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# Hughes Hubbard & Reed

## U.S. Television on the Internet and the New “MVPDs” (UPDATED)

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### 1. Introduction

Over the last 20 years, Internet-based programming services and the corresponding distribution platforms have continued to evolve at a staggering pace, with technological advances allowing for faster and more cost-efficient transmissions. The last five years, in particular, have demonstrated to many that the Internet may well be the "projected" Promised Land for the television industry. Established cable programming networks, including HBO, ESPN and others, have leveraged the Internet and created compelling services, including apps and direct-to-consumer offerings. Cable operators and other multi-channel video programming distributors have embraced TV Everywhere and continued to expand the variety and breadth of their IP-connected products and services, offering subscribers an all-in-one linear, on-demand and time-shifted entertainment solution. Even so-called "over-the-top" providers, such as Netflix, Amazon and Hulu, have fully emerged with compelling original programming and viable licensed content.

The march towards an IP-connected frontier, which has been largely driven by the convergence of cloud-based products and services with the delivery and consumption of entertainment content, is now presenting unprecedented opportunity, and the U.S. legal system, together with its rules and regulations, and corresponding court decisions, has neither advanced the ball nor halted the progression to any significant degree. While U.S. courts in the last 10 years have stymied fringe players looking to bring broadcast television to the Internet, such as iViTV[1] and Aereo[2], they have been decided slow and methodical in their approach to creating new legislation and/or precedent for a rapidly evolving medium which drives some of the U.S.'s most important industries – namely, media, entertainment and technology.

The latest foray into this storm of industry evolution was spearheaded by the U.S. Federal Communications Commission ("FCC") late last year, when it proposed that the definition of the term "multichannel video programming distributor" ("MVPD") under the U.S. Communications Act be modernized to include certain internet-based programming services – a decision which, among other things, could ultimately result in these

entities possessing the rights and the responsibilities of an MVPD – in other words, think of an Aereo-like entity with the right to retransmit a broadcast television line-up.

## 2. General Background

The FCC's decision to move in this direction was a poorly kept secret. In September 2014, multiple news outlets<sup>[3]</sup> in the U.S. reported that the FCC was contemplating a proposal to include online video providers that provide linear streams of programming content within the definition of MVPD<sup>[4]</sup> – a move which would allow such entities to enjoy both the privileges and obligations of being an MVPD – entities which are regulated by U.S. law.

Shortly thereafter, on December 19, 2014, the FCC officially released a Notice of Proposed Rulemaking ("NPRM")<sup>[5]</sup> in an effort to "modernize [their] interpretation of the term 'multichannel video programming distributor'" – essentially, by determining whether online video services, including over-the-top ("OTT") services (i.e., services delivering content over the public Internet without the involvement of a multiple-system operator or other similar entity), that make available multiple linear streams of video programming for a subscription fee should be encompassed by the term "MVPD" as defined under the Communications Act of 1934, as amended (the "Communications Act"), regardless of the technology used to distribute the programming.

In other words the FCC, in an effort to bring its own rules "into synch with the realities of the current marketplace and consumer preference where video is no longer tied to a certain transmission technology," is soliciting comments on possible interpretations of the term MVPD and how each of those interpretations would affect the industry and consumers. Put simply, the FCC is seeking to render the term MVPD more or less technology-neutral by proposing that the term include Internet-based distributors that stream continuous linear feeds of third party video programming on the Internet on a paid subscription basis. The goal, based on FCC chairman Tom Wheeler's comments to the NPRM, is to "expand Internet video competition with cable and satellite services [which will] mean more alternatives for consumers beyond the traditional cable or satellite bundle, including giving consumers more options to buy the programming they want."

