

new distribution platforms and technologies, it should initiate a rulemaking proceeding of general applicability so that interested parties will have advance guidance as to how the FCC intends to proceed and so that affected entities will have straightforward and unimpeded appeal rights in the event that an adverse decision threatens their businesses or the public interest.

In any event, regardless of the label that the Commission ultimately applies to online video distributors, the FCC should ensure that the current delicate balance between the copyright law and the Communications Act is respected. Specifically, no distributor, online or otherwise, should be able to legally distribute or appropriate content owners' works, or retransmit a broadcaster's signal, without first acquiring the content owners'/broadcaster's consent.

I. A PRIVATE DISPUTE SHOULD NOT BE THE FORUM FOR RESOLUTION OF CRITICAL POLICY ISSUES THAT AFFECT THE ENTIRE VIDEO PROGRAMMING MARKETPLACE

The Bureau issued the *Notice* in an apparent attempt to gather information related to its evaluation of a program access complaint filed by Sky Angel against Discovery Networks. Sky Angel, an online video provider, claims that it should be entitled to the benefits of FCC rules applicable to certain programming distributors, but the Bureau tentatively concluded that, without the ability to “provide its subscribers with a transmission path,” Sky Angel was not “likely to be able to demonstrate that it [was] an MVPD”² Fox takes no position on the program access dispute between Sky Angel and Discovery. Fox is certain, however, that resolution of the much broader set of issues posed by the *Notice* would have sweeping implications for today's video programming marketplace. MVPDs are subject to many

² See *In re Sky Angel U.S., LLC*, 25 FCC Red 3879, 3883 (2010) (“*Sky Angel*”).

statutory and regulatory requirements. Extending the definition of an MVPD to non-traditional distribution platforms, such as online distributors, therefore raises a host of regulatory and practical issues, including whether the FCC’s regulation of MVPDs can be extended to the Internet without an explicit Congressional directive to do so. As noted below, there is also a close relationship between the definition of an MVPD and the Copyright Act’s statutory licenses, which the Bureau’s *Notice* does not even address. These are complicated and far-reaching questions that will have immediate and long term effects on the development and functioning of the program creation and distribution marketplace – both online and traditional. For this reason, Fox submits that this adjudicatory proceeding is an inappropriate forum for evaluating the definition of a statutory term, any changes to which would affect the operations of and relationships between a whole host of businesses as well as the public interest.

In opening comments, commenters representing various facets of the content distribution industry, Internet-based and non-Internet-based alike, implored the Commission not to use the development of innovative technologies as an excuse for upending business models.³ It makes little sense for the Commission to indiscriminately imperil the interests of so many parties on so slender a reed as the private *Sky Angel* matter. If there are valid reasons for considering updates to the FCC’s interpretation of the statutory term “MVPD,” they warrant evaluation in a full-fledged rulemaking proceeding with all of its attendant Administrative Procedure Act requirements and protections.

³ See, e.g., American Cable Association Comments, at iii; Computer & Communications Industry Association Comments, at 2-3; Open Internet Coalition Comments, at 5; AT&T Corp. Comments, at 4-5; Comcast Corp. Comments, at 6. Please note that for ease of reading, references to “[Party Name] Comments” refer to comments filed by the party of that name on May 14, 2012 in MB Docket No. 12-83.

Specifically, the Commission and the courts long have acknowledged that adjudicatory proceedings are ill suited to reviews of matters with widespread impact. As the Supreme Court has emphasized, “rulemaking is generally a ‘better, fairer, and more effective’ method of implementing a new industry-wide policy than is the uneven application of conditions in isolated [adjudicatory] proceedings.”⁴ And the FCC has observed “that it has long been Commission practice to make decisions that alter fundamental components of broadly applicable regulatory schemes in the context of rule making proceedings, not adjudications.”⁵ Here, that should mean at the least a notice of proposed rulemaking to give interested parties advance guidance about how the FCC itself views the question and plans to proceed. Not only would a rulemaking proceeding ensure that the full Commission, rather than a bureau, considers issues that could roil entire industries, but a general rulemaking approach also would ensure that affected parties would have a clear and unimpeded path to perfect their appeal rights.

