrangements, and even if it did, there would remain a question of whether that bar would require a program to be licensed to two competing

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29 Notice, at ¶ 45.

30 It is not entirely clear from the Commission’s discussion whether, in the wake of American Broadcasting Companies, Inc. v. Aereo, Inc., the statutory licensing scheme now in place would cover both the program stream, as originated and arranged by the broadcaster, and the programs within it, assuming that it did extend to online distributors. Nothing in the Copyright Act suggests it does not, however, and Aereo did not squarely address this issue. See below, at 30.

31 No doubt, this point is responsible in part for Discovery’s complaints about the difficulty of gaining access to Internet distribution rights. Notice, at ¶ 67.

32 An interesting possible consequence of this consequence could be an increase in local programming, as broadcasters compete to differentiate themselves and to draw licensing agreements from online MVPDs. I make no claims about the probability of this outcome, and the burdens and opportunities for broadcasters accompanying it.
broadcast stations in the same area. For the moment, I would suggest that, in the absence of a statutory licensing scheme, the broadcaster’s obligation to negotiate in good faith would extend only to licensing retransmission of the stream itself, and not the third-party contents thereof. (First party contents, by which I mean content originated directly by the broadcaster, would be included in a license of the stream.) Any duty to license the content of the stream would fall on the owners of that content, but, as they are mostly outside of the reach of the Commission’s authority, it probably is necessary to refer that problem to the Copyright Office for resolution.

Program Carriage

Turning now to the specific obligations imposed on MVPDs, several of these would be directly relevant to Blueriddle if applied to its business model. The first one listed by the Commission, the program carriage rules, is particularly relevant. Blueriddle’s primary goal is to broadcast programming that is produced by its members. As a cooperative, its members would, by definition, have a financial interest in the organization, and would of course be affiliated with it as members. This would run afoul of the third prohibition listed by the Commission: that against unreasonable restraint of an unaffiliated programming vendor’s ability to compete. Further, our planned dividend policy would tend to offer a higher rate for exclusively licensed programming over that licensed on a non-exclusive basis. This policy is meant to encourage exclusive licensing, helping in the marketing of the service, while recognizing the lower impact on revenue that non-exclusive content has. This policy appears to run afoul of the second prohibition, against coercing exclusive rights from a programming vendor.

On a broader scale, if the Commission were to declare that all subscription-based linear programming services were MVPDs for purposes of the rules, similar concerns would apply to other services. ESPN, for example, if it were to open a subscription-based service, may well be exposed to complaints that it failed to offer fair terms to program vendors other than its affiliates and in-house production office. It does not seem reasonable to expose a network such as ESPN to such a liability. On the other hand, if the Commission limits the scope of its definition to redistributors, as I have proposed, the rule likewise narrows its application to more familiar grounds, and leaves ESPN, Blueriddle, and other originators out of its application.

To the extent that the Commission’s rules would cover only the sort of services that are similar to existing MVPDs, it may make sense to continue the prohibition of requiring exclusive rights or a financial interest as a condition of carriage. This would be justified more on the general basis of encouraging open competition in the market, though, rather than anything specific to the nature of Internet-based MVPDs. Although it’s not explained in the Notice, it seems likely that the purpose of the rule was to help encourage competition between MVPDs by preventing one distributor from monopolizing programming; in this way, it is the other side of the Commission’s “program access” privilege, discussed above. The two stand or fall together: if a system is forbidden to deny program access to a competitor, then that prohibition should extend

33 Notice, at ¶ 48. For the sake of argument, I assume that the cooperative’s preference for the programs created by cooperative members over those offered by non-members would be considered an unreasonable restraint.
both to the distributor improperly influencing its affiliated programmer (as discussed under the program access privilege) and to improperly influencing its unaffiliated programmers by demanding a financial interest or exclusive rights (the “program carriage” obligation).

The Commission’s query about Internet-based video programming services favoring their affiliated programming over unaffiliated programming is a gray area. At some point, an Internet service ceases to operate like a traditional MVPD and begins to operate more like a program vendor, or an originating broadcaster. Again, by defining program originators out of the scope of the MVPD rules, this point is respected and originators are unaffected. But, even in the case of a fully qualified MVPD, the need to grant equal terms to its affiliated and unaffiliated vendors is not clear. Customers have free access to any Internet-based distributor at any given time, and if one Internet-based MVPD refuses to give equitable terms to a vendor, the vendor may go to a different Internet-based MVPD and get approximately the same level of access with little difficulty. In the Internet era, it is no longer correct to assume that a given MVPD has the ability to cut a disfavored vendor off from its customers in the way that a cable or DBS provider can.

In short, then, there is a good case to be made that the first two prohibitions (financial interest, and exclusive rights) should apply with equal force to Internet-based and traditional MVPDs, since that supports the program access privilege. The affiliate discrimination rules, however, are less useful in dealing with Internet-based distributors. All three rules, moreover, are most properly applied to entities that redistribute program streams rather than to ones that originate or arrange their own.

Retransmission Consent (Revisited)

In examining the flip side of the retransmission consent issue—the view from the perspective of an Internet-based MVPD, rather than a broadcaster—it is clear that, if broadcasters continue to have an obligation to negotiate retransmission consent with Internet-based MVPDs, the converse will be true as well. This very easily could open up the need for a nationally-operated Internet-based MVPD to negotiate with many, many broadcasters. This is not surprising, and it is not particularly harmful, either: the need to negotiate content rights ought to be taken as a part of the business, unless the Commission and the Copyright Office wish to open the door to a compulsory licensing scheme for Internet-based MVPDs. As discussed above, of course, that the rights in the program stream and in the stream’s content now appear to be two separate sets of rights, often with two separate owners, would indicate that obtaining retransmission consent from the broadcaster is only a part of the puzzle.

Because of this fact, good faith in negotiation becomes more complex to evaluate. An Internet-based MVPD may well have the best of intentions in negotiating with broadcasters, but

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34 As I have said, the nature of the Internet when used for broadcasting is to allow any transmitter to reach any receiver, at any place, at any time. Therefore, it is a little confusing for the Commission to refer to an Internet-based distributor “that operate[s] on a nationwide basis” (Notice, at ¶ 51), as though there were any others. I presume that the Commission intends this primarily to mean an Internet-based distributor that wishes—or is obligated, as discussed below—to carry programming from many local broadcasters, as opposed to one that happens to be reachable from any place connected to the Internet.
no luck negotiating with the owners of their content. Does an inability to negotiate content licenses excuse the refusal to negotiate with a broadcaster who carries that content? I would suggest that it does, assuming, again, that there is no statutory licensing scheme in place to cover the situation.

This is, of course, assuming that Internet-based MVPDs will want to carry broadcast programming at all. With its complexities of licensing, it would be quite understandable for a given Internet-based MVPD to wash its hands of the matter and refuse to carry any broadcaster. The Commission should permit this for the special case of Internet-based MVPDs. In contrast to a traditional cable system, which provides nearly-exclusive service over a defined area, an Internet-based system brings neither exclusivity nor definite area. It is necessary for a cable system to be open to its local broadcasters, if only to maintain access to their programming by the cable system’s subscribers: as I have said, it is quite rare for a cable subscriber to have arrangements to receive programming over multiple systems, and so connecting to cable usually cuts off a cable subscriber’s access to over-the-air programming. The same cannot be said for Internet television subscribers, however. Since any Internet-based distributor can reach any Internet user, at any time, a broadcaster need not obtain redistribution over a particular carrier, as with cable, but may get access to the same subscribers through any given carrier.