## 3. Defining MVPD

The first order of the NPRM involved statutory analysis, whereby the FCC seeks to include online video providers within the definition of MVPD. To qualify as an MVPD under the Communications Act, an entity must "make available for purchase, by subscribers or customers, multiple channels of video programming."<sup>[6]</sup> Since the FCC previously held that video distributed over the Internet qualifies as "video programming" given its quality is comparable to programming provided by TV broadcast stations,<sup>[7]</sup> one of the key definitional issues faced by the FCC is how to interpret the phrase "multiple channels of video programming."

**3.1 Channel:** OTT providers have not qualified as MVPDs because, among other things, the term "channel" as used in the definition of MVPD appeared to include (and the FCC confirmed on multiple occasions<sup>[8]</sup>) a physical "transmission path" as a necessary element, and OTT providers, like Aereo and Netflix, do not provide or control a transmission path. In other words, the term MVPD includes entities that control at least some portion of the physical means by which the programming is delivered – for example, via a physical cable that the provider owns or via spectrum that the provider is licensed to use. The FCC is now seeking public input and engaging in discussions with stakeholders regarding, among other MVPD criteria, the transmission path requirement and whether it may be "too difficult to apply in certain cases because an entity's status as an MVPD would change depending on how and where the subscriber receives the content."

**3.2 Multiple Channels:** Following consideration of the transmission path issue, the FCC proposes to interpret "channels of video programming" to mean prescheduled streams of video programming (which they refer to in the NPRM as 'linear' programming), without regard to whether the same entity is also providing the transmission

path. The FCC uses the terms 'prescheduled' and 'linear' interchangeably, "consistent with prior Commission use", but notes that they are distinct from non-linear programming, such as video-on-demand[9], "which is available at a time of the viewer's choosing." [10] This type of distribution would certainly exclude on-demand services like Amazon Prime Instant Video, Hulu Plus, and Netflix, in their current forms, notwithstanding the fact that even if these purely on-demand services, in order to potentially satisfy the Communications Act's requirement of "channels of video programming", elected to incorporate 24-hour-a-day, continuous pre-programmed linear streams of video, they would still need to clear a variety of other substantial hurdles more fully described herein, including the requirement of offering third party content (as opposed to their own original shows on a continuous loop) and the requirement of providing a service similar to or competitive with traditional MVPDs.

The FCC, in continuing its analysis of the statutory criteria for an MVPD, then turns to the requirement that an MVPD make "multiple" channels of video programming available and asks how best to define and address same, posing the following questions: "Should we interpret the term MVPD to require that a certain number of channels of video programming, such as twenty, be made available? Would twenty channels be too low or too high? Is there justification for a different number? Should we interpret the term 'channels of video programming' to require a certain number of programming hours per day or per week or to exempt certain niche programmers?" Despite the foregoing questions, the FCC does not take a position or propose a minimum number of channels or minimum number of programming hours required to meet the "multiple" requirement nor does the NPRM analyze whether its proposed rules would be impacted, for example, by a hybrid OTT provider that offers both multiple channels of linear programming and a Netflix-style on-demand service. Nevertheless, consistent with the offerings of current MVPDs (which provide both linear and on-demand programming services), it reasons that if an Internet-based distributor met the criteria to qualify for MVPD status under the new rules, then its additional on-demand offerings with respect to the same or different content as offered on the linear side may not materially prejudice its MVPD status.

**3.3 Purchase:** Another component of the term MVPD is the requirement that the entity makes multiple channels of video programming "available for purchase." [11] While this requirement appears straightforward (and essentially removes purely free to the user, ad-supported online services from the discussion), the FCC seeks comment on what it means to make video programming available for purchase, particularly as that term would apply in an Internet world, but states that they "tentatively conclude that the term means making an offer to consumers to exchange video service for money." They further ask, "If a cable or satellite company offers its subscribers access to supplemental online linear video services without a separate charge, but as part of their paid television packages, does this offering constitute making the online services 'available for purchase'?"

