

SUBSCRIPTION LINEAR OVDS ARE THE NEW MVPDS ARE THE NEW BLACK

SPENCER RUBIN*

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INTRODUCTION

In March 2010, all Discovery networks “went dark” on Sky Angel subscribers’ televisions. Discovery Communications unilaterally pulled its programming off of Sky Angel’s service because it was “uncomfortable” with Sky Angel’s Internet protocol (“IP”) distribution system.¹ In response, Sky Angel submitted a program access complaint to the Media Bureau at the Federal Communications Commission

* J.D. Candidate, 2016, University of Colorado Law School and Student Note Editor, Colorado Technology Law Journal. Participant in the Technology Law and Policy Clinic, Moot Court, Mock Transactional Drafting, and Student Bar Association, former in-house intern at two national telecommunications corporations, and member of the Colorado IP Inn of Court (and performer in its yearly ethics musical revue). My thanks go to Jane Thompson, Scott O’Donnell, Todd Hoy, Phil Weiser, Kathleen Charapata, Blake Reid, Maureen Ryan, Amy Griffin, and Kristelia Garcia for their support and guidance during the writing of this note. Special thanks go to my friends and family, especially my parents, for their open hearts and minds during this endeavor.

1. *Complaint of Sky Angel U.S., LLC Against Discovery Communications, LLC, et al. For Violation of the Commission’s Competitive Access to Cable Programming Rules*, MB Dkt. No. 12-80, Program Access Complaint, 4 (filed Mar. 24, 2010), <http://apps.fcc.gov/ecfs/document/view?id=7021905466> [hereinafter Sky Angel Complaint].

(“FCC”). Sky Angel alleged that Discovery’s discomfort was merely a guise for anticompetitive behavior: Discovery was purposefully cancelling its affiliation agreement with Sky Angel in favor of DIRECTV’s direct broadcast satellite (“DBS”) distribution of Discovery programming.²

Discovery’s primary argument in response to Sky Angel’s complaint was that the Media Bureau should dismiss the matter on procedural grounds. Discovery argued that Sky Angel was not a multichannel video programming distributor (“MVPD”) and, therefore, was not entitled to relief under the FCC’s Program Access Rules.³ The Media Bureau agreed in its *Sky Angel Standstill Denial Order* and determined that Sky Angel was not likely to succeed on the merits of its complaint because it did not provide an end-to-end transmission path (like coaxial cable or DBS) for its video programming and was, therefore, not an MVPD.⁴ In other words, the Bureau intimated that Sky Angel was merely an online video distributor (“OVD”) because it distributed its programming over a publicly accessible Internet pathway not fully managed by Sky Angel.⁵

The Media Bureau was then prompted by its own determination in the Sky Angel dispute to seek comment on the definition of an MVPD by opening two separate dockets. The Bureau’s *2012 MVPD Definition Inquiry* merely sought public comment on the interpretation of the definition of MVPD.⁶ That docket produced no definitive answer, thus upholding the Bureau’s prior definition of MVPD from the Sky Angel dispute. However, the Bureau’s *2014 MVPD Definition NPRM* appeared to switch course, tentatively concluding that “Subscription Linear” OVDs, which distribute multiple *streams* of prescheduled video

2. *Id.* at 9 (claiming that because Liberty Media owned controlling shares in both Discovery and DIRECTV, Discovery cancelled its affiliation agreement with Sky Angel to anticompetitively favor affiliated distributor DIRECTV).

3. Answer to Program Access Complaint, *Complaint of Sky Angel U.S., LLC Against Discovery Communications, LLC, et al. For Violation of the Commission’s Competitive Access to Cable Programming Rules*, MB Dkt. No. 12-80, 12 (filed Apr. 21, 2010), <http://apps.fcc.gov/ecfs/document/view?id=7021905469> [hereinafter *Discovery Answer*]. See 47 C.F.R. § 76.1003(a) (2014) (“[a]ny multichannel video programming distributor aggrieved by conduct that it believes constitute a violation of the [programming access rules] may commence an adjudicatory proceeding at the Commission.”).

4. *Sky Angel U.S., LCC, Emergency Petition for Temporary Standstill*, DA 10-679, Order, 25 FCC Rcd. 3879, para. 7 (2010) [hereinafter *Sky Angel Standstill Denial Order*].

5. Sky Angel subscribers had to purchase a separate broadband connection from a local Internet Service Provider (“ISP”) in order to receive the Sky Angel service, and thus the pathway from headend to set-top box over which Sky Angel retransmitted programming networks was not fully managed by Sky Angel. See *id.*

6. See *Media Bureau Seeks Comment on Interpretation of the Terms “Multichannel Video Programming Distributor” and “Channel” as Raised in Pending Program Access Complaint Proceeding* [hereinafter *2012 MVPD Definition Inquiry*], MB Dkt. No. 12-83, Public Notice, 27 FCC Rcd. 3079 (2012).

programming—albeit over public Internet pathways that those OVDs do not fully manage—should also constitute MVPDs.⁷ Nonetheless, no final order has been issued in the 2014 proceeding, although it appears as though the Bureau is aggressively advocating that Subscription Linear OVDs are MVPDs. Still, the law concerning the definition of MVPDs is the *Sky Angel Standstill Denial Order*, and video programming distributors across the United States have been left in limbo, wondering: “What is actually an MVPD . . . ?”

Or, maybe not. In the past, a programming distributor could be considered an MVPD if it used an end-to-end transmission path with which it was *affiliated* in order to send video to subscribers.⁸ However, this affiliated-with-an-end-to-end-transmission-path notion was created in 1996 and surely did not consider Internet transmission paths. And it still begs the question: If the Media Bureau believes that Subscription Linear OVDs are MVPDs, then even in the absence of a final order in the *2014 MVPD Definition NPRM*, could a Subscription Linear OVD’s programming sent over an affiliated, end-to-end broadband transmission path meet the definitional standard of an MVPD?

The distinction between an MVPD and OVD could not be more significant for the efficacy of the statutory regime that governs MVPDs. The Cable Television Consumer Protection and Competition Act (“1992 Cable Act”) affords MVPDs several statutory rights. An MVPD has the right to bring a programming access dispute before the FCC to enjoin a video programmer affiliated with a rival cable operator (or DIRECTV) from offering programming content to the former MVPD on a discriminatory basis.⁹ An MVPD also has the right to make broadcasters negotiate in good faith for the broadcasters’ consent to retransmit the signals of their programming.¹⁰ The 1992 Cable Act also exacts several statutory obligations from MVPDs. An MVPD cannot unreasonably restrain an unaffiliated video programmer from competing fairly for distribution by the MVPD.¹¹ An MVPD must also comply with closed

7. *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services* [hereinafter *2014 MVPD Definition Inquiry*], MB Dkt. No. 14-261, Notice of Proposed Rulemaking, 29 FCC Rcd. 15,995, paras. 13–17 (2014) [hereinafter *2014 MVPD Definition NPRM*] (tentatively concluding that “Subscription Linear” OVDs, which make available continuous, linear streams of video programming on a subscription basis, should be considered MVPDs because they functionally offer to consumers the same service packages as traditional MVPD, with only the technical difference of distribution over the publicly accessible Internet).

8. *See Implementation of Section 302 of the Telecommunications Act of 1996 Open Video Systems*, CS Dkt. No. 96-46, Third Report & Order and Second Order on Reconsideration, 11 FCC Rcd. 20,227, para. 171 (1996).

9. 47 U.S.C. § 548(b) (2013).

10. *Id.* §§ 325(b)(3)(C)(ii)–(iii).

11. *Id.* § 536(a)(3).

captioning,¹² equal employment opportunity,¹³ and commercial loudness regulations,¹⁴ among others.

Besides the headache that Subscription Linear OVDs could cause if the FCC had to ensure that they were in compliance with MVPD statutory obligations like closed captioning, the additional application of MVPD statutory benefits to Subscription Linear OVDs could cause an all-out regulatory nightmare. If Subscription Linear OVDs, of which there may be potentially hundreds in the coming years, were to be considered MVPDs, they could flood the FCC with program access disputes.¹⁵ This would severely devalue the programming of programmers affiliated with rival cable operators (or DIRECTV) because (1) the programmers would have to offer their “must-see” programming to any complaining Subscription Linear OVD on non-discriminatory terms; and (2) the copyright owners of the programming content could ransom the public-Internet distribution license for their content at artificially high rates, knowing that cable (or DIRECTV) affiliated programmers would have to pay much higher rates in order to offer their programming on non-discriminatory terms to Subscription Linear OVDs.¹⁶

Similarly, if Subscription Linear OVDs were included in the same retransmission consent regime as MVPDs, this “would vastly increase the scope and burden of the regulatory obligations applicable to . . . broadcasters.”¹⁷ Broadcasters would suddenly be responsible for negotiating with hundreds of Subscription Linear OVDs. This would constrain their ability to reasonably assess the value of their signal to each Subscription Linear OVD, depending on the latter’s subscriber base, server location(s), and ability to effectively market the programming contained within each broadcast signal.¹⁸ Furthermore, because the Internet would allow Subscription Linear OVDs to have a national distribution footprint, these OVDs might have trouble ensuring that broadcasters’ signals are only retransmitted to the appropriate designated market area (“DMA”) mandated by each broadcaster’s FCC

12. 47 C.F.R. § 79.1 (2014).

