

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
)	
Interpretation of the Terms “Multichannel Video Programming Distributor” and “Channel” As Raised in Pending Program Access Complaint Proceeding)	MB Docket No. 12-83

REPLY COMMENTS OF THE WALT DISNEY COMPANY

The Walt Disney Company (“Disney”)¹ respectfully submits the instant reply comments in the above-captioned proceeding in which the Media Bureau (“Bureau”) of the Federal Communications Commission (“FCC” or “Commission”) seeks comment on the meaning of the terms “multichannel video programming distributor” (“MVPD”) and “channel” as set forth in the Communications Act of 1934, as amended (“the Act”) and the Commission’s rules.² Disney agrees that the complex issues raised in the *Public Notice* are likely to have far-reaching policy ramifications, including potentially significant implications relating to the carriage of broadcast television signals. Before acting on the various issues raised in the *Public Notice*, the Commission must carefully examine and fully take into consideration the entire legal landscape governing carriage of broadcast signals. Moreover, the Commission must recognize that whether

¹ Disney files these reply comments on behalf of itself, as well as the following Disney-owned entities: ESPN (80% owned by Disney), Disney ABC Cable Networks Group, the ABC Television Network, and the ABC Owned Television Stations. The ABC Owned Television Stations are located in the following markets: New York (WABC-TV), Los Angeles (KABC-TV), Chicago (WLS-TV), Philadelphia (WPVI-TV), San Francisco (KGO-TV), Houston (KTRK-TV), Raleigh-Durham (WTVD(DT)), and Fresno (KFSN-TV).

² See *Media Bureau Seeks Comment on Interpretation of the Terms “Multichannel Video Programming Distributor” and “Channel” as Raised in Pending Program Access Complaint Proceeding*, Public Notice, DA 12-507, MB Docket No. 12-83 (rel. Mar. 30, 2012) (“Public Notice”).

or not various online distributors are ultimately classified as an MVPD, *any* entity seeking to retransmit broadcast television signals and the copyrighted programming on those signals must obtain consent to do so.³

I. THE FCC MUST TAKE FULL ACCOUNT OF THE STATUTORY, REGULATORY, AND POLICY RAMIFICATIONS OF THE DEFINITIONAL ISSUES RAISED IN THIS PROCEEDING.

Innovation in the video distribution platform market can further important Commission policy objectives and can benefit consumers and content providers alike. For instance, the emergence of new video distribution platforms will increase choice and competition in the video marketplace. Consumers will benefit from this increased competition by way of increased access to programming.⁴ Content programmers also will benefit, as such competition will provide additional outlets through which they can distribute their programming. This increased distribution can increase advertising and retransmission revenues for broadcasters, which, in turn, can be used to enhance news and entertainment programming, furthering the Commission's competition and localism goals.⁵ However, broadcasters must maintain the rights to control the retransmission of their signals over all distribution platforms, including the Internet, and to negotiate for compensation for distribution of such signals. To do otherwise would upset the delicate balance that Congress established in adopting the compulsory copyright license and retransmission consent regimes.

The instant proceeding seeks comment on the definitions of "MVPD" and "channel" to enable the Bureau to resolve a program access complaint filed by Sky Angel U.S., LLC ("Sky

³ See 47 U.S.C. § 325(b)(1)(A) (2012) ("No cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, except with the express authority of the originating station.").

⁴ See National Association of Broadcasters Comments to *Public Notice* in MB Docket No. 12-83, at 3 (filed May 14, 2012) ("NAB Comments").

⁵ See *id.*

Angel”) against Discovery Communications, LLC and its affiliate, Animal Planet, L.L.C.⁶

Although the Bureau initiated this proceeding to facilitate the resolution of the pending Sky Angel adjudication, the *Public Notice* recognizes that the “interpretation of these terms has legal and policy implications that extend beyond the parties to the complaint.”⁷ For example, the *Public Notice* explicitly recognizes the potentially far-reaching ramifications of the FCC’s actions for online distributors of video programming, broadband Internet service providers, on-demand video program providers, cable-affiliated programmers, and television broadcasters.⁸ Accordingly, the *Public Notice* seeks comment not only on the definitions of terms necessary to resolve the pending Sky Angel adjudication, but also on the policy, legal, and practical implications of the FCC’s decision. Because the consequences of the FCC’s decision are likely to have far-reaching implications, the Commission should ensure that it considers all the implications before proceeding to adopt any rule or policy of general applicability and should consider resolving the issue through a full notice-and-comment rulemaking proceeding.⁹

Moreover, the *Public Notice* does not identify or seek comment on all of the issues or legal and policy implications that are involved in the Commission’s resolution of these issues. As discussed in many of the opening comments, the definition of online distributors as MVPDs raises a whole host of questions as to the regulatory landscape applicable to MVPDs. It is imperative that any action the FCC adopts in this proceeding properly take into consideration the full range of applicable legal requirements and policy ramifications.

⁶ See Public Notice ¶¶ 4-5.

⁷ *Id.* ¶ 1.

⁸ See, e.g., *id.* ¶¶ 1, 8, 10, 12, 13.

⁹ See *Acme Television, Inc.*, Letter, 26 FCC Rcd 5189, 5192 (MB 2011) (noting that “the Commission has long refused to develop broad new rules in an adjudicatory context”); see also *Cnty. Television of So. Cal. v. Gottfried*, 459 U.S. 499, 511 (1983) (“[A] rulemaking is generally a better, fairer, and more effective method of implementing a new industry wide policy than uneven application of conditions in isolated [adjudicatory] proceedings.”).