In the case of Blueriddle, our business, as I have said, does not depend on carrying broadcast channels. Were Blueriddle to be considered an MVPD, and if it then had an obligation to negotiate in good faith with any broadcaster that approached it, our business could be expanded to an unwarranted degree, particularly because there would not seem to be a natural limit to the number of broadcasters whose service areas would be crossed by Blueriddle’s. I would not want a two- or three-channel Blueriddle service to suddenly be forced into a 300-channel monstrosity to accommodate a flood of requests for carriage by broadcasters across the nation.

I would propose an interpretation of good-faith in this context to mean that equal terms are offered for access to any broadcast slots that the Internet-based MVPD cares to open up in its system, up to the system’s capacity. If the distributor’s terms are to deny access, then that should be permissible; the business of carrying broadcasters may then fall to another distributor. Likewise, if the terms include a geographic restriction (only broadcast stations serving Birmingham, for example), that should be permissible: I suggest that regional specialization is a ripe market for Internet-based MVPDs to enter. Network affiliation may be another allowable limitation, in this specific context, and again, a likely one to develop: if CBS wishes to offer an MVPD service to its affiliates, nationally, perhaps that should be permitted. Even though this would tend not to allow a CW affiliate (for example) access to CBS’s service, I suggest that result would be wholly consistent with consumer expectations, and any harm to the CW affiliate would be slight, given the relative ease with which Internet broadcasting streams can be set up and maintained, and the ability for the consumer to switch between them at will. On the other hand, were CBS to accept its New York affiliate to its stream, but not its Detroit affiliate, that might not be acceptable under this obligation without a good reason; likewise, if the Birmingham specialist were to impose unreasonably disparate conditions on one or more Birmingham stations, that would be unacceptable.
It is true that, given the inherently national scope of Internet distribution, the simpler course for many distributors may be to negotiate for, and carry, network programming directly, rather than that of the individual broadcasters. This is particularly so given the long-lamented lack of localism in modern television broadcasting: other than the local news broadcasts, there is often little but network and syndicated programming offered by a broadcast station. This may not provide the necessary incentive for Internet-based MVPDs to negotiate with individual broadcasters for programming: if all the distributor gains for its subscribers is a choice of ten newscasts for having negotiated with ten broadcasters, rather than one network, that is not likely to have been a profitable exchange. This problem is not new to the Commission, of course: ten years ago, the Commission inquired into the lack of localism in broadcasting and how best to increase it. At the time, the Commission suggested the rise of satellite radio as a force that could, by streaming national programs, help to diversify local radio stations’ programming as they attempted to differentiate themselves from satellite. (It is not entirely clear that this has worked out as hoped.) The Commission also suggested that satellite and cable networks had already, at that point, motivated broadcasters to provide more local programming. That may be so, although the most visible change in broadcasting at this point has been the development of new networks to take advantage of the expanded footprint occupied by broadcast television stations since the digital TV conversion. This does not seem to have helped localism much. It is to be hoped that the addition of Internet distribution to the mix will spur existing broadcasters to differentiate themselves more clearly; if they succeed, the chances of being picked up on an Internet-based MVPD would seem to be much greater than if they continue to operate as mere relay stations for their networks.

Closed Captioning

To the extent that Internet-based video distributors are considered to be MVPDs, it would appear that the Commission has several overlapping directives regarding closed captioning. The rules with the most direct application would be those established in the Commission’s recent and ongoing rulemaking on captioning of IP-delivered video programming, which generally requires that programming that had been exhibited on television carry closed captions when delivered over the Internet.

For entities that operate under my proposed Redistributor Interpretation, the enactment of §79.4 would seem to be controlling: in all probability, the major portion of programming being distributed would be, or would have been, distributed over television in the United States, and would thus fall squarely within the scope of §79.4. The burden of complying with these rules,

35 In the Matter of Broadcast Localism, MB Docket 04-233.

36 This includes networks such as MeTV (http://metvnetwork.com) and Antenna TV (http://antennatv.tv), which specialize in “vintage” programming.

however, would likely be small: since the programming being redistributed should have been captioned already, compliance should be a relatively simple matter of transcoding the caption stream into a format appropriate for Internet distribution (and in fact, the requirement to pass through existing captions appears in both sets of rules already\(^\text{38}\)).

On the other hand, it is not entirely clear that §79.1 would not also apply. §79.1(a)(11) defines “video programming distributor” as, among other entities, “any other distributor of video programming for residential reception that delivers such programming directly to the home and is subject to the jurisdiction of the Commission.” An Internet-based MVPD would seem to meet all of these criteria, and thus would be obligated to provide captioning on all of its channels. In fact, the key criterion separating the applicability of §79.1 and §79.4 would seem to be the final criterion: “subject to the jurisdiction of the Commission.” This requirement does not appear in §79.4, so the key distinction would appear to be in the assertion of Commission jurisdiction. To the extent that the Commission seeks to assert jurisdiction over certain Internet-based multi-channel program distributors, it would inherently seek to make §79.1 applicable to them: with the possible exception of special MVPDs that distribute only to non-residential end users, or that distribute to residential users through an intermediary, §79.1 would be implicated by its own terms.

One practical effect would be that §79.1’s exemptions, in addition to its requirements, would become available to Internet-based MVPDs. For example, §79.1(d)(9) exempts programming broadcast on networks younger than four years old, §79.1(d)(11) exempts channels where the cost of captioning would exceed 2% of annual revenue from the channel, and §79.1(d)(12) exempts channels producing less than $3 million in gross annual revenues\(^\text{39}\). By contrast, §79.4 contains no such exemptions by rule, but only a procedure for petitioning the Commission for exemption. On the one hand, this may reduce the economic burden on a smaller MVPD: to the extent that the MVPD is required to add captions to its programs, a small MVPD may not be compelled to caption its programming. On the other hand, arguably an Internet-based MVPD that is exempted by §79.1(d) may find itself “falling through” to the requirements of §79.4. This may cause smaller MVPDs to face an economic disadvantage when transmitting television programming that was not originally captioned: such programming would fall into the scope of §79.4 instead, and captioning would be required for transmitting it over the Internet, even if it would not be required for distribution by other means, unless the distributor had sought and obtained an exemption from the Commission—not a certain prospect, even under the best of circumstances.

For this reason, the Commission must make clear, in interpreting its rules, whether §79.1, §79.4, or both will apply to Internet-based MVPDs. The fairest solution would be to apply §79.1 to all MVPDs, including those operating on Internet protocols. This also would be more

\(^{38}\) See 47 C.F.R. §79.1(c)(1) and §79.4(c)(2)(i).