**3.4 Summary of Requirements:** Ultimately, the FCC states that "We tentatively conclude that an entity that makes [qualifying] linear services available via the Internet is an MVPD, and our regulations apply to all of the MVPD's video services." But then it promptly limits that conclusion by proposing, among other things, that this interpretation of MVPD not be applicable to a distributor that makes available only programming that it owns – for example, "sports leagues or stand-alone program services" that exclusively stream programs they own or control (e.g., multiple streams of shows programmed solely from an network's existing library of content). Such a framework would certainly prevent OTT providers, like Netflix, from obtaining MVPD status by offering a 24-hour-a-day loop of their own original programming (e.g., a dedicated "House of Cards" and "Orange is the New Black" channel) in order to meet the Communications Act's requirement of "multiple channels of video programming".

Perhaps the most important statement by the FCC in considering how to interpret the term "MVPD" is their intention to ensure that the term captures "entities that provide service similar to or competitive with more traditional MVPD service but through new distribution methods..." – a statement that appears to be designed to provide the FCC with a certain amount of discretion in the assessing, on a case-by-case basis, the status of an entity seeking to be considered an MVPD. One can imagine that the FCC would be keen to prevent certain OTT providers from modifying their services just enough to technically satisfy the statutory requirements of an MVPD,

by, for example, adding 20 new streaming channels to a predominantly on-demand service like Netflix in order to obtain the benefits of MVPD status.

#### **4. Benefits and Obligations of MVPD Status**

As a general matter, an entity that meets the definition of an MVPD is subject to both privileges and legal obligations under the Communications Act and the FCC's own rules. The regulatory privileges of MVPD status include the right to seek relief under the program access rules and the retransmission consent rules.

**4.1 Program Access Rules:** The FCC's program access rules under the Communications Act provide certain protections to MVPDs in their efforts to license cable-affiliated programming.[12] These rules, among other things, prohibit a cable operator from engaging in "unfair methods of competition or unfair or deceptive acts or practices" that have the "purpose or effect" of "hinder[ing] significantly or prevent[ing]" an MVPD from providing programming to subscribers or consumers (the "unfair act" prohibition), including discrimination with respect to the prices, terms, and conditions of sale or delivery among or between competing MVPDs (the "non-discrimination" rule).

**4.2 Retransmission Consent Rules:** The Communications Act further benefits MVPDs by requiring broadcasters to negotiate in good faith with MVPDs for retransmission consent[13] and prohibiting broadcasters from negotiating exclusive retransmission consent agreements with any MVPD. Absent these provisions, broadcasters could potentially refuse to negotiate with, and thereby withhold their signals from, MVPDs that wish to carry these signals. To the extent that an MVPD believes that a broadcaster has violated these provisions, it may file a complaint with the FCC.[14]

Ultimately, extending program access protections to Internet-based providers would allow them to gain access to the level of television content that may allow them to attract and retain subscribers at a clip that could allow them to compete with the established cable and satellite industries. And extending retransmission consent protections and obligations to those providers would allow them to enter the market "for the disposition of the rights to retransmit broadcast signals." [15] Put simply, these rules would require cable-affiliated programmers to make their programming available to MVPDs on nondiscriminatory rates, terms, and conditions, while at the same time preventing certain entities from improperly withholding cable-affiliated programming from competitors; and would require that negotiations between parties for broadcast programming be in good faith.

**4.3 Obligations:** Among the regulatory obligations of MVPDs are statutory and regulatory requirements relating to (i) program carriage; (ii) the competitive availability of navigation devices (including the integration ban); (iii) good faith negotiation with broadcasters for retransmission consent; (iv) closed captioning; and (v) Equal Employment Opportunity. To the extent that an Internet-based distributor of video programming falls within the definition of an MVPD, it will be able to take advantage of the privileges of MVPD status but will also be subject to MVPD obligations, unless the FCC waives some or all of them if authorized to do so. Accordingly, the FCC asks the following questions in the NPRM: "Would waiver or exemption from certain regulations be an appropriate approach for regulating Internet-based distributors? If so, what regulations should be waived or modified to exempt Internet-based distributors, and do we have authority to do so under the Act? Alternatively, does the statute permit us to allow these entities to choose whether they wish to be classified as MVPDs?" Here, again, no position has been taken by the FCC.