13. *Id.* §§ 25.601, 76.71(a).

14. 47 U.S.C. § 621 (2013) [hereinafter *The CALM Act*].

15. Notice of Ex-Parte of Nat’l Cable and Telecomm. Assoc., *2012 MVPD Definition Inquiry*, MB Dkt. No. 12-83, 2 (filed Oct. 14, 2014), <http://apps.fcc.gov/ecfs/document/view?id=60000973316>.

16. *See id.* *See also* Comments of Discovery Comm., LLC, *2014 MVPD Definition Inquiry*, MB Dkt. No. 14-261, 12 (filed Mar. 3, 2015), <http://apps.fcc.gov/ecfs/document/view?id=60001039137>.

17. Comments of Comcast Corp., *2012 MVPD Definition Inquiry*, MB Dkt. No. 12-83, 11 (filed May 14, 2012), <http://apps.fcc.gov/ecfs/document/view?id=7021917786>.

18. *See id.*

operating license.¹⁹

Clearly, equating Subscription Linear OVDs with MVPDs could cause a regulatory fiasco. However, should there be no resolution to the *2014 MVPD Definition Inquiry*, it is still doubtful that many Subscription Linear OVDs could affiliate with an end-to-end broadband transmission path in order to become an MVPD under the *Sky Angel Standstill Denial Order*. Nonetheless, two new Subscription Linear OVD services are affiliated with ISPs that could distribute programming networks over end-to-end Internet transmission paths. DISH Network has released its own OVD called SlingTV, which delivers a slimmed-down bundle of programming networks like ESPN, A&E, and HGTV (plus an optional HBO add-on) and can be delivered via any ISP broadband connection, including DISH's own broadband service.²⁰ Comcast has begun offering a similar service, called Stream TV, in limited markets, and has plans to expand the service within its broadband footprint.²¹

Thus, absent a final order in the *2014 MVPD Definition Inquiry*, if a Subscription Linear OVD merely needs to be streamed over a broadband, end-to-end transmission path in order to be considered an MVPD, then it is possible that the emerging DISH and Comcast OVDs could be classified as MVPDs. Moreover, the DISH and Comcast OVDs would have selfish incentives—the programming access and retransmission consent regimes—to be classified as MVPDs, despite the costs this could impose on other companies. Should the DISH and Comcast OVDs be able to take advantage of these pro-competitive MVPD statutory benefits, with dozens or even hundreds more Subscription Linear OVDs following suit in the near future, the current definition of an MVPD may no longer be a meaningful way to distinguish which video programming distributors should be assigned the rights and obligations that traditional facilities-based video distributors were intended to have under the 1992 Cable Act.

Part I of this note traces the history of the Sky Angel dispute and how it brought the issue of the definition of MVPD before the FCC. Part II analyzes how, despite vigorous comment in the Media Bureau's *2012 MVPD Definition Inquiry* and *2014 MVPD Definition Inquiry*, the definition of MVPD is still ambiguous and can include OVDs whose content rides over a broadband, end-to-end transmission path. Finally,

19. Comments of Nat'l Ass'n of Broadcasters, *2014 MVPD Definition Inquiry*, MB Dkt. No. 14-261, 15–16 (filed Mar. 3, 2015), <http://apps.fcc.gov/ecfs/document/view?id=60001039050>.

20. *Why We're Better*, SLING TELEVISION, <https://www.sling.com/why-we-are-better> (last visited Oct. 1, 2015).

21. Matt Strauss, *Introducing a New Streaming Service From Comcast*, COMCAST VOICES BLOG (July 12, 2015), <http://corporate.comcast.com/comcast-voices/a-new-streaming-tv-service-from-comcast>.

Part III looks at two emerging OVD services and how both of these services could potentially be included within the definition of MVPD.

I. FIRST ENCOUNTERS INTERPRETING “MVPD” AT THE FCC

A. *The technological evolution of Sky Angel*

After converting to Christianity in 1977, Robert W. Johnson Sr. began thinking of developing a video service that could provide Christian and family programming to subscribers who desired only such content.²² By 1996, his idea became a reality when he received a DBS license from the FCC and partnered with EchoStar Communications Corporation to get Sky Angel “off the ground.”²³ For ten years, Sky Angel provided traditional DBS service to customers across the country through a geostationary satellite. The satellite orbited Earth and received the signals of religious and family-friendly programming networks that Sky Angel was licensed to distribute. The satellite would then beam down the programming signals to Sky Angel subscribers’ dishes that were wired to set-top boxes. However, in 2006, Sky Angel’s geostationary satellite malfunctioned, preventing nearly half of Sky Angel’s programming lineup from being retransmitted.²⁴

Instead of attempting to repair its geostationary satellite for \$300–400 million,²⁵ Sky Angel decided to send programming signals in IP format to its subscribers, who all received new Internet-connected set-top boxes.²⁶ From a new terrestrial satellite farm in Chattanooga, Tennessee, Sky Angel received the signals of the programming networks in its service offering.²⁷ Those live signals were then encrypted, transmitted via fiber-optic cable, and prepared for retransmission at an Internet headend.²⁸ When a subscriber desired to watch a certain programming network, her Internet-connected set-top box contacted the IP address of Sky Angel’s headend over the publicly accessible Internet.²⁹ The encrypted signal of the live network requested was then sent back over

22. *About Us*, SKY ANGEL, <http://www.skyangel.com/index.php/about-us/> (last visited Nov. 15, 2015).

23. *Id.*

24. *Id.*

25. Daniel Fisher, *The Tiny TV Broadcaster That Cable And Internet Giants Are Trying To Kill*, FORBES (Sept. 10, 2012), <http://www.forbes.com/sites/danielfisher/2012/08/23/the-tiny-tv-broadcaster-that-cable-and-internet-giants-are-trying-to-kill>.

26. *See About Us*, *supra* note 22; *see also The Future of Video, Hearing before the H. Sub. Comm. on Commc’ns and Tech.*, 112th Cong., 3 (Statement of Robert W. Johnson Jr., CEO, Sky Angel, LLC) (June 25, 2012), <http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg82325/pdf/CHRG-112hhrg82325.pdf>.

27. *See Fisher*, *supra* note 25.

28. *The Future of Video*, *supra* note 26, at 24.

29. *See id.*

the publicly accessible Internet to the subscriber's set-top box where it was decrypted and displayed on the subscriber's television set.³⁰

Throughout that process, Sky Angel maintained the following: (1) It “exclusively control[led] the origination, distribution, and reception of all programming;” (2) Only authorized subscribers could watch the programming through the set-top box authorization process; and (3) Each set-top box had all the necessary digital rights management (“DRM”) protections to prevent illicit copying of the programming.³¹ However, the fact remains that the television signals were sent, for some portion of the transmission path, over Internet backbones or last-mile facilities owned and managed by ISPs unaffiliated with Sky Angel, over which Sky Angel retained no control, and over which other public Internet traffic traveled.³² Therefore, in order to have received Sky Angel's service, a subscriber would have to purchase both the Sky Angel subscription/set-top box and a separate broadband connection from a local ISP, meaning that Sky Angel did not fully manage the pathway over which it retransmitted programming networks.

B. The beginning of the Sky Angel-Discovery dispute

By 2010, Sky Angel was offering around eighty streams of religious and family-friendly programming,³³ which cost the company roughly \$15 million.³⁴ Among Sky Angel's then-current programming offerings were the NFL Network, the MLB Network, the Weather Channel, and the Hallmark Channel.³⁵ One of the most valuable programmers from whom Sky Angel had procured the retransmission rights for its IP distribution platform was Discovery. By 2010, Sky Angel had been transmitting five of Discovery's programming networks for two-and-a-half years: Discovery Channel, Animal Planet, Discovery Kids Channel, Planet Green, and the Military Channel.³⁶

Although the terms of the Sky Angel-Discovery affiliation agreement remain confidential, Sky Angel claims that Discovery unambiguously knew that Sky Angel transmitted the five Discovery networks through a public Internet distribution path.³⁷ Despite its apparent knowledge of Sky Angel's distribution technology, Discovery became concerned when Sky Angel advertised that its IP-enabled set-top box was mobile and could be connected to any broadband access point

30. *Id.*

31. *Id.*

32. *See id.*

33. Sky Angel Complaint, *supra* note 1, at 1.

34. *Id.* at 2.

35. *Id.* at 9.

36. *Id.* at 3.

37. *Id.*

with a minimum download speed of 1.5 Mbps.³⁸

The mobile capability of Sky Angel’s set-top box, as advertised, would appear to allow a Sky Angel subscriber to share her set-top box with any number of non-subscribers. These non-subscribers could then plug it into their broadband connections and receive Discovery programming without paying for the Sky Angel service.³⁹ Even though Sky Angel’s website no longer makes the claim that its set-top box is mobile,⁴⁰ Discovery’s rationale for feeling “uncomfortable” with Sky Angel’s IP distribution⁴¹ seems validated given this information.

