

Could Verizon/SpectrumCo Create Gaping New Loophole In Media Ownership Rules?

Few people would imagine that the Verizon/SpectrumCo deal, [now heading rapidly for conclusion](#), could potentially have huge impact on traditional broadcast ownership rules. Unfortunately, unless the FCC takes action, the deal is likely to create a new and powerful loophole in traditional media ownership rules involving something called the "attribution rules." While I do not think the participants themselves are aware of this problem, or intend this outcome, allowing the major cable companies and Verizon to participate in a Joint Operating Entity (JOE) without certain precautions creates a means by which these parties, if they wished, could coordinate their video offerings in a way that Congress and the FCC have traditionally found antithetical to our media policy of viewpoint diversity.

As the attribution rules apply to broadcast media, the mechanism for circumventing the attribution rules set in this case would extend to radio and television broadcast ownership as well. In other words, it's not just about Comcast and VZ, or even Comcast and TWC, sharing programming info such as what they are paying for ESPN or what tier they plan to place Tennis Channel or EPIX. Approval of the deal in its current form also creates a mechanism whereby broadcasters such as News Corp and CBS could get together to coordinate news coverage on things of mutual interest, such as whether Congress should adopt SOPA.

Fortunately, the DOJ proposed final judgment lays the groundwork for addressing these concerns. But the FCC has to actually focus on this and act. It doesn't make a difference for the current deal, but it makes a huge difference for the future of media ownership.

I explain below . . .

We start with the fact that, from an FCC perspective, the purpose of the ownership rules is not merely to protect competition but also to protect what we call "viewpoint diversity." Since the FCC adopted the first ownership limits more than 70 years ago, it has focused on making sure that we have sufficient "genuinely antagonistic" (to borrow a phrase from [Red Lion](#)) sources of news and entertainment. As the FCC also long recognized, business relationships that fall short of control but that allow someone to influence news coverage or programming decisions can compromised the independence of these sources and undermine the diversity of views the ownership rules promote and protect. For example, if Rupert Murdoch were to sit on the Board of CBS, he would be in a position to influence how CBS covered news or selected programming. While this would not rise to the same level of control Murdoch has over Fox Broadcasting, it would still allow him to influence CBS' news coverage and possibly blunt attacks by CBS on Fox's news coverage. By contrast, if both CBS and Fox are genuinely independent, we increase the chance that they will cover different things or cover the same things differently.

The Attribution Rules.

The FCC therefore adopted the “attribution rules” to cover business relationships that give influence rather than control. If Rupert Murdoch sits on the board of CBS, or owns a big chunk of CBS voting stock (5% or more), then we treat Rupert Murdoch as if he owned CBS as well as Fox. In other words, we attribute the broadcast outlets owned by CBS to Rupert Murdoch because he can influence CBS in a way that the ownership rules are designed to prevent. Since combining News Corp and CBS broadcast assets would exceed the national ownership cap, Rupert Murdoch would not be allowed to sit on CBS’ Board.

The FCC did not, initially, have the same concern about ownership and attribution in cable. In the 1992 Cable Act, Congress ordered the FCC to develop ownership and attribution rules for cable similar to those for broadcasting (this was codified at [47 USC 533\(f\)](#)). The FCC adopted these rules in 1993. But in 1999, the FCC [modified the rules to allow joint ventures by cable operators to promote technological innovation and local phone service](#). The idea was that allowing AT&T (which back then was a CLEC) to buy up cable companies and partner with other cable companies would promote residential phone competition and broadband deployment. So the FCC permitted cable operators to “insulate” themselves from the attribution rules if they formed limited partnerships for non-programming purposes provided they certified they would not talk about programming.

VZ/SpectrumCo and the Attribution Rules.

Lets now bring this back to VZ/SpectrumCo. As I've [written extensively elsewhere](#), the element of the whole VZ/SpectrumCo transaction that gives me the most heartburn is the "[Joint Operating Entity](#)" aka the JOE. From my perspective, it creates a secret back room where the biggest companies in video, voice and data can get together and talk about whatever they want. That includes exchanging information about plain ordinary MVPD video programming stuff that Congress and the FCC have said since 1992 compromises the twin pillars of our media policy, competition and diversity.

I have therefore argued to the FCC that, at a minimum, they need to make the parties to the JOE meet the certification requirements in the FCC's rules ([47 C.F.R. 76.501](#)) to insulate themselves from the attribution rules. Most of this discussion focuses on the Highly Confidential information since attribution depends on corporate structure, so I can't go into any detail. It also means that people who care about the media ownership rules generally have no idea that we could be on the cusp of a very bad precedent that guts the attribution rules generally.

How? Lets return to our hypothetical News Corp/CBS example. Rupert Murdoch can't sit on the board of CBS or buy 5% of the voting shares. But suppose News Corp and CBS create a Joint Operating Entity (JOE) "to develop new, spectrum efficient technologies for the delivery of news and entertainment, and to develop spectrum efficient mobile television delivery systems." We can certainly see how this is timely and useful technology. At the same time, it is also clear that if this arrangement allowed

Leslie Moonves and Rupert Murdoch to get together on a regular basis and chat about how they should coordinate news so that they can get SOPA passed next time and what stories deserve coverage or other conversations that compromised the independence of their news and programming, that would effectively gut the attribution rules.

I do not imagine for one minute that Verizon, Comcast, TWC, and Bright House decided to create the JOE so they could circumvent the attribution rules. But I also believe that once a device for evading the rules gets blessed in an FCC decision, it will proliferate very rapidly. An industry that quickly figured out how to use Local Marketing Agreements (LMAs) to avoid attribution, then switched to Joint Sales Agreements (JSAs) when the FCC made LMAs attributable will jump on JOE bandwagon pretty quickly if the FCC creates a precedent that JOEs exist outside the attribution rules.

What The FCC Should Do.

Fortunately, the FCC does not need to do much to solve this problem. The [proposed DoJ Final Judgment] at V.J. states: "No Defendant shall participate in, encourage, or facilitate any agreement or understanding between VZT and a Cable Defendant relating to the price, terms, availability, expansion, or non-expansion of VZT Services or Cable Services." This is pretty much what the FCC requires as a certification for insulation to the rules. The parties themselves have repeatedly stressed that the JOE will not focus on traditional programming issues (most recently [here](#)).

What the FCC needs to do is emphasize in the Order that it understands the DOJ condition and the representations of the parties to act as a required certification under the ownership rules. The FCC would need to extend this condition to apply to information exchanged between the cable operators as well as between the cable operators and Verizon. That is to say, Comcast and Time Warner Cable would also be prohibited from sharing traditional cable programming information (such as how much either one is paying for ESPN) with each other, as well as with Verizon.

Such a result makes little practical difference to the participants in this proceeding. But it potentially makes a huge difference for the vitality of the media attribution rules. We already have enough problem with existing loopholes undermining the broadcast ownership rules. We don't need to create a new one.