\(^{39}\) Many of these exemptions do not excuse a distributor from passing through captions received. §79.1(d)(12) makes this exclusion from the exemption explicit. §79.1(d)(11) only excuses a distributor from spending any money to caption programming on channels that do not meet the revenue threshold, and it is likely that transcoding captions from one format to another can be done without an identifiable expense. §79.1(d)(9) contains no pass-through requirement at all, however.
consistent with the purpose of §79.4, which seems to have been directed more at the situation of a video producer (such as a broadcast station) making programs available on-demand on its Web site, and similar situations.

Were the Commission to adopt its Linear Programming interpretation—and assuming that it does intend to include originators of programming along with redistributors in that interpretation—the effect would be a broadening of the applicability of §79.1 to those additional entities. While that may be appealing as a way of increasing the availability of captioned programming, it also runs in direct opposition to §79.4’s scope, which is explicitly limited to captioned programming that was originally broadcast on domestic television. In this case, I would suggest that the Commission would need first to decide whether it wants to assert jurisdiction over non-broadcast television programming, and if so, whether there is a legal basis for that jurisdiction. The better course may be to leave entities that are not in the business of redistributing television programming under the authority of §79.4. This would be somewhat less confusing, as the line dividing MVPDs from program originators is conceptually simpler to understand than one bringing certain originators, but not others, into the scope of the rule.

As a final note, the Commission has not set out clear technical standards for delivering captions to end users, in the way that they are set out for broadcast television. This is not surprising, since the technology for delivering video programming is diverse and under continuous development and improvement, and as a result, there is no prevailing standard for caption delivery on Internet-delivered program\(^ 40\). While now is not the time for the Commission to fix a standard—that time, if it comes at all, will come when the technology settles down of its own accord—the lack of a single standard or group of standards impairs access to captioned programming. This is particularly so when Internet-based MVPDs come into play. Traditional MVPDs can either use the standard method of closed captioning that can be decoded by all modern televisions, or can include technology to decode those captions more directly in their decoder boxes. Internet-based MVPDs, however, are likely to rely on user-provided media players rather than distributor-furnished decoders. The ability of user-provided media players to decode captioning is variable, and not all players may be able to decode all captions in all the possible formats that can be used for streaming over the Internet\(^ 41\). The Commission’s requirement is only that the captions be transmitted “in a format reasonably designed to reach the end user in that quality” (i.e., the quality of the captions provided by the content owner). It would be immensely helpful, both for enforcing the rule on those bound by it, and for the guidance of those served by it, if the Commission were to provide guidance on which formats may be considered “reasonably designed” to transmit captions to the end user in a usable manner.

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\(^ 40\) One of the obstacles that Blueriddle faces in providing captioning to its subscribers lies in the capabilities of its media delivery network. We have not yet confirmed whether our proposed MDN supports the transmission of captions, or in what formats it supports them, although we are prepared to test this in service and intend to do so before beginning regular operations.

\(^ 41\) For example, see the list at http://en.wikipedia.org/wiki/Comparison_of_video_player_software#Subtitle_ability.
Video Description

An Internet-based MVPD faces certain special challenges in delivering video description with its programming. Aside from the lack of standards for delivery of multiple alternate audio streams, any alternate audio stream will consume significant additional bandwidth beyond the requirements of the base program. For example, consider a program transmitted with video at 480p resolution (848x480 pixels), monophonic base audio at 44.1 kilohertz sampling. One reference suggests a data rate of 1216 kilobits per second (kbps) for the video portion, and 64 kbps for the audio, for a total of 1280 kbps required\(^\text{42}\). Adding a second audio stream at comparable quality would require an additional 64 kbps, for a total of 1344 kbps, about 5% higher. In areas with good high-speed Internet access, this may not be substantial; in the case of areas with poor broadband, however, the proportional increase in bandwidth will be higher, and may be high enough to degrade video quality for all subscribers. (For example, the same reference suggests a resolution of 360p for a 1.5 Mbps link, with a video bitrate of 896 kbps; the total bandwidth required to carry two audio streams of equal quality would then be 1024 kbps, pushing the practical limits of the link. 1.5 Mbps is a common speed for older and longer DSL links.) The requisite bandwidth would also add up at the headend, where the MVPD puts its programming into the Internet, adding to transport costs for the distributor: depending on how the distributor arranges its system, it may be necessary to provide that bandwidth once for each individual subscriber, rather than once for all subscribers as in a traditional cable system\(^\text{43}\).

The simplest way to handle these challenges would be to make channels with video description available separately from those with baseline audio only. Under this scheme, the MVPD would send either the baseline or the video-description program, depending on the viewer’s request. In this case, only one audio stream would be sent with the program, eliminating the need for additional bandwidth. This would require additional channels on the system, though, which may impose different burdens on the distributor. It also would mean carrying separate channels for the visually impaired and for the sighted, which may impose burdens on the users. Depending on the exact system design, furthermore, this may not improve matters.

Presumably, an Internet-based MVPD that faces bandwidth constraints could be considered to lack the technical capability to pass through video description, and would therefore be excepted from the rule as it relates to pass-through description. How this affects a distributor’s obligation to furnish video description for 50 hours per quarter is not clear. Perhaps it would be reasonable to reduce video quality selectively in order to meet the requirement. I would not recommend this, however: it would inherently tend to consign video description to the least-


\(^{43}\) By comparison, the bandwidth load imposed by carrying captions is negligible. Captions sent at a rate of 20 characters per second, often cited as the fastest desirable rate, would have a basic bandwidth requirement of about 160 or 320 bits per second, depending on whether 8- or 16-bit encoding is used. This pales to insignificance even against an audio bandwidth of 64,000 bits per second.
popular hours of programming, where the loss of quality would be least noticed and least likely to affect viewership, but the benefits to the audience would likewise be least.

If extended to Blueriddle, it is likely that the video description rules would be mostly irrelevant: we do not plan to provide any of the five networks on which video description is required, or likely to become required. To the extent that we did receive video description with the programs we carry, we would try to provide it, assuming that our distribution system could handle it. It would be more palatable to be allowed to develop the best way of doing this, rather than being obligated to provide it up front and, therefore, obligated to use whatever mechanism is at hand.

The Section 79.105 requirements are not irrelevant to Internet-based distributors, but (as mentioned regarding closed captioning) subscribers are likely to bring their own media players, and under that circumstance it seems unreasonable to hold the distributor responsible for an inability to decode the alternate audio stream. This would appear to be the subject of a separate proceeding before the Commission, and perhaps not a proper topic for this rulemaking, beyond the obligation for the distributor to get the secondary audio stream to the customer in a format that can reasonably be decoded. This is similar to the current requirements for closed captioning, as mentioned above, and suffers from some of the same unavoidable infirmities resulting from a lack of standards.

Emergency Information

Many of my comments on video description apply with equal force to the matter of the Commission’s §79.2 emergency information accessibility rules. Because these rules depend on the presence, and accessibility, of a secondary audio stream, the technical problems of providing that stream are the same whether it carries video description, emergency information, or other content. The one point of difference lies in the scope of application: while the video program description rules apply only to certain channels, emergency information could be required to be provided on any channel where emergency information is found.