C. A Program Access Rules violation?

Due to its concerns over unauthorized viewing of its programming content, Discovery gave notice to Sky Angel on March 19, 2010⁴² that it was unilaterally terminating their affiliation agreement.⁴³ While Discovery may have been serious about its concerns with the mobility of Sky Angel’s set-top boxes, Sky Angel believed that those concerns were merely a façade for a more nefarious reason to terminate the affiliation agreement. Sky Angel opined that, because Liberty Media had ownership interests in both Discovery and DIRECTV, Discovery was actually terminating its affiliation agreement with an Internet television provider in order to favor its affiliated DIRECTV DBS video service.⁴⁴ Because it alleged that Discovery was withholding programming content in order to favor a rival video provider with whom it was also affiliated, Sky Angel

38. Compare Discovery Answer, *supra* note 3, at 8, with *The Future of Video*, *supra* note 26, at 3 (still claiming that only authorized subscribers can watch television on Sky Angel’s service).

39. While this note will not expand on the possible copyright infringements that this behavior elicits, an understanding of Discovery’s license fee structure is sufficient to understand why Discovery would not welcome this type of mobile set-top box. If, theoretically, any number of non-subscribers of Sky Angel could borrow a subscriber’s set-top box, plug it into a broadband connection, and watch Discovery programming, then the number of Sky Angel subscribers watching Discovery programming as calculated in the Discovery license fee arrangement would be under-inclusive. Sky Angel would only calculate the number of actual subscribers in determining how much to pay Discovery for its monthly license fees. However, Sky Angel would have no way to calculate how many “unauthorized” viewers of Discovery programming existed if a subscriber chose to share his set-top box with non-subscribers. Therefore, Sky Angel would unintentionally be devaluing Discovery programming because more people could be watching Discovery through Sky Angel service than the proportional license fee arrangement accounted for.

40. *About Us*, *supra* note 22. *But see* Discovery Answer, *supra* note 3, at 8 (describing Sky Angel’s then-current “Frequently Asked Questions” page, which allegedly included information on the mobility of the Sky Angel set-top box).

41. *See supra* Introduction.

42. Discovery had given Sky Angel notice of termination in several prior circumstances. *See Sky Angel Complaint*, *supra* note 1, at 4–8.

43. *Id.* at 8.

44. *Id.* at 9.

sought relief under the FCC’s Program Access Rules.

The FCC enacted the Program Access Rules in 1992, based on two key provisions of the Communications Act.⁴⁵ The first, § 628(b), prohibits unfair acts by vertically integrated cable operators (and DIRECTV)⁴⁶ that have the “purpose or effect . . . [of] hinder[ing] significantly” the ability of rival MVPDs to provide competitive video services.⁴⁷ The second, § 628(c)(2), delegates authority to the FCC to ban unjustified discrimination in the sale of programming.⁴⁸ Pursuant to these two sections, the 1992 Program Access Rules permit an aggrieved MVPD to file a program access complaint at the FCC’s Media Bureau to demand access to affiliated programming of rival cable operators (and DIRECTV) if they have hindered the aggrieved MVPD’s access to their affiliated programming through (1) unfair acts or (2) unjustified discrimination.⁴⁹

Believing itself to be an MVPD against whom Discovery was discriminating in favor of affiliated DIRECTV, Sky Angel filed a program access complaint on March 24, 2010 on two grounds.⁵⁰ First, Sky Angel alleged that Discovery violated the Program Access Rules because the unilateral termination of the affiliation agreement was an “unfair act” that hindered Sky Angel from distributing Discovery programming, while favoring DIRECTV.⁵¹ Second, Sky Angel alleged that Discovery violated the Program Access Rules because its unilateral termination of the affiliation agreement constituted “unlawful discrimination” between the programming distribution terms offered to Sky Angel and DIRECTV.⁵² In its complaint, Sky Angel also petitioned the Media Bureau to issue a temporary standstill of the affiliation

45. JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, *DIGITAL CROSSROADS: TELECOMMUNICATIONS LAW AND POLICY IN THE INTERNET AGE* 343 (2d ed. 2013).

46. The original language of the section only applies to “cable operators,” but it has been extended to DIRECTV through the FCC-mandated conditions on the 2008 transaction where News Corporation sold its controlling share in DIRECTV to Liberty Media (who, coincidentally, at the time of filing of the Sky Angel programming access dispute, was also a shareholder of Discovery Communications). *See News Corporation and the DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control*, MB. Dkt. No. 07-18, Memorandum Opinion and Order, 23 FCC Red. 3265 (2008).

47. 47 U.S.C. § 548(b) (2013); *Development of Competition and Diversity in Video Programming Distribution and Carriage*, MM Dkt. No. 265, First Report & Order, 8 FCC Red. 3359, paras. 36–41 (1993); *see also* NUECHTERLEIN & WEISER, *supra* note 45, at 343.

48. 47 U.S.C. § 548(c)(2) (2013); *see also* NUECHTERLEIN & WEISER, *supra* note 45, at 343.

49. *See generally* 47 C.F.R. §§ 76.1000-04 (2014) (stating the Program Access Rules as written by the FCC).

50. *See* Sky Angel Complaint, *supra* note 1.

51. *See id.* at 11; *see also* 47 C.F.R. § 76.1001 (2014) (the first Program Access Rule under which Sky Angel sought relief).

52. *See* Sky Angel Complaint, *supra* note 1, at 11; *see also* 47 C.F.R. § 76.1002(b) (2014) (the second Program Access Rule under which Sky Angel sought relief).

agreement termination while the program access dispute was resolved.⁵³ Sky Angel argued that it would suffer “irreparable harm” from the termination of the affiliation agreement because of the “must-have” nature of Discovery programming.⁵⁴

Less than a month later, on April 21, 2010, Discovery replied to Sky Angel’s initial complaint.⁵⁵ Discovery principally argued that Sky Angel was not a party that could even make a complaint under the Program Access Rules. Discovery argued that only an MVPD could commence a program access dispute, and Sky Angel was not an MVPD because of its distribution over a public Internet pathway that Sky Angel did not manage from end-to-end.⁵⁶ On the same day, the Media Bureau released its *Sky Angel Standstill Denial Order*, explaining that it believed Sky Angel was not likely to succeed on the merits of its program access dispute. Therefore, the Media Bureau declined to issue a temporary standstill of the affiliation agreement.⁵⁷ Without the temporary standstill, Discovery was able to terminate its affiliation agreement with Sky Angel, as were several other programming networks that did not want or grant the right to Sky Angel to distribute their programming over the publicly accessible Internet. By January 2014, so many programming networks had terminated their agreements with Sky Angel that the latter suspended distribution of its service because it was unable to maintain a lineup of “must-have” programming.⁵⁸

Substantively, the Media Bureau based the *Sky Angel Standstill Denial Order* on the same argument made by Discovery: Sky Angel was not an MVPD because it distributed programming through a publicly accessible Internet pathway that Sky Angel did not manage from end-to-end. In order to be an MVPD, Sky Angel would not only have to transmit programming networks, but it could also only do so over an end-to-end transmission path from Sky Angel facilities to the subscribers’ set-top boxes.⁵⁹ Because Sky Angel’s Internet programming distribution utilized

53. Sky Angel Complaint, *supra* note 1, at 15.

54. *Id.*

55. See Discovery Answer, *supra* note 3.

56. *Id.* at 12–18 (interpreting 47 C.F.R. § 76.1003(a) (2014)).

57. *Sky Angel Standstill Denial Order*, *supra* note 4, para. 7. See, e.g., *Virginia Petroleum Jobbers Ass’n v. Federal Power Comm’n*, 259 F.2d 921 (D.C. Cir. 1958); *Washington Metropolitan Area Transit Comm’n v. Holiday Tours*, 559 F.2d 841 (D.C. Cir. 1977) (clarifying the elements a complainant must meet to be granted a temporary standstill, one of which is being likely to prevail on the merits of the complaint).

58. Supplemental Comments of Sky Angel U.S., LLC, *Complaint of Sky Angel U.S., LLC Against Discovery Communications, LLC, et al. For Violation of the Commission’s Competitive Access to Cable Programming Rules*, MB Dkt. No. 12-80, at 1 (filed June 10, 2014), <http://apps.fcc.gov/ecfs/document/view?id=7521288609>.

59. See *Sky Angel Standstill Denial Order*, *supra* note 4, para. 7; see also *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and*

Internet backbones and ISP last-mile pipes that Sky Angel did not control, and because these backbones and pipes also carried public Internet traffic,⁶⁰ Sky Angel did not offer an end-to-end transmission path and was not an MVPD. Thus, the Media Bureau implicitly found that Sky Angel should be categorized as an OVD.

