

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of

MB Docket No. 14-261, "Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services"

Comments of Seth Johnson

To: Marlene H. Dortch, Secretary
Federal Communications Commission

MB Docket 14-261 proposes to interpret the term "multichannel video programming distributor" in the Communications Act to allow the FCC to apply provisions for retransmission consent to all services that make multiple linear video streams available, including on the Internet.

This establishes, by a regulatory act of the Federal Communications Commission, the first formal exception to the provisions of the Digital Millennium Copyright Act's Section 512 provisions protecting online service providers from copyright liability so long as they comply with defined procedures for Notice and Takedown.

The NPRM tentatively concludes that this definition is a reasonable interpretation that would allow the application of the Communications Act to establish liability for retransmitting linear programming on the Internet under the Act's provisions for retransmission consent. It proceeds to request comments on numerous questions related to this proposed interpretation among others, such as the effect of different interpretations on the industry and consumers, how to modify good faith negotiation rules for retransmission consent, impacts on copyright holders, and how the various types of privileges and obligations that apply to MVPDs under the statute would work for or against prospective market entrants under the FCC's proposed definition.

The NPRM uses a principle of technology neutrality in public policy in its reasoning for defining MVPDs and applying the Act this way, and the market dynamic that the FCC projects coming into force under this new policy is based on this same principle. This means the FCC applies the same rights for the Internet as have already been established in the legal tradition, and the market dynamic is described in terms of driving competition in video markets and deployment of high-speed broadband infrastructure based on the same type of exclusive rights for video on the Internet as have applied under the established legal tradition.

This action has implications for the system of liability protections for online service providers established in Section 512 of the Digital Millennium Copyright Act, establishing for a particular class of online service

providers a liability to retransmission consent claims not considered in the DMCA, and establishing a kind of right online similar to the thin right related to broadcast signals that the US is attempting to establish through the Broadcasters Treaty. The US Delegation to the WIPO SCCR has indicated in a private email exchange that the US believes it can use retransmission consent as part of the basis for the enabling legislation necessary to establish the provisions of the Broadcasters Treaty as US national law. While these implications enter areas of exclusive rights policy for which the FCC is not responsible, the FCC has also not alerted us to or called for comment on the latter implication in terms of implementing an international treaty right.

In addition, the question of whether exclusive rights should be "technology neutral" cannot be decided by the FCC. While it is empowered to implement MVPD policies under the 1992 Cable Act, the FCC cannot determine that exclusive rights policy would not be adapted to the nature of the Internet, as it is doing in applying this principle while establishing retransmission consent for MVPDs on the Internet. The DMCA is itself not technology neutral with respect to the Internet. The DMCA represents a unique combination of provisions designed to implement the WIPO Copyright Treaty and the Phonograms and Performances Treaty while introducing a unique new protection against liability for copyright claims in the traditional mode for the dynamic new medium of the Internet, a protection without which the traditional mode would easily interfere with the full potential for forms of innovation and diversity of modes of expression made possible in the Internet environment.

It is not only outside the powers of the FCC to adjust the scope of copyright established by this combination of provisions interacting with each other within the DMCA by applying retransmission consent to linear broadcasts online, it is also not within the FCC's powers to determine that exclusive rights policy for the Internet would be the same as exclusive rights already established in the legal tradition, in relation to other technological contexts.

I urge the FCC to reconsider its approach to the question of implementing MVPDs and retransmission consent online, and to recommend modes of addressing the proposal that may possess the full range of powers needed to do so, and to present for public comment the notion of establishing the international Broadcasters Treaty by means of a national implementation through retransmission consent, rather than allowing that implication to pass unnoticed.

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