#### **5. Interplay with the Copyright Act**

Classification as an MVPD under the Communications Act would not necessarily mean that OTT providers that provide multiple streams of linear programming would automatically be in a position to obtain retransmission rights to television broadcast linear programming, so they could begin streaming linear channels of television

content à la Aereo. Rather, these OTT providers, despite MVPD status under the Communications Act, would still need to qualify for the compulsory copyright licensing scheme under the Copyright Act which has its own rules about the types of entities that are eligible for this kind of license. Specifically, Section 111 of the Copyright Act provides "cable systems" (as defined by the Copyright Act)[16] a statutory license to retransmit copyrighted broadcast performances if the "cable system" pays a statutory fee for those performances.[17] As the current definition of "cable system" reads, OTT providers like Netflix and Hulu would not qualify because they do not, among other things at this stage, receive signals from broadcast stations.

Many suggest that any FCC decision interpreting the definition of MVPD to include Internet-based distributors would conflict with copyright law and the FCC has asked how expanding the definition of MVPD in the Communications Act to include some Internet-based distributors interrelates with copyright law. Thus far, the U.S. Copyright Office has interpreted narrowly the scope of entities eligible for such licenses and, indeed, rejected the claim of one OTT video provider, Aereo, Inc., in 2014. Following the Supreme Court's finding that Aereo violated certain copyright holders' exclusive right to perform their works publicly as provided under the Copyright Act,[18] Aereo filed with the Copyright Office its right and election to pay statutory royalties to retransmit broadcast signals as a cable system. The Copyright Office accepted the filing "on a provisional basis," pending "further regulatory or judicial developments," including the FCC's interpretation of the term MVPD (as contemplated by the NPRM).

## **6. Industry and Stakeholder Response**

Comments to the NPRM from interested parties were initially due February 17, 2015, with reply comments due March 2, 2015; however, in light of the complicated nature of the issues, several parties, requested an extra 30 days to comment, and the FCC provided an extension. As a result, detailed comments and reply comments were received from a variety of interested parties, including major broadcast and cable networks and programmers, professional sports leagues, OTT entities (e.g., Amazon, etc.), cable and satellite operators, wireless carriers (e.g., AT&T, Verizon, etc.), entertainment unions (e.g., Writers Guild of America, West, Inc., etc.), retail manufactures (e.g., TiVo Inc., etc.), cable, movie and television industry groups (e.g., MPAA, etc.) and other associations, collectives, businesses and individuals. In most instances, the comments were as expected given the many fundamental complexities arising out of the contemplated application of MVPD obligations on OTT entities and the potential negative effects in the marketplace that could result. In other words, OTT entities offering programming services through websites, mobile apps and other similar IP-connected platforms are not ideally positioned from a programming or operational perspective to have to adhere to regulations created decades ago to address cable and satellite operators, such as emergency alerts, program carriage and navigation device rules. Moreover, to the extent that certain such obligations were waived only for OTT entities, cable and satellite operators (as well, as broadcast and cable networks and programmers) could potentially be disadvantaged by the unequal application of such obligations which raises questions concerning the potential anti-competitive effects of same in the marketplace.