However, the Media Bureau's reasoning for denying Sky Angel's standstill petition remains ambiguous at best.⁶¹ What about the definition of MVPD clearly necessitates that they must have end-to-end transmission paths?⁶² If an entity looks like a traditional television provider from the perspective of consumers—like Sky Angel does—should it not also be called an MVPD under the Communications Act like other traditional television providers (cable operators, DBS providers, and telco companies)? So crucial was defining an MVPD to the Sky Angel dispute that the Media Bureau opened two subsequent proceedings to ask for public comment on the issue.⁶³

The *2012 MVPD Definition Inquiry* and the *2014 MVPD Definition Inquiry* have exposed the ambiguity of the Media Bureau's original MVPD definition, despite its clear position in the *Sky Angel Standstill Denial Order*. This ambiguity in the "official" MVPD definition will be critical to the future development of OVDs. Thus, Part II tracks the development of the definition of an MVPD, how that definition can be interpreted differently, and why the end-to-end transmission requirement is still ambiguous.

Carriage, MM Dkt. No. 92-265, First Report & Order, 8 FCC Rcd. 3359, para. 63, n.79 (1993) [hereinafter *FCC's Implementation of Sections 12 and 19 of the 1992 Cable Act*] (suggesting that all members of the MVPD class must provide end-to-end transmission paths to their subscribers).

60. See *The Future of Video*, *supra* note 26, at 3.

61. See Carl Kandutsch, *Still No Online Cable System—Sky Angel vs. Discovery Channel*, CARL KANDUTSCH LAW OFFICE, <http://www.kandutsch.com/articles/still-no-online-cable-system-sky-angel-vs-discovery-channel> (last visited Nov. 15, 2015).

62. This is the rhetorical question implied in the reasoning of the *2014 MVPD Definition NPRM*. The NPRM notes that 47 U.S.C. § 522(13) (2013), which defines MVPD, never requires that an MVPD have an end-to-end transmission path. Rather, the NPRM notes that the definition of MVPD includes a non-exhaustible list of entities that should be considered MVPDs (e.g., cable operators and DBS providers). The NPRM goes on to explain that these examples of MVPDs not only provide end-to-end transmission paths, but more generally also provide multiple streams of prescheduled video programming. Because 47 U.S.C. § 522(13) (2013) is silent as to whether these examples of MVPDs are listed because they share the common feature of an end-to-end transmission path or because they offer multiple streams of prescheduled video programming, the NPRM concludes that the definition of MVPD is ambiguous and nothing should preclude the FCC from including entities that merely offer multiple streams of prescheduled video programming, an interpretation which would include Subscription Linear OVDs. See *2014 MVPD Definition NPRM*, *supra* note 7, para. 19.

63. See *id.*; See also *2012 MVPD Definition Inquiry*, *supra* note 6.

II. THE DEFINITION OF MVPD IS STILL AMBIGUOUS.

A. *Conflicting statutory interpretations*

In 1992, Congress passed the 1992 Cable Act, which further amended the 1934 Communications Act.⁶⁴ The Cable Act responded to concerns that incumbents in the video distribution market would anticompetitively leverage their vertically integrated programming networks to disadvantage rivals.⁶⁵ As a result, the Cable Act created a new regulatory classification for non-broadcast television providers known as MVPDs, defined as: “a person such as, but not limited to, a cable operator . . . [or] a direct broadcast satellite service . . . who makes available for purchase, by subscribers or customers, multiple channels of video programming.”⁶⁶

In order to better foster competition in the video delivery marketplace, the Cable Act imposes the following obligations and confers the following benefits on all MVPDs:

- MVPDs can bring an adjudicatory proceeding before the FCC to prevent programmers affiliated with rival cable operators from withholding or offering on discriminatory terms their programming (the program access right).⁶⁷
- MVPDs must obtain retransmission consent from local broadcast stations before retransmitting broadcast signals to subscribers,⁶⁸ however, local broadcast companies must engage in good faith negotiations for retransmission consent. Local broadcasters can impose a fee on MVPDs for retransmission consent, but MVPDs are protected from broadcasters engaging

64. See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified as amended in scattered sections of 47 U.S.C.).

65. CHARLES B. GOLDFARB & KATHLEEN ANN RUANE, CONG. RESEARCH SERV., R42722, ONLINE VIDEO DISTRIBUTORS AND THE CURRENT STATUTORY AND REGULATORY FRAMEWORK: ISSUES FOR CONGRESS, 4 (2013), http://www.ipmall.info/hosted_resources/crs/R42722_130114.pdf.

66. 47 U.S.C. § 522(13) (2013); 47 C.F.R. § 76.1000(e) (2014) (repeating the statutory definition of MVPD for the purposes of the Program Access Rules); The definition of MVPD has been extended to telephone companies that deliver video, like AT&T’s U-verse and Verizon’s FiOS. See, e.g., 47 U.S.C. § 571(a)(1)–(4); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Dkt. No. 07-269, Further Notice of Inquiry, 26 FCC Rcd. 14,098, para. 10 (2011).

67. This is the regulatory regime under which Sky Angel brought its program access complaint against Discovery. See 47 U.S.C. § 548(b) (2013).

68. *Id.* § 325(b)(1). Retransmission consent laws and regulations are a distinct legal regime from the compulsory copyright regime prescribed by The Copyright Act of 1976. Without referring to MVPDs, the Copyright Act prescribes rules under which certain video distributors may pay broadcasters a below-market price for the aggregate of all copyrights for all programs in each broadcast. Part II.B, *infra*, touches on copyright law’s effect on the definition of MVPDs with regard to the *ivi* and *Aereo* cases. See 17 U.S.C. §§ 111, 119, 122 (2013).

in “bad faith” negotiations.⁶⁹

- MVPDs cannot unreasonably restrain unaffiliated video programmers from competing fairly for distribution by the MVPD (the program carriage obligation).⁷⁰
- MVPDs must also comply with closed captioning,⁷¹ equal employment opportunity,⁷² and commercial loudness regulations,⁷³ among others, to ensure that MVPDs offer their services on a fair and non-discriminatory basis to consumers.

Despite MVPD obligations like program carriage and closed captioning, one can immediately understand why OVDs would want to be considered MVPDs based on the benefits conferred under the program access and retransmission consent regimes. First, OVDs would be able to demand that broadcasters bargain with them in good faith for the retransmission of their “must-see” network programming. Furthermore, OVDs would also be able to bring a program access dispute against any rival MVPD if they suspected that their rivals were discriminatorily withholding their vertically integrated programming or offering it on unfair terms.

As attractive as the MVPD statutory benefits would be to OVDs, the inclusion of OVDs as MVPDs is far from certain. On several earlier occasions, the FCC has interpreted the statutory definition of an MVPD as necessarily excluding OVDs. In 1993, the *FCC’s Implementation of Sections 12 and 19 of the 1992 Cable Act* stated that the purpose of the Act was to ensure adequate “facilities-based competition” in the video delivery marketplace.⁷⁴ Since the 1992 Cable Act creates the regulatory regime for MVPDs, the *FCC’s Implementation of Sections 12 and 19 of the 1992 Cable Act* implies that MVPDs are only facilities-based entities, which are commonly understood to “provide . . . [their] own complete infrastructure.”⁷⁵ Traditional OVDs do not provide their own complete infrastructure because they do not fully own and operate the Internet distribution path over which they transmit their programming.⁷⁶ Therefore, in implementing the 1992 Cable Act, the FCC seems to have excluded OVDs from the scope of the MVPD definition.

Furthermore, in its *Sky Angel Standstill Denial Order*, the Media

69. 47 U.S.C. §§ 325(b)(3)(C)(ii)–(iii) (2013).

70. *Id.* § 536(a)(3).

71. 47 C.F.R. § 79.1 (2014).

72. *Id.* §§ 25.601, 76.71(a).

73. 47 U.S.C. § 621 (2013) (The CALM Act).

74. *FCC’s Implementation of Sections 12 and 19 of the 1992 Cable Act*, *supra* note 59, para 63, n.79.

75. See John Bergmayer, *Do the Verizon/Cable Transactions Spell the End of “Facilities-Based” Competition?*, PUBLIC KNOWLEDGE (Feb. 23, 2012), <https://www.publicknowledge.org/news-blog/blogs/verizon-facilities>.

76. See *The Future of Video*, *supra* note 26, at 3.

Bureau determined that an OVD that does not own and operate the path over which its programming is transmitted cannot be an MVPD. The Media Bureau came to this initial conclusion because OVDs do not provide “multiple *channels* of video programming” under the statutory definition of MVPD.⁷⁷ Similarly, in the Media Bureau’s *2012 MVPD Definition Inquiry* and *2014 MVPD Definition Inquiry*, many commenters concurred with the *Sky Angel Standstill Denial Order*’s conclusion that OVDs do not provide “channels.”⁷⁸ Their general argument is that the term “channel” must adhere to its own statutory definition, which precludes OVDs.

The Cable Communications Policy Act of 1984 (“1984 Cable Act”), a precursor to the 1992 Cable Act, defines “channel” separately as “a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel (as television channel is defined by the Commission by regulation).”⁷⁹

The commenters who agree with the *Sky Angel Standstill Denial Order* assume that this 1984 definition of “channel” was incorporated into the 1992 Cable Act definition of MVPD because the 1992 Act amends the 1984 Act. They further assume that while only a “cable system” is referenced in the definition of “channel,” that definition still applies to all the constituent entities of the MVPD class. By applying their assumptions about the 1984 definition of “channel” to the definition of MVPD, proponents of the *Sky Angel Standstill Denial Order* interpretation therefore conclude that each video stream sent by an MVPD to its subscribers must be assigned its own “portion of the electromagnetic frequency.”⁸⁰

Theoretically, an MVPD could only assign certain frequencies within its transmission pipes to certain channels if it owned and operated those pipes.⁸¹ Therefore, these commenters who agree with the *Sky Angel*

77. *Sky Angel Standstill Denial Order*, *supra* note 4, para. 7 (interpreting 47 U.S.C. § 522(13) (2013)) (emphasis added).