Notably, the *Public Notice* fails to acknowledge either the Copyright Act¹⁰ or the compulsory copyright licenses in Sections 111 and 119 of that law, despite that these compulsory licenses prompted Congress to adopt the retransmission consent regime for MVPDs.¹¹ Indeed, after many years of experience, Congress concluded that the compulsory copyright licenses adopted in the Copyright Act forced broadcasters to “subsidize the establishment of their chief competitors[,]” threatened broadcasters’ incentives to invest in high quality programming, and “created a distortion in the video marketplace which threaten[ed] the future of over-the-air broadcasting.”¹² In adopting retransmission consent requirements, Congress recognized the imperfections of the compulsory license scheme, whereby copyright holders were not paid for the full value for the right to publicly perform their works *i.e.*, copyright holders were paid a price not set by the marketplace.¹³ The retransmission consent requirement and complementary FCC rules providing for the enforcement of private contractual arrangements (*e.g.*, network non-

¹⁰ See Copyright Act of 1976, Pub L. No. 94-553 (1976). A principal objective of the 1976 Act was to overturn the results in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), and *Teleprompter Corp. v. CBS, Inc.*, 415 U.S. 394 (1974)—where the Supreme Court ruled that the retransmission of copyrighted programming on broadcast signals without the consent of, and without paying any compensation to, copyright owners did not violate the Copyright Act of 1909. In 1988 Congress accorded satellite carriers a similar compulsory license in Section 119 of the Copyright Act.

¹¹ Under this regime, cable systems transmitting broadcast signals outside of their local service areas (generally defined as the station’s television market) must pay a fee to the Register of Copyright based on the number of “distant” signals carried. See 17 U.S.C. § 111(d)(1). No fee is payable for retransmission of television signals within the station’s television market. A similar statutory copyright license permits the use of broadcast television programs by satellite services without the copyright owner’s consent. *Id.* § 119.

¹² S. Rep. No. 102-92, at 35 (1991), reprinted in 1992 U.S.C.C.A.N. 1133, 1169; see also *Amendment of the Commission’s Rules Related to Retransmission Consent*, MB Docket No. 10-71, Notice of Proposed Rulemaking, 26 FCC Rcd 2718, 2720 ¶ 4 (reporting Congress’s finding that “cable operators obtained great benefit from the local broadcast signals that they were able to carry without broadcaster consent or copyright liability, and that this benefit resulted in an effective subsidy to cable operators.”).

¹³ See Attachment D to National Association of Broadcasters Comments to *Notice of Proposed Rulemaking* in MB Docket No. 10-71, at 5-6 (filed May 27, 2011) (providing a short history of the program exclusivity rules).

duplication and syndicated exclusivity rules) were adopted to ensure that broadcasters have control over the use of and are compensated fairly for the retransmission of their signals by competing distribution platforms.¹⁴ Accordingly, the FCC cannot take action in this proceeding in a vacuum without considering the implications of the Copyright Act.

Above all else, the FCC must not adopt a regulatory scheme whereby online distributors may retransmit a broadcaster's signal without obtaining consent from either the broadcaster or the owners of the copyrighted programming on that signal.¹⁵ The legislative history of Section 325 makes clear "that Congress' intent was to allow broadcasters to control the use of their signals by *anyone* engaged in retransmission by *whatever means*."¹⁶ Accordingly, the Commission must ensure that broadcasters, like all other programmers and content providers, continue to have the right to control the distribution of their signals and to recapture the value of retransmission and resale of their signals.¹⁷

¹⁴ FCC, *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* ¶¶ 9, 32 (MB rel. Sept. 9, 2005).

¹⁵ Disney agrees with other commenters that it is unnecessary for the FCC to decide in this proceeding whether the definition of MVPD should encompass Internet-based distributors of non-linear programming, such as the joint venture described between Verizon and Redbox. *See* Verizon Comments to *Public Notice* in MB Docket No. 12-83, at 11 (filed May 14, 2012); *see also* ABC Television Affiliates Association, CBS Television Network Affiliates Association, and NBC Television Affiliates Comments to *Public Notice* in MB Docket No. 12-83, at n.8 (filed May 14, 2012) ("Affiliates Associations Comments"). Disney further agrees that should OVDs be classified as MVPDs, consistent with the statute, such classification must be limited to those OVDs that provide multiple *linear* channels or streams of programming for purchase by subscribers or customers. *See* 47 U.S.C. § 522(13). Such status should not be extended to entities that distribute programming for free or "on-demand." *See* DIRECTV, LLC Comments to *Public Notice* in MB Docket No. 12-83, at 13-14 (filed May 14, 2012) (identifying common characteristics among MVPDs).

¹⁶ S. Rep. No. 102-92, at 34, *reprinted in* 1992 U.S.C.C.A.N. at 1167 (emphasis added); *see also* Affiliates Associations Comments, *supra* note 15, at 15-16; NAB Comments, *supra* note 4, at 6-7.

¹⁷ *See* NAB Comments, *supra* note 4, at 5-7; Saga Communications, Inc. Comments to *Public Notice* in MB Docket No. 12-83, at 4 (filed May 14, 2012) ("Saga Comments").

II. CONCLUSION

Online distributors have great potential to increase competition in the MVPD marketplace, thereby benefiting both consumers and content providers. However, the Commission cannot ignore the complex legal landscape in which MVPDs operate. Importantly, regardless of the regulatory classification, online distributors must not be permitted to expropriate the signals of broadcaster or retransmit their content without first obtaining consent, consistent with Congressional intent and the requirements of Section 325.

Respectfully submitted,

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