

## HOW THE WIPO BROADCAST TREATY CONFLICTS WITH AMERICAN MEDIA POLICY

### Introduction

The proposed WIPO Treaty for the Protection of Broadcasting Organizations has focused mostly on providing broadcasters and cablecasters with exclusive rights in content they broadcast. The most recent draft treaty proposal considered by WIPO<sup>1</sup> as well as the recent proposal put forth by the delegation from South Africa<sup>2</sup> provides evidence of this approach. Many public interest groups, technology companies, and copyright owner groups<sup>3</sup> have explained how this approach would adversely impact the copyright system. Less explored are the impacts on various stakeholders that occupy the media landscape. These stakeholders, including broadcasters, content

providers, programming networks, and program distributors, operate in a paradigm created by communications policy. This policy seeks to foster localism, competition among program distributors and program networks, and most importantly, promote the public's access to information from a wide variety of sources. This policy is inconsistent with the exclusive rights approach taken by the broadcast treaty proposals. The broadcast treaty would introduce new complexities to relationships in the media landscape, strengthen the position of one set of stakeholders, and introduce uncertainties into initiatives underway at the Federal Communications Commission (FCC).

### Retransmission Consent Reform

U.S. communications policy considers broadcast stations public trustees charged with the responsibility of responding to the interests of the local communities in which they transmit.<sup>4</sup> To protect the ability of local broadcast stations to achieve this objective, the Communications Act provides various rights to local broadcasters including the right to prevent cable and satellite companies from retransmitting their signals without their authorization.<sup>5</sup> In addition, where cable and satellite companies may not be willing to retransmit their signals, the Act also gives broadcasters the right to choose mandatory carriage instead of

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<sup>1</sup> Revised Draft Basic Proposal for the WIPO Treaty on the Protection of Broadcasting Organizations, World Intellectual Property Organization, SCCR/15/2, July 31, 2006, available at [http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_15/sccr\\_15\\_2.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_15/sccr_15_2.pdf)

<sup>2</sup> Proposal on the Draft Treaty on the Protection of Broadcasting Organizations, *Proposal by the Delegation of South Africa*, SCCR/22/5, March 1, 2011, available at [http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_22/sccr\\_22\\_5.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_22/sccr_22_5.pdf)

<sup>3</sup> See The Consolidated Text for the Protection of Broadcasting Organizations drafted by the Chairman of the SCCR – Joint Reaction of Rights Holders, The Association of European Performer's Organizations et. al., June 2004, available at <http://www.cptech.org/ip/wipo/bt/rightsholders062004.pdf>

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<sup>4</sup> See, e.g., *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 116-19 (1973), *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 389-90 (1969), *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 227 (1943).

<sup>5</sup> 47 U.S.C. §325(b)

retransmission consent.<sup>6</sup> Furthermore, cable service providers are required to black out certain programming duplicative of the content transmitted by some local stations.<sup>7</sup> While in theory, these rights are meant to protect local broadcast stations; in fact these rights combined with recent marketplace developments have resulted in impasses in retransmission consent negotiations affecting “millions of consumers.”<sup>8</sup> Many of these consumers have lost access to content they paid for.<sup>9</sup> To address these concerns, the FCC recently instituted a rulemaking procedure to reform retransmission consent. Proposals put forth before the Commission include the adoption of new rules that would mandate interim carriage of broadcast content<sup>10</sup> and

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<sup>6</sup> 47 U.S.C. §325(b)(3)(B).

<sup>7</sup> 47 C.F.R. §§76.92 & 76.101.

<sup>8</sup> Amendment of the Commission’s Rules Related to Retransmission Consent, *Notice of Proposed Rulemaking*, 34, Docket No. 10-71, (March 3, 2011), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmat ch/FCC-11-31A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmat ch/FCC-11-31A1.pdf).

<sup>9</sup> For ex., Cablevision and News Corp.’s inability to renew their agreement for two fox-affiliated television stations and one MYNetwork TV affiliated station for a period of 15 days resulted in Cablevision subscribers being unable to view a number of sporting events including the first two games of the world series and other regularly scheduled programming. Similarly, Walt Disney and Cablevision’s failure to reach an agreement on carriage of Disney’s ABC signal for nearly 21 hours resulted in consumers losing access to 14 minutes of the academy awards. *Id.*, at 9.

<sup>10</sup> Public Knowledge et. al. *In the Matter of Petition for Rulemaking to Amend the Commission’s Rules Governing Retransmission Consent*, 35-39, MB Docket No. 10-71, (March 9, 2010).

adverse review of the conduct of a broadcast station that fails to negotiate in good faith when renewing its broadcast license.<sup>11</sup>

The initiative to reform retransmission consent operates in a paradigm where the purpose of reform is to facilitate consumer access to content. Giving broadcasters exclusive rights would introduce a new layer of rights with no clarity as to the policy justification for the FCC’s regulation of these new rights. Not only would such rights increase the already considerable leverage broadcasters have in retransmission consent negotiations, it would call into question the ability of the agency to require broadcasters to make available access to their content/signal.