78. *See, e.g.*, Notice of Ex-Parte of Nat’l Cable and Telecomm. Assoc., *supra* note 15, at 2; Comments of Comcast Corp., *supra* note 17, at 9–10; Comments of Verizon Commc’ns Inc., *2012 MVPD Definition Inquiry*, MB Dkt. No. 12-83, 3–4 (filed May 14, 2012), <http://apps.fcc.gov/ecfs/document/view?id=7021917768>; Comments of Discovery Comm., *supra* note 16, at 16–18.

79. 47 U.S.C. § 522(4) (2013); The FCC further defines “television channel” in several regulations. On one hand, “television channel” has been defined as “[a] band of frequencies 6 MHz wide in the television broadcast band and designated either by number or by the extreme lower and upper frequencies.” 47 C.F.R. § 73.681 (2014). Alternatively, “television channel” has been defined as a “signaling path provided by a cable system.” *Id.* § 76.5(r)–(u).

80. *See, e.g.*, Comments of the Nat’l Cable and Telecomm. Assoc., *2012 MVPD Definition Inquiry*, MB Dkt. No. 12-83, 2–3 (filed May 14, 2012), <http://apps.fcc.gov/ecfs/document/view?id=7021917752>; Comments of Discovery, *supra* note 16, at 16–18 (emphasis omitted).

81. For example, Comcast has traditionally assigned all of its television channels to separate frequencies within each of its cable strands (its transmission paths) using quadrature

Standstill Denial Order argue that the statutory definition of MVPD requires an entity to have two characteristics: (1) the transmission of multiple streams of video programming, and (2) the ownership and operation of an end-to-end transmission path between the distributor's storage point of the programming and the subscribers' reception points.⁸² Because OVDs traditionally do not fully own and operate the Internet distribution paths through which their programming is distributed, these commenters argue that OVDs are not MVPDs. Much like the determination in the *FCC's Implementation of Sections 12 and 19 of the 1992 Cable Act*, the commenters who argue that OVDs do not provide multiple "channels" of video programming are making a "facilities-based" claim. They believe that the 1992 Cable Act definition of MVPDs makes clear that only facilities-based entities that provide an end-to-end transmission path for assigning portions of electromagnetic spectrum to certain channels are MVPDs.

However, in the *2014 MVPD Definition Inquiry*, the FCC and commenters make convincing arguments that the statutory definition of MVPDs can at least extend to Subscription Linear OVDs.⁸³ The FCC "tentatively concludes" that the examples of MVPDs listed in the 1992 Cable Act definition (e.g., cable operators and DBS providers) are illustrative of entities that each make "multiple *streams* of prescheduled video programming available for purchase, rather than [examples of entities that control] the physical distribution network" over which programming is sent.⁸⁴ The FCC arrives at this conclusion because it believes the 1984 definition of "channel" is ambiguous. "Channel" is only defined in the context of "cable systems," just one constituent member of the MVPD class created in 1992.⁸⁵ Thus, the FCC reasons that, regardless of whether the 1984 definition of "channel" as applied to MVPDs would require them to each have end-to-end transmission paths, the 1984 definition cannot be applied to MVPDs because it explicitly refers to "cable systems."

Based on the ambiguity created by applying the 1984 definition of

amplitude modulation ("QAM") technology. NUECHTERLEIN & WEISER, *supra* note 45, at 212.

82. See Comments of the Nat'l Cable and Telecomm. Assoc., *supra* note 80.

83. See, e.g., *2014 MVPD Definition NPRM*, *supra* note 7, paras. 18–28; Comments of Verizon, *2014 MVPD Definition Inquiry*, MB Dkt. No. 14-261, 3–4 (filed Mar. 3, 2015), <http://apps.fcc.gov/ecfs/document/view?id=60001039125>; Comments of Public Knowledge, *2014 MVPD Definition Inquiry*, MB Dkt. No. 14-261, 3–18 (filed Mar. 3, 2015), <http://apps.fcc.gov/ecfs/document/view?id=60001039111> (each arguing why "Subscription Linear OVDs"—a term coined by the *2014 MVPD Definition NPRM* to refer to OVDs that offer multiple streams of prescheduled, linear programming over the public Internet—qualify as MVPDs under the current MVPD definition).

84. *2014 MVPD Definition NPRM*, *supra* note 7, para. 19 (emphasis added).

85. *Id.* para. 21; see also 47 U.S.C. § 522(4) (2013).

“channel” to interpret “MVPD,” the FCC asserts that it may redefine an MVPD’s “channel” as a “stream” of programming content, rather than a controlled frequency in an end-to-end transmission path. The FCC believes that the “stream” definition is the reasonable, everyday meaning consumers of MVPD services give to the term “channel” (e.g., the Weather Channel), and thus that is the definition that should be used when determining what is an MVPD.⁸⁶ As a result, the *2014 MVPD Definition NPRM* recommends that Subscription Linear OVDs should qualify as MVPDs because they offer multiple “channels” (a.k.a., “streams”) of prescheduled, linear programming, despite distribution over the public Internet without the use of an end-to-end transmission path.

Adding to the *2014 MVPD Definition NPRM*’s reasoning for redefining “channel” in the MVPD context, Verizon commented that nowhere does the definition of MVPD mention any necessary technological components that an MVPD must possess.⁸⁷ In other words, Verizon implies that the end-to-end transmission-path requirement was an administrative construct concocted by the Media Bureau when it applied the 1984 definition of “channel” in the *Sky Angel Standstill Denial Order*.

Most convincingly, Public Knowledge commented in the *2014 MVPD Definition Inquiry* that “channel” should mean one thing in the 1984 Cable Act and another in the 1992 Cable Act because of the subject matter of each act.⁸⁸ Because the purpose of the 1992 Act, which defines MVPD, is to promote competition in the video programming market, Public Knowledge asserts that the most inclusive meaning of “channel” (a.k.a., “programming stream”) should be adopted for the 1992 Act in order to allow more qualified entities (i.e., Subscription Linear OVDs) to compete as MVPDs.⁸⁹ Applying the 1984 transmission-path definition of “channel” to MVPD narrows the field of possible MVPDs that can compete. To further prove that “channel” can have two definitions, Public Knowledge points to the Oxford English Dictionary, which defines “channel” as both a transmission path and as a stream of programming.⁹⁰ Even the FCC uses the two definitions of “channel” interchangeably.⁹¹ For those reasons, Public Knowledge sees no reason

86. *2014 MVPD Definition NPRM*, *supra* note 7, para. 24.

87. Comments of Verizon, *supra* note 83, at 4; *see also* 47 U.S.C. § 522(13) (2013).

88. Comments of Public Knowledge, *supra* note 83, at 6.

89. *Id.*

90. *Id.* at 9.

91. *Id.* at 8. *See, e.g., Revision of the Commission’s Program Access Rules & Examination of Programming Tying Arrangements*, MB Dkt. No. 07-198, First Report & Order, 25 FCC Red. 746, para. 30 (2010); *Applications of Comcast Corp., General Electric Co. & NBC Universal, Inc.*, MB Dkt. No. 10-56, Memorandum Opinion & Order, 26 FCC Red. 4238, para. 61, n.131 (2011). In both documents the FCC uses the term “channel” to mean “programming streams” without explicitly stating that it is diverging from the 1984

why the competitive purpose of the 1992 Act should preclude the “program-stream” definition of “channel” from being applied to MVPDs, despite the 1984 Act definition.

There are good reasons on both sides for selecting one definition of “channel” over the other. Both the 1984 transmission-path definition and the 2014 *MVPD Definition NPRM* definition could equally apply to “channel” as it is used in the definition of MVPD. At best, then, the definition of MVPD, and whether or not it includes Subscription Linear OVDs, is ambiguous.

B. Complication by copyright and the courts

As if the statutory definition of MVPD were not ambiguous enough, two recent court decisions have reached opposite conclusions as to whether Subscription Linear OVDs should be classified as “cable systems” under copyright law, similar to “cable-operator” MVPDs under the 1992 Cable Act. In interpreting the scope of the public performance right in copyright law with regard to retransmissions of broadcast programming, *WPIX, Inc. v. ivi, Inc.* and *ABC, Inc. v. Aereo, Inc.* each tangentially addressed whether Subscription Linear OVDs might be considered MVPDs.⁹²

The intersection of copyright law and telecommunications law with respect to the treatment of OVDs can easily become confusing. While both bodies of law use distinct definitions, terms, and provisions to regulate certain interactions related to video distributors, each body of law informs the other’s understanding of MVPDs. As explained in Part II.A, the 1992 Cable Act applies pro-competitive regulations to the group of video-distributing entities that it considers MVPDs. Conversely, the Copyright Act of 1976 provides standards by which certain video distributors, some of which are also MVPDs, must respect the copyrights contained in broadcast programming that they retransmit.⁹³

The Copyright Act recognizes that broadcasters transmit their programming for free over the airwaves. It also recognizes that video distributors could capture these broadcast signals for free and retransmit them to subscribers for pure profit without compensation to the copyright holders of the programming.⁹⁴ Together, § 101 and § 106 of the

definition.