A more interesting question, however, and one that perhaps is more widely relevant, is that of the Internet-based distributor’s obligation to furnish any emergency information at all. The Commission’s existing Emergency Alert Rules effectively require most broadcasters and retransmission providers (including wireline and wireless cable systems, DBS providers, and wireline video systems) to participate in the EAS at least for national emergency messages, and are allowed to participate in state or local EAS plans as well. They do not explicitly include MVPDs in their scope, so on the surface MVPDs in general, and Internet-based MVPDs specifically, would not be obligated to participate in the EAS under the current rules. That being so, it follows that Internet-based MVPDs are not likely to originate EAS alerts on their systems.

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44 Notice, at ¶ 55 (footnote 158).

45 47 C.F.R. §11.11(a).

46 47 C.F.R. §11.21. In addition, §11.55(a)(2) makes participation in state and local EAS plans optional for DBS and SDARS providers.
and therefore would not likely have any reason to initiate secondary audio describing those alerts.

It does not seem likely, on the other hand, that any MVPD would take special measures to block an EAS activation that it takes in from one of its program sources. For example, in the event of a national level EAS activation, every broadcast station participating in the National EAS is obligated to stop its programming and broadcast the alert. To the extent that a participating broadcaster is being relayed by an Internet-based distributor, this alert would then also be relayed unless the distributor took special steps to block it. There seems to be little reason for a distributor to take that action. While it may be best practice for the Commission to require Internet-based MVPDs to pass through National EAS alerts uninhibited and unaltered, this is not likely to become an actual problem.

The inherently national scope of an Internet-based distributor makes it more difficult, if not impossible, to target state and local emergency messages to their areas of applicability. The existing EAS rules recognize this in their treatment of DBS and SDARS (satellite radio) services, which likewise are inherently national in scope, and are permitted, not required, to participate directly in state and local EAS plans. Insofar as they are required to participate in EAS at all—and, I repeat, there is no clear directive in §11 commanding MVPDs to do so—I recommend that the Commission grant the same concession to Internet-based MVPDs, and permit them to participate in State or Local EAS Plans without making it mandatory.

A related issue is the strictly technical one of participation in traditional EAS that relies on in-band on-channel digital signaling, as opposed to participation in Next Generation EAS that relies on Common Alerting Protocol (CAP) messages. The stated goal of transitioning to CAP has been to facilitate the move to new broadcasting technologies, and in fact, the CAP standards were originally developed for Web documents. It seems counterproductive to begin the transition from EAS to an Internet-based system of alerting, only to require Internet-based broadcasters to convert the alerts back into EAS format for distribution. I would suggest that any EAS requirements that the Commission imposes on Internet-based MVPDs should take this into account: a completely practical method for meeting the spirit of the EAS rules, for example, may be for Internet-based MVPDs to use Web methods to display CAP alerts in a pop-up window.

All of this might be better handled in a separate rulemaking proceeding, particularly as it might impose new EAS requirements onto existing MVPDs. The point in this proceeding is that there may be ways of meeting the intent of the emergency information accessibility rules without actually providing a secondary audio stream, by taking advantage of the flexibility of the CAP


48 *See id. at 648, ¶ 10.*

49 This, of course, assumes that the programming is being delivered through a Web browser. There are a variety of devices available for viewing Internet-delivered programming, as I will discuss in the next section. Some will have a similar function available, and some will not, making it difficult for the Commission to fix one method of communicating alerts as the rule. The best rule may center on effective communication, regardless of the exact mechanism.
system, for example. The Commission should give due consideration to this matter before imposing a less technologically advanced solution onto Internet-based program distributors. In the meantime, to the extent that an Internet-based MVPD can relay secondary audio streams in an accessible format at all, it seems trivial to then relay secondary audio streams containing accessible emergency information.

Accessible User Interfaces

The Commission’s rules on user interface accessibility are clearly centered on the present scenario in which the navigation devices are furnished by the program distributor. To the extent that an Internet-based MVPD furnishes reception equipment, this will continue to be applicable\textsuperscript{50}. However, the more common scenario now, and likely to remain the most common scenario, is one in which the subscriber uses their own equipment, such as a tablet or laptop computer, or a set-top streaming device (such as a Roku or WDTV), to receive programming\textsuperscript{51}. Under this condition, it seems pointless to hold the Internet-based MVPD responsible for ensuring the accessibility of the user’s equipment. The better course would be to focus on accessibility of the devices themselves. Indeed, the current wording of §79.108 limits its applicability to MVPDs “that lease or sell such devices,” and I would encourage the Commission to continue that limitation in the case of Internet-based MVPDs.

The most likely application of the interface accessibility rules, in this context, would be on the distributor’s support of that interface. For example, a Web-based interface that relies on graphical buttons to select a program stream would be required to provide ALT tags on those graphics for the guidance of the visually impaired. It would then be incumbent on the subscriber to get and use a browser supporting the ALT tags and utilizing them as required. It would not be the distributor’s responsibility, however, to provide that browser, or to restrict access to its site to that browser alone, provided that it didn’t routinely furnish browsers to its other customers.

\textsuperscript{50} It will be applicable, in fact, whether the Commission selects its Linear Programming interpretation, its Transmission Path interpretation, my Redistributor interpretation, or any other. As the provision of receiving equipment is not a component of any of those interpretations, it is not clear how the exact interpretation chosen would affect the applicability of these rules.

\textsuperscript{51} It is not clear to me whether the Commission’s §79.107 rules would apply to all conceivable receivers of Internet broadcasts. Does the Commission have the authority, for example, to regulate the functions provided by a third-party video player that is not furnished or recommended by, say, a laptop computer’s manufacturer? Would such a player be in compliance with the accessibility rules by depending on the user’s computer operating system to aid accessibility? Could this set up a scenario in which the same video player was both compliant and non-compliant depending on which version of the operating system the user’s computer was running, and if so, who should be charged with the responsibility to comply? In practical terms, I would not expect the Commission to get the complaint in a scenario such as this; it may be sufficient for the Commission to interpret its rules to cover only devices meant principally for receiving digital broadcasts, such as the Roku, rather than the whole universe of available devices.
Equal Employment Opportunities

I concur in Sky Angel’s claim that “the Commission’s EEO requirements ‘are not oppressive,’” and for the most part are good, sensible requirements to aid in ensuring that equal employment opportunities exist within MVPDs.

I would caution, however, that the rules as currently stated in §76.75(b)(2), regarding required outreach efforts, are more geographically centered than an Internet-based MVPD is likely to be. Given an inherently national scope, any Internet-based MVPD is likely to be fairly considered as “located, in whole or in part, in a smaller market,” defined as metropolitan areas with a population below 250,000 and any area outside of a metropolis. As a consequence, any Internet-based MVPD likely would be obligated to participate in only one of the listed outreach initiatives, rather than the two required of entities in large markets. This may, or may not, be a significant difference, but I would encourage the Commission to give it fair consideration under the circumstances.

Navigation Devices

The purpose of Section 629 of the Act, and the corresponding regulations concerning the commercial availability of navigation devices, is presumably to prevent any cable provider or other MVPD from forcing its subscribers to purchase or lease its equipment. In the case of Internet-based video distribution, this should not be an issue: by far, it would be more economical for all concerned to use commercially available technology and software to distribute programming than to try to develop, sell, and maintain a dedicated system of proprietary devices. It is, therefore, somewhat unnerving to read that Sky Angel proposes to do precisely that by using a proprietary box to furnish their service.