When FCC action could simultaneously disrupt businesses ranging from content producers to broadcast stations to cable to online programmers *and* affect consumers’ access

⁴ *Community Television v. Gottfried*, 459 U.S. 499, 511 (1983) (quoting lower court in *Gottfried v. FCC*, 655 F.2d 297, 301 (D.C. Cir. 1981)). See also *Melcher v. FCC*, 134 F.3d 1143, 1164 (D.C. Cir. 1998) (“[S]ystemic issues” are “most appropriately considered in a rulemaking proceeding that offer[s] all interested parties the opportunity to comment and [gives] the agency the opportunity to proceed in a more thorough and fair manner”).

⁵ *In re Sunburst Media L.P.*, 17 FCC Rcd 1366, 1368 (2002). See also *In re Applications for License and Authority to Operate in the 2155-2175 MHz Band*, 22 FCC Rcd 16563, 16581 (2007) (footnotes omitted) (“Although the Commission has wide latitude to choose whether it will proceed by adjudication (e.g., waiver proceedings) or by rulemaking, it is nevertheless the case that guidance from the courts indicates that issues of general applicability are more suited to rulemaking than to adjudication”); *In re Amendment of Parts 2 and 25 of the Commission’s Rules*, 17 FCC Rcd 9614, 9699 (2002) (footnotes omitted) (“The rulemaking approach is accorded judicial preference when an agency develops new policies. This preference is based on the principle that a rulemaking under the Administrative Procedure Act’s provisions for notice and broad public participation assures fairness, the opportunity to develop the record and mature consideration”).

to and enjoyment of content, a private adjudication represents a woefully unsuitable venue for moving forward.

II. REGARDLESS OF THE LABEL IT APPLIES TO ONLINE DISTRIBUTORS, THE COMMISSION SHOULD HOLD INVIOATE BROADCASTERS' RIGHT TO CONTROL RETRANSMISSION OF THEIR SIGNALS

As the record in this proceeding makes clear, the Commission's evaluation of the issues raised in the *Notice* is not occurring in a vacuum.⁶ The Commission should remain especially mindful of the interrelations between the Copyright Office's statutory licensing scheme and the Communications Act. Congress has provided cable systems and direct broadcast satellite ("DBS") distributors a limited statutory license that allows those MVPDs to retransmit broadcast signals in exchange for government-set royalties. These licenses necessarily supersede the concept of marketplace negotiations, however, and are therefore considered exceptional mechanisms. Indeed, the Copyright Office has made clear that "[s]tatutory licenses are an exception to the copyright principle of exclusive ownership for authors of creative works, and, historically, the Office has only supported the creation of such licenses when warranted by special circumstances."⁷ As a result, the Copyright Office repeatedly has "opposed (and continues to oppose) the formation of a statutory license for the retransmission of broadcast signals over the Internet."⁸ In addition, the Copyright Office has found that "a government-mandated Internet license would likely undercut private negotiations leaving content owners with relatively little bargaining power in the distribution

⁶ See ABC Television Affiliates Association, CBS Television Network Affiliates Association, and NBC Television Affiliates Comments, at 14-18 ("Network Affiliate Comments"); Cablevision Systems Corp. Comments, at 15-16.

⁷ REGISTER OF COPYRIGHTS, SATELLITE HOME VIEWER EXTENSION AND REAUTHORIZATION ACT, SECTION 109 REPORT, at 76 (2008) ("SHVERA SECTION 109 REPORT").

⁸ REGISTER OF COPYRIGHTS, SATELLITE TELEVISION EXTENSION AND LOCALISM ACT, SECTION 302 REPORT, at 48 (2011) ("SHVERA SECTION 302 REPORT").

of broadcast programming.”⁹ Given that “the lack of a statutory license provides an incentive for parties to find new ways to bring . . . programming to the marketplace,” and since the online distribution market “continues to grow,” the Copyright Office’s position is well-justified.¹⁰

Like various other content creators, Fox has invested enormous sums to produce and acquire high-quality video programming for distribution to consumers. Content creators have taken tremendous comfort from the knowledge that Federal law is designed to protect their investments by ensuring that *any* distributor that wants to transmit copyrighted video programming must *first* obtain consent to do so. Through the interrelated copyright and retransmission consent statutes, content owners today know that a distributor must obtain a private copyright license, or else – if relying upon a statutory license for broadcast content – obtain express consent from the broadcast station before retransmitting that station’s signal. The delicate balance between these regimes has facilitated the development of the robust and growing Internet video distribution marketplace.