92. Because the litigation is ongoing in multiple courts, this note does not review *Fox Television Stations, Inc. v. AereoKiller*, which stated that copyright law *could* treat an OVD as if it were a “cable system” under the Copyright Act, and thus a possible MVPD under the 1992 Cable Act. *FilmOn* provides similar reasoning for treating OVDs as MVPDs via copyright law that *Aereo* provides. *Fox TV Stations, Inc. v. AereoKiller*, No. CV 12-6921-GW(JCX), U.S. Dist. LEXIS 97305 (C.D. Cal. July 16, 2015).

93. See 17 U.S.C. §§ 101, 106, 111, 119, 122 (2013).

94. See H.R. Rep. No. 94-1496, at 86–7 (1976).

Copyright Act therefore provide protection for copyrights contained in broadcast programming. These sections prevent video distributors from retransmitting (publicly performing) the copyrighted programs embedded in broadcast signals without first obtaining a license from the programming copyright holders.⁹⁵ Sections 101 and 106 do not force broadcasters and their programming copyright holders to offer licenses for video distributors' retransmission.⁹⁶

However, §§ 111, 119, and 122 of the Copyright Act prescribe a compulsory copyright regime under which broadcasters must offer one, below-market license fee for “cable systems” and “satellite carriers” to retransmit all the copyrights contained in the broadcasters' signals.⁹⁷ Therefore, “cable systems” and “satellite carriers” who wish to retransmit broadcast programming under the Copyright Act of 1976 can compel broadcasters to charge them for a copyright license to do so.

“Cable systems” and “satellite carriers” under the Copyright Act do not include all entities that distribute video programming. For example, the Copyright Act only considers “*facilities*” that make “secondary transmissions of . . . [broadcast] signals or programs by wires, cables, microwave, or other communications channels” to be “cable systems.”⁹⁸ Thus, a video distributor claiming to be a “cable system” is only entitled to a compulsory copyright under the Copyright Act if it provides its own transmission facility. This language parallels the end-to-end facilities requirement necessary for categorization as an MVPD under the *Sky Angel Standstill Denial Order*.

In *WPIX, Inc. v. ivi, Inc.*, the Second Circuit confirmed the notion that the term “cable systems” in the Copyright Act refers only to a traditional, facilities-based cable entity. In refusing to compel broadcasters to give *ivi*, a Subscription Linear OVD, compulsory copyright licenses under § 111, the *ivi* court held that the definition of “cable systems” in the Copyright Act was ambiguous (despite its use of the word “facilities”). But, such ambiguity triggered *Chevron* deference for the Copyright Office, which had determined in 2011 that all OVDs were not “cable systems” under § 111 of the Copyright Act for various reasons, including the nature of OVDs' transmission paths.⁹⁹ Therefore,

95. See 17 U.S.C. §§ 101, 106 (2013).

96. See *id.*

97. See *id.* §§ 111, 119, 122; GOLDFARB & RUANE, *supra* note 65, at 6; NUECHTERLEIN & WEISER, *supra* note 45, at 336.

98. 17 U.S.C. § 111(f)(3) (2013) (emphasis added on “facilities” to demonstrate that the Copyright Act uses possible “facilities-based,” “end-to-end” jargon, excluding OVDs from being “cable systems” under the Act).

99. *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 284 (2d Cir. 2012); see also U.S. Copyright Office, *Satellite Television Extension and Localism Act § 302 Report*, 48 (Aug. 29, 2011), <http://copyright.gov/reports/section302-report.pdf> (summarizing the Copyright Office decision not to grant OVDs “cable system” status under the Copyright Act as due to (a) concerns about

Subscription Linear OVDs were not able to obtain the compulsory copyright licenses from broadcasters under *ivi*.

The *ivi* definition of “cable systems” in the Copyright Act necessarily influences what it means to be an MVPD. “Cable operators” are a constituent member of MVPDs, and they are essentially synonymous with the meaning of “cable systems” under the Copyright Act. While the 1984 Cable Act defines “cable operators”¹⁰⁰ and the Copyright Act defines “cable systems,” Congress meant for “the compulsory licensing system and the Communications Act . . . [to] complement each other.”¹⁰¹ Given the reciprocity between the 1984 Cable Act and the Copyright Act, the holding in *ivi* that OVDs are not “cable systems” under the Copyright Act suggests that OVDs would also not be “cable operators” under the *Sky Angel Standstill Denial Order* definition of MVPDs.

However, in the dicta of *ABC, Inc. v. Aereo, Inc.*, the Supreme Court may have inadvertently contradicted the *ivi* reasoning that Subscription Linear OVDs are not “cable systems.” In that case, Aereo, a Subscription Linear OVD that captured live broadcasts and streamed them over the Internet, argued that it was not publicly performing broadcasters’ copyrighted programs without a compulsory license¹⁰² because its unique retransmission technology was more like a “private” performance.¹⁰³ In ruling against Aereo’s “private” performance defense, the Court stated that there are “many similarities between Aereo and cable companies.”¹⁰⁴ They both capture broadcast programming signals and retransmit them to their subscribers. These similarities convinced the Court that the difference in technical retransmission between Aereo and cable companies was “not critical” and that Aereo was a public performer of broadcast programming that had not paid for the proper compulsory copyright license.¹⁰⁵

Therefore, the Supreme Court drew a similarity between the *operation* of Aereo and a cable company: both entities retransmit multiple streams of prescheduled, linear broadcast programming to the

broadcast signal security over an Internet transmission path, (b) prohibitions on compulsory licensing regimes for Internet companies under several Free Trade Agreements, and (c) a lack of marketplace need for compulsory licenses for OVDs). See *Chevron U.S.A., Inc., v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–45 (1984).

100. 47 U.S.C. § 522(5) (2013).

101. *WPIX, Inc. v. ivi, Inc.*, 765 F.Supp.2d 594, 603 (S.D.N.Y. 2011).

102. Under the Second Circuit’s decision in *ivi*, Aereo was not eligible for compulsory copyrights at the time because it is an OVD. Therefore, Aereo would have had to obtain permission from the broadcasters and their programming copyright holders to retransmit the programming contained in their broadcast signals.

103. See *ABC, Inc. v. Aereo, Inc.*, 134 S.Ct. 2498, 2503 (2014).

104. *Id.* at 2507.

105. *Id.*

public. Based on the Court’s dictum, Aereo then petitioned the Copyright Office to be recognized as a “cable system” under § 111 of the Copyright Act in order to require broadcasters to give them compulsory copyright licenses. Even though the Copyright Office subsequently denied Aereo’s petition, citing the *ivi* decision, *Aereo* still opened the door for treating Subscription Linear OVDs as MVPDs.¹⁰⁶ According to the Supreme Court, Aereo “publicly performs” like a “cable system” under the Copyright Act because it retransmits multiple streams of prescheduled, linear programming, albeit over the public Internet. And since “cable systems” are basically “cable operators,” the latter of which are members of the MVPD class, then what would stop Aereo, or any Subscription Linear OVD, from also being an MVPD?

The answer to this question is of course that the end-to-end-transmission-path requirement imposed in the *Sky Angel Standstill Denial Order*, which is still law, would deny all Subscription Linear OVDs from being MVPDs because public Internet video distribution is not “facilities-based” nor does it offer “channels” under the 1984 Cable Act. Of course, these conclusions can be countered by pro-OVD arguments like the ones made in the *2012 MVPD Definition Inquiry* and the *2014 MVPD Definition Inquiry*. And if anything, the conflicting reasoning in *ivi* and *Aereo* demonstrates that it is still an open question whether Subscription Linear OVDs should be treated like “cable systems” under the Copyright Act, and like “cable operators” under the 1984 Cable Act. That said, in a world where the *Sky Angel Standstill Denial Order* is still the law of the land, for the time being a video distributor must own and operate an end-to-end transmission path to be an MVPD.

In fact, if the qualifying requirement for MVPD status is an end-to-end transmission path for its linear programming, then a Subscription Linear OVD, which owns and operates the whole public Internet transmission path over which it transmits its content, should also be an MVPD. In fact, two Subscription Linear OVD services, SlingTV and Comcast Stream TV, could feasibly operate in such a way as to transmit video content solely over end-to-end public-Internet transmission paths, operated by their affiliated ISPs. SlingTV and Comcast Stream TV could be MVPDs. Part III examines this possibility in further detail.