The distribution of intellectual property over the Internet brings a huge number of challenges to rights management; or, put less pretentiously, there are a lot of pirates out there. In such an environment, it’s not surprising that Sky Angel, and presumably other entities in the business or preparing to enter the business, would want to do so using technology that is not so commonly available. The theory is that such technology, being more obscure, is more secure than commonly available devices and software. This theory is not necessarily correct, of course, but it is understandable. And, in an environment where sending out media over the Internet is often seen, if not itself piracy, as an open invitation to content piracy, it may be necessary to have some sort of “little black box” in the distribution path strictly to reassure those providing the content.

The Commission should not be swayed. I have assumed throughout these comments that one benefit of an Internet-based distribution system is the opening up of markets and access, so that the consumer can more easily switch between providers, perhaps subscribing to several smaller-scale providers at once depending on the subscriber’s needs. This depends on having open access, however, and open access can be hindered by requiring a proprietary device in order

52 Notice, at ¶ 59 (footnote 169).
53 47 C.F.R. §76.75(j).
54 Notice, at ¶ 59, citing Sky Angel Comments at 19.
to receive a particular carrier’s programming. At minimum, each such device typically would occupy one set of inputs on the customer’s television (or other receiver), and only a limited number of inputs are available on most TV sets, setting a practical limit on the number of set-top boxes that one customer could have. There is also the question of cost: if it is necessary for the customer to buy, or lease, additional navigation devices in order to receive programming from additional carriers, the cost of those devices will likely act as a disincentive toward adding or changing subscriptions, and hence as a disincentive to a fully competitive market.

The existing Commission rules seem to contemplate an MVPD as a closed system, for which only one navigation device is normally necessary. As a result, they focus on allowing the customer to connect customer-provided equipment to the (single) system and still receive programming. When an open system, such as the public Internet, is considered, this ceases to be the case, or at a minimum is no longer a sure thing. Therefore, I would very much recommend that the Commission consider how to amend its navigation device rules in order to ensure that a subscriber to multiple simultaneous Internet-delivered MVPDs is able to receive all of them successfully, while minimizing equipment requirements. For example, is it possible to adapt the CableCARD technology to provide access control to multiple streams of programming at once? Or is there similar technology available on the market to perform that function? Or, more likely, the usual access control mechanisms used on the Internet (user names and passwords, mostly) would be sufficient, and conditional access could be controlled at the distributor’s end, rather than the subscriber’s.

Blueriddle, for its part, intends to use only common Internet services to distribute its content. We do not intend to rely on any proprietary hardware, and in fact, we will seek to broaden access to our programming by publishing our interface requirements. This is meant to allow our service to be viewed on commercially available streaming receivers (set-top boxes, like the Roku, etc.) as well as computers, smartphones, tablets, and so on. We see no commercial advantage to be had by restricting access to customers who have obtained a proprietary navigation device, and believe that commonly used Web security mechanisms give us enough control over our content’s security.

One point that should be addressed by the Commission in this regard is the treatment of customer-provided equipment that uses provider-furnished software to access programming. In particular, if the Internet-based MVPD provides software to its subscribers that combines the media player and conditional access functions, but is loaded onto a subscriber’s computer, phone, or other device, would such software fall afoul of §76.1204(a)(1)? Taken literally, it seems as though it would, assuming that a piece of software, alone, can be defined as a “device” for purposes of §76.1200(c). Yet, this does not seem as obnoxious as combining both functions into one set-top box. Installing and removing software is less work than installing and removing hardware, as a rule, and the chance of a provider charging exorbitant rates for that software seems relatively low. In addition, it is arguable that such a piece of software does perform only the conditional access function, with the subscriber’s device doing most of the navigation and display, and hence complying with §76.1204. The Commission may want to exclude this case explicitly from the navigation device requirements as applied to Internet-based MVPDs.

55 See 47 C.F.R. §76.1205.
Signal Leakage

The Commission’s rules on signal leakage find little application to Internet-based MVPDs. It is too much to claim that Internet-based MVPDs would not use aeronautical frequencies, or at any rate that they would have no potential to interfere with them. However, one point of the Commission’s Linear Programming interpretation is that it would apply regardless of whether the entity under consideration owns its transmission facilities or not\(^\text{56}\), and as a general proposition, an entity that does not own its own facilities has no control over the technical parameters of the signals that travel over those facilities. As a consequence, in the case where an Internet-based MVPD’s signals move over facilities that leak signal in the aeronautical band and cause harmful interference, the fault likely is with the carrier’s facilities, and not with the MVPD’s. Therefore, any enforcement efforts by the Commission would be more productively directed at the carrier than at the MVPD. I would, therefore, recommend that the Commission exclude Internet-based MVPDs from the signal leakage rules to the extent that their own facilities are not involved. Of course, in the case of an Internet-based MVPD that does own, maintain, and use transmission facilities, it should be held accountable for leaks in those facilities, presumably under whatever other rules apply to those facilities (for example, if the MVPD is a cable operator using its own lines for an over-the-top service, §76.611 should govern).

Inside Wiring

I agree that the Commission’s inside wiring rules generally would not apply to Internet-based distributors. To the extent that an Internet-based distributor is affiliated with an entity that provides inside wiring, I would expect that the rules governing that affiliated entity would control. In this case, a cable-affiliated distributor would not be liable for complying with the inside wiring rules, but its affiliated cable operator would be.

Having said this, I would caution the Commission against excluding Internet-based MVPDs from the inside wiring rule. §76.801 explicitly limits the scope of the inside wiring rules to cases in which the inside wiring is installed by a cable operator in a subscriber’s home. This situation is likely to be rare where Internet-based MVPDs are concerned, but it is not completely implausible. The existing limits already address the most likely scenario of an Internet-based MVPD that does not install home wiring; however, in the unusual case of one that does, it would be helpful to have the rules in place to establish the disposition of that wiring when service is terminated, and to help prevent evasion of the rules by existing distributors.

\(^{56}\) Notice, at ¶ 23.
Commercial Loudness

The Commission’s existing rules on commercial loudness focus on the use of the “dialnorm” metadata parameter present in the AC-3 audio encoding system. The AC-3 system, in turn, is defined in the ATSC digital television standard. The purpose of the “dialnorm” parameter is to allow the receiver to adjust for content loudness automatically and without user intervention or knowledge. As there is nothing compelling an Internet-based distributor to comply with the ATSC standard, however, it is entirely plausible that some would choose to encode their audio in another format that does not contain the “dialnorm” parameter.

This situation is addressed in ATSC A/85, which recommends that the target loudness value for content without metadata should be -24 LKFS unless otherwise arranged by the parties exchanging content. This is, however, only a recommendation; nothing in the current rules, nor in the CALM Act, compels a distributor to modulate their output to this level. To the extent that the rules require a distributor, in the absence of the “dialnorm” parameter, to modulate its audio loudness to some fixed level, and preferably -24 LKFS, this is not wholly clear from the phrasing of the rules now: MVPDs are only compelled to measure the loudness of their content, and to certify that they have no knowledge of a violation of the ATSC practice, when the practice itself does not necessarily compel any particular course of action.