The comments provided to the FCC reflect a variety of viewpoints consistent with each participant's specific interests—with many supporting and many opposing the FCC's proposal—however, as a general matter, the majority of the interested parties in the marketplace on the distribution, operational and programming side advocate for maintaining the current regulatory framework in one form or another and do not support the specific changes proposed in the NPRM. For example, certain OTT providers and other entities with IP-connected video offerings assert that the online video marketplace is currently thriving and could be damaged at this stage in its development from government regulation, particularly when many OTT providers have no desire to avail themselves of the rights and obligations afforded MVPDs under the Communications Act. As Amazon.com, Inc. states in its reply comments to the NPRM,

"Most OTT providers today bear no resemblance to "MVPDs" as that term was originally understood, nor do these providers wish to become more like traditional MVPDs. Rather, the services offered by Amazon Instance Video,

Netflix, Apple and others represent a new industry altogether... Importantly for the sake of this proceeding, there has been no indication that additional regulation is needed to enable this new industry to grow and bring consumers even more benefits. Thus, the Commission's proposed rule changes seek to graft a twentieth-century economic and physical distribution model onto a modern digital media platform. Amazon does not support this approach."<sup>[19]</sup>

Many cable operators providing comments, including the National Cable & Telecommunications Association, also oppose reclassification of the term "MVPD", and argue, among other things, that Congress did not intend for the regulatory framework surrounding MVPDs to encompass non-facilities-based providers like OTT services. Several broadcast and cable networks and programmers providing comments also oppose the FCC's proposal. They note, in particular, that the program access rules applicable to MVPDs (which prohibit discrimination with respect to the prices, terms, and conditions of sale or delivery of content between competing MVPDs) would require that programmers acquire online rights and licenses from production entities, copyright holders and other vendors solely for the benefit of licensing same to the new proposed "MVPDs" which engage in online-only distribution (as opposed to ancillary online offerings accompanying cable subscriptions, like TV Everywhere). In other words, it may be "economically unfeasible" for a programmer to acquire the complete bundle of rights for every program it distributes to traditional MVPDs so those rights may be granted to OTT entities deemed MVPDs, particularly given this obligation will allow content owners to demand higher licensing fees from programmers given the new leverage they would possess in negotiations.

The FCC's proposal did receive material support from entities like Verizon, FilmOn X, Sky Angel and the Consumer Federation of America and certain other associations and collectives. Verizon stated that "taking this step would promote the Commission's policy goal of encouraging increased video competition, including from online video providers... [It would also] facilitate online providers' ability to gain access to video programming and enable the Commission to address practices by programmers that stymie greater video competition from online providers and experimentation with these new business models that may better serve consumers."<sup>[20]</sup> At the same time, Verizon also notes that "the Commission should not impose outdated and burdensome regulations on over-the-top MVPDs..." For advocates of the FCC's proposal, the application of certain MVPD requirements and the waiver of others will likely require further detailed decision making by the FCC, with some commenters, such as the Electronic Frontier Foundation and the Wireless Internet Service Providers Association, discussing the possibility of an "opt out" mechanism for OTT entities that do not desire to obtain MVPD status despite meeting the technical requirements of same.

## **7. Potential Impact**

It is clear from the text of the NPRM that the FCC currently considers services like Netflix, Hulu Plus, Amazon Instant Video, YouTube and other similar Internet-based video programming services (at least, as they exist today) to fall outside the current and proposed statutory definition of MVPD because they either (i) make programming available for free, and not "for purchase" as required by the definition of an MVPD or (ii) do not provide prescheduled programming that is comparable to programming provided by a television broadcast channel (i.e., linear, prescheduled transmissions). Nevertheless, if OTT services began to provide multiple linear streams of prescheduled content (both owned and otherwise sourced from multiple third party providers at least in part) in a manner that satisfied all of the requisite definitions (as may be interpreted) and meet all of the corresponding requirements, then an OTT provider could be deemed an MVPD (of course, assuming it was sufficiently similar to and/or competitive with traditional MVPDs). This status would then put them in a position to avail themselves of certain rights afforded MVPDs while at the same time requiring that they comply with stringent, legacy regulations —a position some OTT entities would enjoy and others would eschew. Nevertheless, this status, even if obtained, would not, however, guarantee OTT entities the automatic right to carry broadcast programming without having to negotiate for it, as compulsory licensing under the Copyright Act requires that they qualify as a "cable system". The definition of a "cable system" under the Copyright Act, however, could be subject to revised interpretation

based on where the FCC lands on how to define and interpret MVPD status, but that outcome appears unlikely given the Copyright Office's stance on this subject to date.