106. As a result of the Copyright Office’s determination that Aereo was not a “cable system” under § 111, Aereo filed for Chapter 11 bankruptcy and has since ceased its video distribution service. See Letter from Jacqueline C. Charlesworth, General Counsel and Assoc. Register of Copyrights, U.S. Copyright Office, to Matthew Calabro, Dir. of Fin. Planning & Analysis and Revenue, Aereo, Inc. (July 16, 2014), http://www.nab.org/documents/newsRoom/pdfs/071614_Aereo_Copyright_Office_letter.pdf; see also Emily Steele, *Aereo Concedes Defeat and Files for Bankruptcy*, N.Y. TIMES (Nov. 21, 2014), <http://nyti.ms/1F8eI9N>.

III. SOME SUBSCRIPTION LINEAR OVDs CAN QUALIFY AS MVPDS

If the *Sky Angel Standstill Denial Order* remains binding, despite the *2014 MVPD Definition NPRM's* tentative conclusions, Subscription Linear OVDs that retransmit programming over an end-to-end, public Internet distribution path could reasonably be MVPDs. This could be a huge boon for qualifying OVDs as they would obtain the MVPD statutory benefits of (1) the program access right,¹⁰⁷ and (2) the good-faith retransmission consent right,¹⁰⁸ despite the statutory obligations of program carriage¹⁰⁹ and other ancillary regulations, like closed captioning requirements.¹¹⁰

However, if too many Subscription Linear OVDs received the statutory benefits of MVPDs, they could harm the efficacy of those benefits. Programmers who are affiliated with cable operators (or DIRECTV) have originally had the proprietary right to exclude OVDs from distributing programming, unless bargained for at arm's length. This is what makes those programmers' programming so valuable. But, if enough Subscription Linear OVDs engaged in programming access disputes against programmers affiliated with cable operators (or DIRECTV), this programming would be severely devalued. Those programmers would have to offer their "must-see" programming to any complaining Subscription Linear OVD on non-discriminatory terms. Copyright owners of those programmers' content could also ransom the public-Internet distribution license for their content at artificially high rates, knowing that cable (or DIRECTV) affiliated programmers would have to pay higher rates in order to offer their programming on non-discriminatory terms to Subscription Linear OVDs.¹¹¹

Similarly, if too many Subscription Linear OVDs were included in the retransmission consent regime, broadcasters would suddenly be responsible for negotiating with hundreds of OVDs, which would prevent them from efficiently assessing the reasonable value of their signals depending on the OVDs' subscriber base, server location(s), and ability to effectively market the programming contained within each broadcast signal.¹¹² Furthermore, because the Internet would allow Subscription Linear OVDs to have a national distribution footprint, these

107. See 47 U.S.C. § 548(b) (2013); see also *supra* Part II.A.

108. See 47 U.S.C. § 325(b)(3)(C)(ii)–(iii) (2013); see also *supra* Part II.A.

109. See 47 U.S.C. § 536(a)(3) (2013); see also *supra* Part II.A.

110. See, e.g., 47 C.F.R. § 79.1 (2014) (closed captioning regulations); see also *supra* Part II.A.

111. See Notice of Ex-Parte of Nat'l Cable and Telecomm. Assoc., *supra* note 15, at 2; see also Comments of Discovery Comm., *supra* note 16, at 12.

112. See Comments of Comcast Corp., *supra* note 17, at 11.

OVDs might have trouble ensuring that broadcasters' signals are only retransmitted to the appropriate DMA mandated by each broadcaster's FCC operating license.¹¹³

The doomsday scenario of too many Subscription Linear OVDs receiving MVPD status is likely just a specter. Few existing Subscription Linear OVDs can currently provide programming streams over an end-to-end public-Internet transmission path. The most important of the group are DISH and Comcast, which have both developed Subscription Linear OVD services in 2015 named SlingTV and Stream TV, respectively.¹¹⁴ And since both DISH and Comcast are ISPs,¹¹⁵ SlingTV and Stream TV could be considered MVPDs for the areas in which their Subscription Linear content is only streamed over their affiliated ISPs' end-to-end public-Internet transmission paths. For SlingTV, even if it could be streamed over DISH's end-to-end public-Internet transmission path, the availability of SlingTV nationwide and via all other non-DISH ISPs would almost certainly prevent it from being treated like an MVPD under the *Sky Angel Standstill Denial Order*. Because Stream TV will only be available to subscribers in Comcast's ISP footprint, its chances for MVPD treatment are markedly better.

The rest of Part III explores how DISH's and Comcast's ISP offerings could be configured to create end-to-end public-Internet transmission paths for their Subscription Linear OVDs, and the complications which would subsequently arise from trying to treat such services as MVPDs.

A. DISH's SlingTV

On February 9, 2015, DISH Network launched a Subscription Linear OVD service called SlingTV, separate from its traditional DBS television offering.¹¹⁶ SlingTV's basic tier of service costs \$20 per month, appears to the consumer as a slimmed-down bundle of programming networks also found on traditional MVPDs, and features live streams of programming networks like ESPN, A&E, and HGTV.¹¹⁷ On top of this basic tier, subscribers can add "buy-through" tiers, the most popular of which features a live stream of the standard HBO

113. See Comments of Nat'l Ass'n of Broadcasters, *supra* note 19, at 15–16.

114. See *Why We're Better*, *supra* note 20; see also Strauss, *supra* note 21.

115. See *Bundle With Dishnet High-Speed Internet And Save*, DISH NETWORK, <http://www.mydish.com/upgrades/products/satellite-internet> (last visited Nov. 15, 2015); see also *Internet Service*, XFINITY, <http://www.xfinity.com/internet-service.html> (last visited Nov. 17, 2015).

116. David Katzmaier, *Sling TV: Everything You Need to Know*, CNET (Mar. 17, 2015, 10:37 AM), <http://cnet.co/1yo1Pcd>.

117. *Why We're Better*, *supra* note 20.

network for an additional \$15 per month.¹¹⁸ Lastly, DISH eventually plans to give its SlingTV subscribers access to a programming tier where they can stream live feeds of local broadcast networks,¹¹⁹ suggesting that DISH believes local broadcasters will engage in retransmission consent bargaining with the service.

While the exact technical specifications of SlingTV's public-Internet retransmission technology are not public knowledge, anyone in the United States who has purchased broadband connectivity from an ISP that provides speeds similar to those needed to watch Hulu or Netflix should be able to stream SlingTV.¹²⁰ This means that, nationwide, DISH does not currently offer SlingTV exclusively as an MVPD under the *Sky Angel Standstill Denial Order*. Many SlingTV subscribers connect to the service over public Internet pathways that are not end-to-end managed by DISH. However, any subscriber to SlingTV that streams content in any session solely over the public DISH ISP service, known as dishNET,¹²¹ would be consuming the service as if it were an MVPD under current law. In other words, only if a dishNET subscriber received content from a SlingTV server solely over an end-to-end dishNET transmission path, would the subscriber be consuming SlingTV acting as an MVPD.

In order for SlingTV's live programming networks to be solely streamed over dishNET's end-to-end public-Internet transmission path, DISH would have to ensure that the terrestrial satellites receiving SlingTV's live programming networks interconnected directly at dishNET's network operations centers.¹²² The network operations center is a hub that receives Internet traffic from across the globe and transmits it to satellite Internet distribution systems.¹²³ The network operations center routes traffic via fiber to DISH's terrestrial satellites, and those terrestrial satellites then beam that traffic up to orbiting geostationary satellites capable of retransmitting broadband content back down to

118. *Pricing*, SLING TELEVISION, <https://www.sling.com/package> (last visited Nov. 15, 2015).

119. Todd Spangler, *Dish Plans to Charge Internet TV Subs Extra for Live Local Broadcast Channels: Sources*, VARIETY (Oct. 3, 2014, 3:00 PM), <http://variety.com/2014/digital/news/dish-plans-to-charge-ott-subs-extra-for-live-local-tv-channels-sources-1201320623>.

120. Katzmaier, *supra* note 116.

121. *See Bundle With Dishnet High-Speed Internet And Save*, *supra* note 114; *see also* Press Release, DISH Network, DISH Launches dishNET Broadband, Bringing High-Speed Internet to Rural Americans with Slow or No Access (Sept. 27, 2012, 6:08 AM), <http://about.dish.com/press-release/programming/dish-launches-dishnet-broadband-bringing-high-speed-internet-rural-america> (explaining that dishNET offers download speeds of up to 10 Mbps, enabling users to stream online video content).

122. *See How Does Satellite Internet Work?*, GROUND CONTROL, http://www.groundcontrol.com/How_Does_Satellite_Internet_Work.htm (last visited Nov. 15, 2015).

123. *See id.*

Earth.¹²⁴ Any dishNET subscriber nationwide who has installed a satellite dish and router capable of establishing an Internet connection can contact DISH's geostationary satellite to reach the provider's terrestrial satellite and network operation center.¹²⁵ From the network operations center to a subscriber's premises, all Internet traffic travels solely over fiber and satellite public Internet pathways fully managed by DISH, i.e., an end-to-end transmission path. Thus, if DISH directly interconnected dishNET's network operations centers with the terrestrial satellites receiving the live signals of programming networks retransmitted on SlingTV, then, for dishNET subscribers, those live signals would only travel over DISH's end-to-end public-Internet transmission pathways. In this way, SlingTV would satisfy the *Sky Angel Standstill Denial Order's* standard for being an MVPD. Subsequently, SlingTV could possibly get program access and good-faith retransmission consent rights when streamed by dishNET subscribers.