Today online video distributors are not eligible for a statutory copyright license. These providers cannot lawfully retransmit a broadcast station’s signal without obtaining a private copyright license (i.e., obtain consent from the entities that hold the copyrights in the programming broadcast by the station), regardless of whether they are “MVPDs.” In the future, if Congress grants (or courts permit) online providers the right to utilize a statutory license, Congress’ goal to maintain a balance between the Copyright and Communications Acts must be preserved. Any distributor that due to its eligibility for a statutory license does

⁹ SHVERA SECTION 109 REPORT, at 188.

¹⁰ *Id.*

not have to obtain a copyright license to retransmit broadcast programming must be required to seek retransmission consent from the originating broadcast station, just like the cable systems and satellite operators that have the advantage of statutory licenses today.

As a group of network affiliates noted in its comments in this proceeding, the dangers of upending this balance for one type of distributor are not merely academic.¹¹ Some Internet-based video distributors already have attempted to engage in regulatory arbitrage by leveraging the benefits of copyright law without assuming any of the burdens of complying with FCC regulations: “Certain programming distributors that rely on the Internet for delivery have claimed that they are entitled to the benefits of the statutory copyright license in Section 111 of the Copyright Act but have insisted that they are not MVPDs and thus need not obtain retransmission consent from broadcasters.”¹² As a result, if the Commission does anything at all in this proceeding, it at least should reinforce what Congress clearly intended when it adopted both the statutory license and retransmission consent regimes – that all distribution platforms must either obtain negotiated licenses from copyright owners or consent from broadcasters prior to retransmitting the signals of broadcast stations. Only if broadcasters maintain control over the retransmission of their signals can stations and broadcast networks continue to invest in the production and acquisition of the most popular news, sports and entertainment content on television.

The bottom line is that Internet distributors should never be in a position to argue that they can retransmit and appropriate content owners’ copyrighted works or broadcast signals without consent. Such a position represents a clear contravention of Congress’ unequivocal

¹¹ See Network Affiliate Comments, at 15 n. 25.

¹² *Id.*

intent. When it comes to broadcasting, Congress has stated expressly that “anyone engaged in retransmission by whatever means” must obtain a station’s consent before retransmitting that station’s programming.¹³ In other contexts, the Commission has confirmed that its mandate is to interpret statutory terms in a manner designed to effectuate Congressional intent.¹⁴ Here, where Congress has left no doubt as to its intent that copyright owners’ works be protected against unauthorized retransmission, and that stations retain control over the retransmission of their signals, the FCC should ensure that distributors using any technology – transmitting “by whatever means” – acquire advance permission.¹⁵

III. CONCLUSION

In sum, Fox respectfully submits that the current adjudicatory proceeding is an inappropriate forum for considering questions of statutory interpretation that would have far-reaching implications for both consumers and a wide array of businesses. If the Commission nonetheless takes action based on the record developed in response to the *Notice*, Fox urges the FCC to ensure that broadcasters retain control over the retransmission of their signals.

¹³ S. Rep. No. 102-92, 1992 U.S.C.C.A.N. 1133, 1167 (1991).

¹⁴ *See, e.g., Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746, 761 (2010) (stating that legislative history did not “indicate[] a Congressional intent to limit the broad statutory language” prohibiting unfair practices by MVPDs in distributing vertically integrated programming) (*vacated in part on other grounds, Cablevision Systems Corp. v. FCC*, 649 F.3d 695 (D.C. Cir. 2011)).

¹⁵ *Cf.* Motion Picture Association of America Comments, at 2-3 (stating that unforeseen changes in the market could disrupt copyright and harm content owners).