### Comcast/NBC Merger

As part of the regulatory approvals required to facilitate Comcast Corp.’s acquisition of NBC Universal Inc., the Department of Justice<sup>12</sup> and the FCC<sup>13</sup>

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<sup>11</sup> Amendment of the Commission’s Rules Related to Retransmission Consent, *Notice of Proposed Rulemaking*, 18, Docket No. 10-71, (March 3, 2011), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmat ch/FCC-11-31A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmat ch/FCC-11-31A1.pdf).

<sup>12</sup> See *U.S.A. et. al. v. Comcast Corp. et. al.*, Proposed Final Judgment, (D.C. Cir), Case:11-cv-00106, available at <http://www.justice.gov/atr/cases/f266100/266160.pdf>

<sup>13</sup> Applications of Comcast Corp., General Electric Company and NBC Universal, Inc for Consent to Assign Licenses and Transfer Control of Licensees, *Memorandum Opinion and Order*, Docket No. 10-56, January 18, 2011, available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmat ch/FCC-11-4A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmat ch/FCC-11-4A1.pdf)

imposed several conditions on the merged entity. These conditions are intended to prevent adverse effects on competition that would result from the merger. Under these conditions, the new merged entity is required to license its broadcast, cable, and film content to online video distributors, such as Hulu and to competitive video programming distributors. The merged entity is also required not to encourage NBC's local affiliates to deny video programming distributors the right to carry their signals.

These conditions were the product of a policy that views broadcasters as public trustees and access to broadcast programming as the public's right. An approach that would instead view broadcasters as owners of exclusive rights is likely to limit the regulators' ability to impose conditions that require access to content. It would also considerably increase the complexity of fashioning and monitoring such merger conditions as all players, including local affiliates would have rights not only in the signal, but also in the content.

### AllVid

The Communications Act directs the FCC to adopt regulations aimed at ensuring that consumers have access to converter boxes, set top boxes, or other video navigation devices from "manufacturers, retailers, and other vendors not affiliated with" video programming distributors.<sup>14</sup> The FCC's National Broadband Plan notes that achieving this objective in a manner that integrates traditional television with the

Internet is likely to spur broadband adoption.<sup>15</sup> In April 2010, the FCC issued a notice of inquiry (NOI) soliciting comments on means to accomplish this goal. One method suggested in the NOI is the adoption of a video interface called AllVid. According to the FCC, the interface would present video services from programming distributors in a standard way to video navigation devices and would handle communications with the distributor's service on the backend. Providing broadcasters and cablecasters exclusive rights in content would increase complexities in making AllVid a reality as broadcasters and cablecasters could use their new rights to undermine rules that dictate how this content would be presented, and on which devices.

In fact, the way that (sometimes spurious) arguments about rights can complicate media reform efforts is already on display in the AllVid proceeding. Some parties have argued that their "presentation" of programming and their electronic programming guides are protected by copyright, thus preventing the Commission from requiring them to make these available to competitive video navigation device manufacturers and retailers.<sup>16</sup> While these arguments are spurious (primarily because US copyright law only protects

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<sup>14</sup> 47 U.S.C. §629(a)

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<sup>15</sup> The Federal Communications Commission, Connecting America: The National Broadband Plan, 18, *available at* <http://download.broadband.gov/plan/national-broadband-plan.pdf>.

<sup>16</sup> Comments of AT & T, Video Device Competition, 51-56, MB Docket No. 10-91, July 13, 2010, *available at* <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020523390>

original, creative expressions and not facts) they complicate administrative decisions and can raise subtle issues of copyright that the agency is not equipped to deal with. Were a broadcast treaty to bestow content rights on those who are essentially compilers of content, this could provide them with stronger arguments for resisting efforts such as AllVid.

If protection against circumvention of technological protection measures (TPMs) were added to these new rights, as Article 19, of SCCR/15/REV proposes, these difficulties would increase manifold. Manufacturers of Allvid compliant set top boxes would have to negotiate for new sets of rights to access decryption keys to access content, thereby rendering the goal of achieving a simple solution via Allvid more difficult to attain. In addition, the FCC's authority to make regulations with respect to this new regime would be in question.

### **Online Video Delivery**

In its complaint opposing the proposed merger of Comcast Corp. and NBC Universal Inc., the Department of Justice (DoJ) described online video delivery (OVD) as a new and innovative technology that could be a competitive alternative to current video programming distribution services, such as cable and satellite services. The DoJ called for imposition of conditions on the merged entity that would preserve and foster development of this platform by requiring that the new entity not unfairly deny OVDs access to content. Development of this service currently faces considerable challenges from existing program distributors and

program suppliers who are trying to maintain their existing business models. Providing program suppliers, i.e. broadcasters and cablecasters with another layer of rights, unregulated either by the Communications Act or the Copyright Act, would further strengthen their hand and hurt the development of OVD.