Of course, this supposition raises a question about the scope of SlingTV's MVPD treatment. As previously stated, SlingTV is streamed over ISP networks other than dishNET's, like cable companies or telcos. SlingTV necessarily could not be treated like an MVPD when streamed over any public Internet pipes not managed by DISH because DISH's control over distribution would not be end-to-end as required by the *Sky Angel Standstill Denial Order*. Even more complicated, a SlingTV subscriber could stream programming at home with dishNET but use 4G LTE wireless broadband from AT&T or Verizon to stream the same content on the go. In the former case, the service would qualify as an MVPD, whereas the latter would not.

These main exceptions to treating SlingTV like an MVPD under the *Sky Angel Standstill Denial Order* highlight the irony of the current MVPD qualifications. Why should a video distributor be treated like an MVPD in some circumstances but not others? Should a consumer's choice to stream the SlingTV over dishNET versus another ISP determine whether SlingTV could qualify for the statutory MVPD treatment? Clearly, treating SlingTV like an MVPD only in circumstances where SlingTV is streamed over a dishNET end-to-end transmission path distribution would be a regulatory nightmare. Would broadcasters only be obligated to engage in good-faith retransmission consent for their signals when those signals are exclusively streamed over dishNET, meaning that they could refuse access to their programs in other cases? How could these negotiations proceed in an efficient and non-convoluted manner such that they could be considered to be made in "good faith?" Similarly, would SlingTV only be able to file a program

124. *See id.*

125. *See id.*

access dispute over programming when streamed over a dishNET end-to-end transmission path? If some SlingTV subscribers will always stream programming over an unaffiliated ISP's service, would SlingTV ever get program access protection?

There are no easy answers to these questions. This discussion merely seeks to demonstrate that there are still considerable roadblocks to treating SlingTV like an MVPD if streamed over a dishNET end-to-end transmission path. However, of utmost importance, in *some* circumstances, SlingTV *is* technically an MVPD based on the *Sky Angel Standstill Denial Order*, given the lack of further FCC binding orders. For that reason, DISH might still consider advocating that MVPD treatment be extended to SlingTV in the appropriate circumstances.

B. Comcast Stream TV

As of this writing, Comcast has recently launched a Subscription Linear OVD service, called Stream TV, in a handful of markets.¹²⁶ By 2016, Stream TV will be available everywhere in the Comcast ISP footprint.¹²⁷ Stream TV will offer subscribers the ability to stream about a dozen live programming networks, including the local broadcasts of CBS, ABC, and NBC as well as HBO, all for the price of \$15 per month.¹²⁸

Like DISH, Comcast has not published the technical specifications about Stream TV's public-Internet distribution technology. Yet, unlike DISH, Comcast will only offer Stream TV in the territory covered by its cable modem ISP footprint, known as XFINITY Internet. This means that every public Internet distribution pathway of Stream TV could be made via an end-to-end transmission path, qualifying Stream TV as an MVPD under the *Sky Angel Standstill Denial Order*. As a result, Comcast would only need to make minor adjustments to ensure Stream TV's MVPD treatment.

Generally, XFINITY Internet systems have three components: a headend, coaxial cable, and each subscriber's cable modem. Public Internet traffic arriving from backbones first contacts the XFINITY Internet headend serving the cable system in a specific community. That Internet traffic is then transmitted through the system's coaxial cable, which eventually runs to individual subscribers' premises. Inside the coaxial cable, which also transmits traditional cable programming

126. Strauss, *supra* note 21; *Making the Most of Stream TV – only from XFINITY, COMCAST XFINITY: SUPPORT*, <http://customer.xfinity.com/help-and-support/cable-tv/stream-overview/> (last visited Nov. 15, 2015) (listing Stream TV availability in parts of Illinois, Indiana, Maine, Massachusetts, Michigan and New Hampshire).

127. Strauss, *supra* note 21.

128. *Id.*

signals, the Internet traffic is separated using quadrature amplitude modulation (“QAM”) technology.¹²⁹ When arriving at a subscriber’s premises, the Internet traffic is routed to the subscriber’s cable modem, which then streams content to all broadband-enabled devices using Ethernet or Wi-Fi.

From the headend to a subscriber’s premises, all Internet traffic travels solely over cable pathways fully managed by Xfinity, i.e., an end-to-end transmission path. So the only change Comcast would need to make the XFINITY Internet distribution system an end-to-end transmission path for Stream TV would be to directly interconnect XFINITY’s headends with terrestrial satellites that receive live signals of the linear programming networks retransmitted on Stream TV. In this way, Stream TV would satisfy the *Sky Angel Standstill Denial Order’s* qualification for being an MVPD. Subsequently, Stream TV could possibly get program access and good-faith retransmission consent rights.

Contrary to the issues of MVPD treatment raised by the national distribution of SlingTV over some public Internet pathways that cannot be managed by DISH, and thus cannot be end-to-end, Stream TV, as marketed, could be distributed over an end-to-end transmission path for all subscribers. Unlike the scenario involving SlingTV I describe in Part III.A, broadcasters would not need to worry about when they would be obligated to engage in good-faith retransmission consent if Stream TV utilizes end-to-end transmission. Comcast’s decision to limit Stream TV’s availability to XFINITY Internet subscribers necessitates that Comcast remain the only ISP over which Stream TV is streamed. Thus, if the Stream TV delivery system is configured as an end-to-end transmission path that only distributes programming over XFINITY Internet pipes, Comcast will always fully own and operate the public Internet pathway over which the broadcasters’ programming is distributed. In this way, Stream TV would always be an MVPD under the *Sky Angel Standstill Denial Order*, subsequently requiring broadcasters to always engage in good-faith retransmission consent. Similarly, if the Stream TV delivery system is configured as an end-to-end transmission path that only distributes programming over XFINITY Internet pipes, Stream TV would always be an MVPD under the *Sky Angel Standstill Denial Order* for purposes of filing program access disputes.

My hypothesis for the relative ease with which Stream TV could be treated as an MVPD depends on Comcast configuring the Stream TV distribution pathway as end-to-end within each XFINITY Internet footprint (meaning that each ISP headend would need to directly interconnect with terrestrial satellites downloading broadcast and cable

129. See NUECHTERLEIN & WEISER, *supra* note 45, at 212.

programming). However, one can see that, should Comcast make adjustments to ensure that every public Internet pathway over which Stream TV can be streamed is end-to-end, Stream TV would always be considered an MVPD under the *Sky Angel Standstill Denial Order*, avoiding the “regulatory fiasco” of sometimes-MVPD-classification that SlingTV would experience. Thus, no matter the resolution of the 2014 *MVPD Definition Inquiry*, Stream TV could conditionally take advantage of program access disputes and good-faith retransmission consent by qualifying as an MVPD under the *Sky Angel Standstill Denial Order*.

CONCLUSION

Given the current status of the debate surrounding the definition of what statutorily constitutes an MVPD, there is room for Subscription Linear OVDs to assert that they are MVPDs when they provide an end-to-end transmission path for video programming to certain subscribers. The fact that this interesting loophole exists suggests two things about the current regulatory state of the video market: (1) the *Sky Angel Standstill Denial Order's* definition of an MVPD, which is meant to exclude all OVDs, does not fully achieve its goal; and (2) the definition of an MVPD is based on technology that is slowly being uprooted or converged upon by integration of Internet-based distribution systems into the video market.

What becomes clear in the wake of these two observations is that the current definition of an MVPD may no longer be an appropriate way to distinguish which distributors of video programming are assigned the rights from obligations that traditional facilities-based video distributors were given under the 1992 Cable Act. If more and more OVDs proliferate and more and more Americans are substituting OVD services for MVPD services,¹³⁰ the FCC should focus on ensuring competitive protections for OVDs in addition to their traditional MVPD rivals.

As we move into a world dominated by all things Internet, the video marketplace should keep pace with this transition. The *Sky Angel Standstill Denial Order's* definition of an MVPD has failed in statutorily separating MVPDs and OVDs, as illustrated by the fact that SlingTV and Stream TV can implement end-to-end distribution pathways to operate in at least some circumstances like an MVPD, potentially taking advantage of MVPD statutory benefits. Furthermore, the *Sky Angel Standstill Denial Order's* definition of MVPD might be completely overturned

130. In 2013, traditional MVPDs lost 167,000 net subscribers to OVD services. In 2014, traditional MVPDs lost 222,000 net subscribers to OVD services. Shalini Ramachandran, *Pay-TV 'Cord Cutting' Accelerates*, WALL ST. J. (Nov. 6, 2014, 7:50 PM), <http://www.wsj.com/articles/pay-tv-cord-cutting-accelerates-1415321442>.

should an order be released under the *2014 MVPD Definition NPRM* that treats all Subscription Linear OVDs as MVPDs, no matter how they configure their public Internet distribution pathways. The standing definition of MVPD has thus failed to keep pace with the video marketplace's transition to Internet distribution mediums. A major policy goal of the FCC moving forward should be to reconcile its regulation of MVPDs and OVDs as both continue to be marketplace substitutes for one another when Americans choose among video content providers.