Under the current rules, then, MVPDs, who typically would need to convert their output to the ATSC standard at some point or another, are compelled to set the “dialnorm” parameter of AC-3 correctly according to the loudness of their content. By doing this, properly designed customer equipment can adjust itself for commercial loudness, and there is no problem. However, an Internet-based MVPD, depending on what coding it uses for its audio content, may not have such a parameter to set, and lacking firm guidance, may be unclear on whether it is complying with the rule or not. At a minimum, an Internet-based MVPD may be able to evade

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57 For example, “In order to be considered to have installed, utilized, and maintained the equipment and associated software [needed to comply with ATSC A/85 RP] in a commercially reasonable manner, a cable operator or other MVPD must: (i) … ensure that the dialnorm metadata value correctly matches the loudness of the content when encoding the audio into AC-3 for transmitting the content to the consumer ....” 47 C.F.R. §76.607(a)(2).

58 Background and Introduction, Techniques for Establishing and Maintaining Audio Loudness for Digital Television, ATSC A/85:2013, at 8 (§1.1)

59 Id., at 8 (§1.1).

60 An “LKFS” is a unit of loudness, K-weighted, relative to full scale, measured with specified equipment, and equivalent to a decibel. ATSC A/85:2013 at 12 (§3.3).

61 47 C.F.R. §76.607.


63 The word “should,” within the ATSC practice, “indicates that a certain course of action is preferred but not necessarily required.” ATSC A/85:2013 at 12 (§3.1).
application of the loudness rules on the basis that it was not strictly required to meet any particular loudness, but only to measure the loudness of its content.

The better course may be for the Commission, recognizing the new variability in audio coding schemes brought by Internet-based distributors, to require explicitly that distributors not using the AC-3 encoding system maintain a target loudness of \(-24 \pm 2\) LKFS. As an alternative, those distributors should be required to maintain some consistency between the loudness of their commercials and the average loudness of their programming.

The rules further specify that a spot check of commercial loudness must be conducted after the signal has gone through the distributor’s processing equipment, such as a set-top box.\(^{64}\) In the case of an MVPD that supplies subscriber-end navigation devices, set-top boxes, or other similar equipment, this is reasonable, but where should the measurement be made when this is not the case? Would it be acceptable for an MVPD without subscriber-end processing equipment to perform the measurement digitally, by analyzing the audio stream and computing its loudness value, rather than by converting it and measuring the sound output? While digital analysis does not seem to be permitted by the rule as now written, it seems likely to produce more consistent results in this case, where the subscriber’s equipment may not match that used by the MVPD to perform the check. This also may pose less of a burden to Internet-based distributors, while still meeting the statutory mandate to keep commercial loudness consistent with program loudness.

**MDU Access**

It does not seem likely, on first impression, that an Internet-based MVPD would have the ability to enforce an exclusive-access provision in a contract with a multiple dwelling unit (MDU). To some degree, these provisions likely are relics of a time when the local cable operator would offer to wire up the units free of charge in return for exclusive access. It is easily foreseeable that an Internet-based MVPD would use an existing Internet connection to deliver programming to its subscribers, rather than providing premise wiring itself, as discussed above on the topic of “Inside Wiring.” Therefore, the reasons for an Internet-based MVPD to bargain for and obtain an exclusive service contract are much less. And, given that a typical Internet connection provides access to any Internet service without restriction, it follows that a typical subscriber could expect to have no problems accessing any Internet-based MVPD.

However, the Commission has only recently addressed a case in which a multiple occupancy building—in this case, a hotel—had seen fit to jam its guests’ mobile Wi-Fi hotspots, ostensibly for the guests’ protection, but allegedly to force traffic onto its own network to increase revenue.\(^{65}\) Although this case involved a hotel’s deliberate interference with an

\(^{64}\) 47 C.F.R. §76.607(a)(3)(iv)(A).

\(^{65}\) In the Matter of Marriott International, Inc. and Marriott Hotel Services, Inc., DA 14-1444, Order, 29 FCC Rcd 11760 (2014), at ¶ 3; see also the Commission’s related News Release, “Marriott to Pay $600,000 to Resolve Wi-Fi Blocking Investigation,” October 3, 2014 (“At the same time that these employees engaged in [disrupting customers’ Wi-Fi connections], Marriott charged conference exhibitors and other attendees anywhere from $250 to $1,000 per device to use the Gaylord Wi-Fi service in the conference facilities.”).
authorized use of spectrum, it also illustrates one way in which a landlord would be able to control access to the Internet. Another would be for the landlord to furnish the premises equipment necessary to provide high-speed Internet service, but to route it through devices that restrict or forbid access to certain content. And, it is certainly foreseeable that a landlord may attempt to limit or prohibit access to linear video service, either in an attempt to share the available bandwidth more fairly across all tenants, or (less excusably) to direct its tenants toward a particular video provider for personal gain.

There is even the possibility of an Internet-based MVPD arranging its access software to interfere with a customer’s ability to access competitors. For example, if Comcast were to provide viewer software to its customers, combining a video player with necessary access controls, and wanted to interfere with access to its competitors, it would not be particularly difficult to have the Comcast software intercept and cancel requests for video from Cablevision. Although, as a general principle, this sort of arrangement would interfere with all customers, it’s not a stretch to think that it could be targeted specifically at MDU tenants for the sake of locking in an exclusive-access deal.

The Commission has already found it necessary to take a position in favor of the Open Internet, and it is a very small extension of that position to require that Internet service to an MDU must likewise be kept open. As far as that goes, the companies responsible for providing broadband service to an MDU are obligated not to block any legitimate traffic and not to discriminate unreasonably in the handling of traffic. The Commission expressed particular concern at the effects of such practices on the ability of MVPDs and other audio and video distributors to compete. It seems likely that any attempts to gain exclusive rights to provide video programming to an MDU, as traditionally understood, would come from that quarter, and it seems clear that the Open Internet Order already addresses the situation, so that the MDU access rules are redundant as applied to typical “last mile” broadband providers who may also be considered MVPDs. The less clear case is where an Internet-based MVPD that is not a broadband provider (and hence is outside the scope of the Open Internet Order), or a landlord in contract with it, is able to interfere with access to its competitors. It may be necessary to expand the scope of the MDU access rule to include landlords as well, given that, unlike traditional cable service, broadband wires used to deliver Internet video are not limited to one video distributor, and therefore the landlord has no excuse in the case of an Internet-based MVPD to restrict access

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67 Open Internet Order, 17942, at ¶ 63.

68 Open Internet Order, 17944, at ¶ 68.

69 Open Internet Order, 17917, at ¶ 22.
(whereas, which cable and similar services, the landlord has a direct interest in minimizing the number of wires installed on property).  

**Impact on Content Owners**

The Commission next considers the impacts that the proposed MVPD rules would have upon content owners.  