Ultimately, the ball is now in the FCC's court. The FCC has collected stakeholder feedback, will analyze the comments received, and ultimately decide whether to proceed with the rulemaking, issue a new or modified proposal, or take no action on the proposal.

[1] See, e.g., <http://www.digitalhhr.com/2010/09/ivi-tv-update-ivi-files-complaint-for-declaratory-judgment/>.

[2] See, e.g., <http://www.digitalhhr.com/2013/10/the-battle-for-cloud-city-aereo-continues-to-push-copyright-disruption-to-the-u-s-supreme-court/>.

[3] See, e.g., <http://www.broadcastingcable.com/news/washington/fcc-proposing-defining-linear-ovds-mvpds/134392> and <http://www.cedmagazine.com/news/2014/09/fcc-signals-review-if-ott-companies-qualify-as-mvpds>.

[4] The Communications Act defines an MVPD as: "[A] person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming". See 47 U.S.C. § 522(13); see also 47 C.F.R. §§ 76.64(d), 76.71(a), 76.905(d), 76.1000(e), 76.1200(b), 76.1300(d).

[5] Please note that the footnotes set forth herein are largely those reflected in the NPRM.

[6] 47 U.S.C. § 522(13).

[7] The Act defines "video programming" as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." 47 U.S.C. § 522(20). See *Verizon v. FCC*, 740 F.3d 623 (DC Cir 2014) ("intervening improvements in streaming technology and broadband availability enable such programming to be 'comparable to programming provided by . . . a television broadcast station'") (quoting definition of "video programming" in 47 U.S.C. § 522(20)).

[8] See *Sky Angel Standstill Denial*, 25 FCC Rcd at 3882-83, ¶ 7 and other list of citations set forth at footnote 81 of the NPRM.

[9] The FCC uses the term "on-demand" to refer to programming that is not prescheduled by the programming provider. See 47 U.S.C. § 522(12) (defining "interactive on-demand service" as "a service providing video programming to subscribers over switched networks on an on-demand, point-to-point basis, but does not include services providing video programming prescheduled by the programming provider." (emphasis added)).

[10] See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Notice of Inquiry, 29 FCC Rcd 1597, 1603, ¶ 15, n.23 (2014) ("A linear channel is one that distributes programming at a scheduled time. Non-linear programming, such as video-on-demand ('VOD') and online video content, is available at a time of the viewer's choosing."); Implementation of Section 304 of the Telecommunications Act of 1996, Fourth Further Notice of Proposed Rulemaking, 25 FCC Rcd 4303, 4308, ¶ 14 n.43 (2010) ("The term 'linear programming' is generally understood to refer to video programming that is prescheduled by the programming provider. Cf. 47 U.S.C. § 522(12) (defining 'interactive on-demand services' to exclude 'services providing video programming prescheduled by the programming provider').").

[11] 47 U.S.C. § 522(13).

[12] See 47 U.S.C. § 548.

[13] See 47 U.S.C. § 325(b)(3)(C)(ii); 47 C.F.R. § 76.65.

[14] See 47 C.F.R. § 76.65(c).

[15] S. Rep. No. 92, 102nd Cong., 1st Sess. (1991), reprinted in 1992 U.S.C.C.A.N. 1133, 1169.

[16] The Copyright Act holds that a "cable system" is a facility, located in any State, Territory, Trust Territory, or Possession, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the FCC, and makes secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels to subscribing members of the public who pay for such service.

[17] 17 U.S.C. § 111.

[18] American Broadcasting Companies, Inc. v. Aereo, Inc., 134 S.Ct. 2498 (2014).

[19] See Comments of Amazon.com, Inc., MB Docket No. 14-261.

[20] See Reply Comments of Verizon Communications, Inc., MB Docket No. 14-261.

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