In the case of Blueriddle, many of these considerations would probably not be present. As our operations will be focused on broadcasting our own members’ content, rather than retransmitting broadcast or network content, our rights issues would be kept entirely within the cooperative. Nevertheless, it may sometimes become useful to have access to network or broadcast content; to the extent that Blueriddle’s operation may ultimately be considered an MVPD, the rules would still have relevance to us.

**Broadcast Content**

It seems reasonable to assume that the Copyright Act, in granting a statutory license for the retransmission of broadcast content, was not written with the whole variety of closed-circuit video programming distribution facilities in mind, and uses the term “cable system” to refer to them all. The most reasonable purpose for the statutory license, after all, is to facilitate the distribution of programming that already is destined for consumption by the general public to those members of that public who subscribe to cable, rather than using antennas. Indeed, in examining the statutory definition of “cable system,” we find that

A “cable system” is a facility, located in any State, territory, trust territory, or possession of the United States, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels to subscribing members of the public who pay for such service.

This definition, on its face, seems broad enough to encompass an Internet-based service that performs a function similar to that of a traditional cable system. (I would point out at this point that my proposed interpretations, above, mesh well with the Copyright Act’s definition of a cable system by emphasizing the act of retransmitting content.) That being the case, it seems to follow that there is room in the Act to allow any MVPD, whether defined by the Commission as a cable

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70 This should not, of course, be read to inhibit a landlord’s ability to use reasonable, non-discriminatory measures to control the use of a “house” broadband connection, for the sake of sharing access more fairly. Such measures, executed correctly, likely would not fall afoul of either the MDU access rule or (to the extent they apply) the open internet rules, since they would not block or discriminate among content, but only control bandwidth usage.

system or not, to be considered a “cable system” for the purpose of the Copyright Act’s statutory licensing scheme.

American Broadcasting Companies v. Aereo does little to contradict this supposition, and indeed the Supreme Court held, in that case, that

Aereo’s activities are substantially similar to those of the CATV companies that Congress amended the Act to reach. … Aereo sells a service that allows subscribers to watch television programs, many of which are copyrighted, almost as they are being broadcast. In providing this service, Aereo uses its own equipment, housed in a centralized warehouse, outside of its users’ homes. By means of its technology (antennas, transcoders, and servers), Aereo’s system “receive[s] programs that have been released to the public and carr[ies] them by private channels to additional viewers.” … It “carr[ies] … whatever programs [it] receive[s],” and it offers “all the programming” of each over-the-air station it carries. 72

The Court’s description of Aereo’s activities squares comfortably with my proposed interpretation, and, to the degree that retransmitted programming is involved, to the Commission’s Linear Programming interpretation. It is, therefore, very arguable that Internet-based distributors are authorized to take advantage of the Copyright Act’s statutory cable-system licensing provisions.

The one hitch to this interpretation may lie in the Copyright Act’s requirement that, in order to qualify for a statutory license, the retransmission of a program must be permitted “under the rules, regulations, or authorizations of the Federal Communications Commission …. ”73 Thus, the ball would seem to be back in the Commission’s court at this point: should the Commission authorize the retransmission of broadcast signals by Internet-based MVPDs, they would appear to fall under the authority of section 111.

Cable-Affiliated Content

In the case of cable-affiliated content, Discovery’s point is valid: it is too much to ask a cable-affiliated network to grant rights it does not have, even if those rights are essential to giving Internet-based carriers non-discriminatory access to their content. And, in the absence of provisions in the Copyright Act providing for statutory or compulsory licensing of Internet content retransmission, the right to control Internet-based retransmissions remains with the content owners until bargained away.

This places a severe constraint on the ability of the Commission to compel cable-affiliated networks to get Internet distribution rights. While it may be within the Commission’s authority to require cable-affiliated networks to negotiate for such rights, it is indisputable that the Commission’s authority does not extend as far as content creators, to the extent that they could be compelled to negotiate in return. The Commission may as well assert that any program


that has ever been televised must be made available to anyone who asks for broadcast rights, even if the producer later decided to withdraw the program from circulation. This does not seem like a reasonable interpretation of copyright law as it now exists, and I am firmly of the opinion that it would be poor public policy for the Commission to implement any such policy as the Copyright Act now stands. Certainly, if a network were compelled to obtain Internet licensing rights for the benefit of any Internet-based distributors needing them, but the content producers were under no obligation to provide them, the result could be either a severe imbalance of negotiating power, hurting the network; or, a reluctance to license content that did not come with Internet rights, which could hurt content producers who have other plans for Internet distribution.

The most reasonable interpretation of “non-discriminatory access” under the circumstances would be that, if a particular cable-affiliated network has Internet distribution rights to certain content, those rights should be offered on fair terms to any distributor. This meets the intent of the original non-discrimination rule, while recognizing that, if a network lacks certain rights, in the absence of a compulsory license scheme, there is no way to ensure that it can obtain those rights at a reasonable price, if at all. It should be recognized that, to a point, a network that lacks Internet distribution rights to a program necessarily must provide non-discriminatory access to it: namely, no Internet access at all, for anyone. 74

Unaffiliated Content

Finally, there is the question of how non-cable-affiliated networks fit into the scheme of things. Ovation’s concern about market pressures forcing non-cable-affiliated networks to obtain Internet distribution rights for their content, as cited in the Notice, is not entirely clear, but there seem to be two possible cases where this would be so. First, if cable-affiliated networks are obligated to get Internet distribution rights, this would predictably increase the price they pay for content: they would be obtaining more rights than they have previously, and, especially in a world where those rights are already worth additional money to content producers (perhaps even to the point where obtaining those rights is “too expensive for some networks”), it seems fair to demand an additional payment to gain those rights. This being so, producers may tend to be more interested in selling their content to cable-affiliated networks, who would be obligated to buy the Internet distribution rights, and hence obligated to pay extra for programming compared to non-cable-affiliates who would be under no such obligation. Therefore, unaffiliated networks would have to increase their bids in order to compete.

74 Some of the comments cited by the Commission in its Notice seem to center on the question of authenticating access to content, rather than on the basic question of providing access at all. (See, for example, footnotes 196 and 197.) The Commission should take note of that, as it may become a nasty sticking point down the road, if not an outright excuse to discriminate. The insistence upon a specific means of authentication, rather than a certain level of security, could provide a sneaky way to discriminate between distributors with access to that means (e.g., a patent license), and those without. See Notice at ¶ 41 (footnote 115).

75 Notice, at ¶ 70.

76 Notice, at ¶ 67, citing Discovery Comments at 11.
There is not much that the Commission likely can do for this situation. A network, affiliated or not, purchasing Internet distribution rights on top of more traditional distribution rights, will almost certainly pay more, triggering this problem. But, to focus on the Commission’s concerns, were the Commission to obligate a cable-affiliated network to buy the Internet rights to its programs as a means to open market access for Internet-based distributors, even if the network were not itself planning to be distributed online, then the problem becomes more severe. That scenario, tending to increase the price of Internet distribution rights for cable-affiliated networks, would have a more severe price impact than if a cable-affiliated network were permitted to leave alone the Internet distribution rights (and presumably, then, not distribute that program on the Internet) and leave them on the table for someone else to purchase, or for the producers to use themselves. This would tend to keep the price of content from being inflated to no good effect, for cable affiliates and non-affiliates alike.

The second possibility is, perhaps, suggested in the Notice (at footnote 198): that an unaffiliated network would be obligated to get Internet distribution rights for content in order to prevent them from being obtained by some outside party, thus blocking the unaffiliated network from appearing on an Internet-based MVPD. That is just a peril of the marketplace, however.

There seems to be little rational justification for the Commission’s intercession in this area of the market: without a blanket obligation to get Internet rights, the price and terms of those rights is more likely to settle on a fair value. Of course, in the case of a cable-affiliated network that did decide to distribute on the Internet, the general rule to provide access on non-discriminatory terms would then take hold. This would help to prevent some of the problems raised in footnote 198.

The rest of those problems arise when a cable affiliate demands, not the rights to distribute, but a restriction on online distribution. But, when applied to distribution through Internet-based MVPDs, that concern would seem to be handled well by the existing rules: for example, Section 76.1301(b), which forbids an MVPD from coercing exclusive rights against any other MVPD as a condition for carriage. I think it reasonable to assume that, if the Commission decides to treat certain Internet-based distributors as MVPDs, that very act will help to eliminate many of the concerns raised in the Commission’s footnote.

Over-The-Top Service

Finally, the Commission asks how to handle the situation of a cable operator that furnishes an Internet-based program distribution service over-the-top (i.e., using the broadband capabilities of its system) of its more traditional managed video system.

I concur in the Commission’s conclusion that a cable operator does not cease to be a cable operator, for the applicability of the Commission’s existing rules, simply by adopting IP technology rather than more traditional technology, any more than a cable operator ceased to be one by switching from analog to digital operations. The technology used is not so important in that distinction than the fact that a cable system is a closed system for distributing video programming.

77 47 C.F.R. § 76.1301(b).
With this in mind, I also concur in the Commission’s conclusion that a cable operator’s OTT Internet-based service should be considered an Internet-based MVPD\(^78\) and not a cable operation, with two reservations.

The Commission must recognize that the key distinction between an Internet-based MVPD and a cable system is that an Internet-based MVPD is an open system, where a cable system is closed. As I have said above, many of the Commission’s public service obligations imposed on cable systems are a result of a cable systems’ closed nature: a cable subscriber generally does not have any reasonable alternate source for programming during the subscription term, but is forced to accept whatever programming the cable operator will provide, giving the cable operator something like a monopoly power over its subscribers. The same obligations are not appropriate for the more open Internet-based distributors, whose nature allows a consumer to be subscribed to multiple services simultaneously.

For this distinction to hold true, however, the cable system must provide its OTT service independently of its cable operation in two respects: the OTT service should be made available both to cable subscribers and non-subscribers, and the OTT service must not exclude alternate MVPDs from the cable operator’s broadband system\(^79\). The first condition is somewhat less stringent than the second, though making the OTT service available only over the cable provider’s facilities should be a warning that the cable operator may be attempting to evade application of the Commission’s cable system rules. Certainly, if the cable operator’s OTT service is only available over the cable system, the service begins to look much more like an IP-based cable operation than a true, independent, OTT operation.

However, for the situation described by the Commission, in which the OTT service happens (coincidentally, perhaps) to be obtained through the cable operator’s facilities, I see no immediate need to classify that as cable service rather than Internet-based MVPD service. This could be true even if the service were limited to within the operator’s footprint, depending on how “footprint” is defined. If, by “footprint,” the Commission means the cable operator’s franchise area, then there is no sense in regulating the OTT service as a cable service: such a service can be received even without a connection to the cable operator’s system, and this makes it very much an Internet-based MVPD. If, however, by “footprint,” the Commission means “system,” such that a physical connection to the cable operator’s facilities is required in order to receive programming from the OTT service, then as I discussed above, that service argues more

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\(^78\) This assumes, of course, that the service under discussion is otherwise defined as an MVPD. An on-demand type of service, for example, would not involve linear programming and would not qualify for MVPD treatment under the Commission’s proposed Linear Programming interpretation. In that case, again assuming it is an open and competitive service (rather than, say, traditional on-system pay-per-view service), I would propose that neither cable nor MVPD treatment would apply.

\(^79\) To the extent that a cable operator’s system would be considered a broadband provider, the Open Internet Order would seem to apply, and would reinforce this second requirement by prohibiting discriminatory access. It may be best, however, for the Commission to make clear that a cable operator that uses its OTT service to exclude competitors will be treated as a cable operator for both its conventional and OTT services.
for treatment as cable service. OTT service that is bundled in with cable service could be defined
either way, and probably should be defined based on how it is to be received: if the bundled
service is only distributed through the cable system, then it should be treated as an extension of
the cable service and not as a separate MVPD. If, on the other hand, it were available off-system,
but only to cable subscribers, then such a service is more fit to be considered an MVPD separate
from the cable system.

Given the Commission’s proposed treatment of DBS-provided OTT services, I think no
other interpretation is possible if cable and DBS services are to be treated equivalently. Since a
DBS-provided OTT service has no cable to travel over, that service must be furnished off-
system, and as suggested by the Commission, this makes it MVPD service rather than DBS
service. There does not seem to be a rational purpose in treating off-system cable-operated
MVPD service differently than off-system DBS-run MVPD service. On the other hand, there is
also no reason to permit a DBS provider to escape its regulatory liabilities by moving its
programming to IP-based delivery; therefore, though not discussed by the Commission, I would
propose that a DBS provider that furnished Internet-based MVPD service, but only through its
satellite downlink and only to its existing subscribers, should not gain the benefits of MVPD
status, for the same reasons that a cable operator should not be able to become an MVPD by
moving its closed cable operation to a closed IP-based operation.

80 I must point out that the term is not precisely accurate in the case of DBS-provided services,
as described by the Commission. Although Internet-by-DBS is available (see, for example,
HughesNet, http://www.hughesnet.com), I understand the Commission to be discussing
services provided on an Internet broadband connection more generally. Since the Internet-
based program distribution is not necessarily furnished over-the-top of the DBS programming,
calling it OTT is not entirely correct and potentially confusing. I will, however, hold to the
Commission’s terminology for consistency.
Conclusion

As I have said, the times change, and we must change with them. The expansion of the Internet to encompass the transmission of all kinds of information mirrors, in its way, the similar expansion of radio service one hundred years ago. And, although the Internet has thrived under a relatively free-handed regulatory scheme so far, it seems reasonable to ask it to take on some of the regulatory burdens that come with the businesses it seeks to enter or replace, insofar as those regulations serve the sorts of concerns that the use of the Internet cannot handle by itself. The Commission’s proposals, by and large, pass this test, provided that their application is limited to the kinds of businesses now being regulated. Furthermore, their adoption will end the present suspense over what the Commission will do to regulate “cable-by-Net,” facilitating the development of this business—something the Commission has long held out hope for. I am hopeful that the rules finally adopted will serve both these ends, without hindering new models of business unnecessarily, but also without sacrificing the protection accorded the public by the current regulatory scheme; likewise, I am hopeful that the Commission’s work will be helped by my comments, all of which are

Respectfully submitted,

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