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Over the top

The legal gridlock that hinders competition in the US streaming video market


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With the growth of YouTube TV, the new Apple TV app, and Amazon Prime video channels, the world's largest internet media companies have definitively entered the streaming television market. The introduction of these multimedia giants to the over-the-top (OTT) video delivery market confirms the next evolution in the way consumers access video content. But as consumer-facing streaming options and related technology continue to grow and evolve, the Copyright Act (the act) regulating this technology has remained largely unchanged for decades. Moreover, regulations promulgated by other agencies, such as the US Federal Communications Commission (FCC), have lagged technological development.

The antiquated legal and regulatory landscape largely exists as the legacy of prior technologies the government sought to protect. Today, outdated law creates barriers to new market entrants seeking to leverage technology for the benefit of consumers. This outdated and uncertain legal landscape forces the courts into the position of providing guidance to market players. But the high costs associated with litigating the meaning of outdated law can be prohibitive, particularly to emerging technology companies. These barriers ultimately harm consumers, who are deprived of choices and unable to test outdated legal constraints. This leaves the market to entrenched, incumbent companies.

In this article, we summarise the state of affairs as it relates to the law surrounding the delivery of streaming broadcast television content to consumers. Many of the issues are far too complicated to fully discuss in an article of this length, but it is nonetheless helpful to consider the legal gridlock that continues to hinder competition in the streaming video market.

US Copyright Act

The act, first introduced in 1790, and revised in 1831 and 1909, was last globally updated in 1976. At that time, "community antennas" – large hilltop antennas connecting rural communities by dedicated physical cables and wires – were new and disruptive technology. With the 1976 amendment, Congress created a statutory licence for certain secondary transmissions made by "cable systems". This amendment overturned *Fortnightly Corp v United Artists Television, Inc*[1] and *Teleprompter Corp v Columbia Broad Sys, Inc*[2] by defining the secondary transmissions made by the community antenna systems as public performances, but carved out a statutory licence for retransmitters using "wires, cables, microwave, or other communications channels to subscribing members of the public who pay for such service."[3]

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Congress attempted to use technology neutral language in drafting the statutory licence. While the "typical [cable] system" in 1976 used a "network of cable" to make secondary transmissions,[4] the House of Representatives recognised in a 1976 House Report by the Committee on the Judiciary that "technical advances have generated new industries and new methods for the reproduction and dissemination of copyrighted works" and that there are "promises [of] even greater changes in the future."[5] During congressional hearings, the then-Register of Copyrights, Barbara Ringer, testified that the statutory licence for cable systems "deals with all kinds of secondary transmissions, which usually means picking up electrical energy signals ... off the air and retransmitting them simultaneously by one means or the other – usually cable but sometimes other communications channels, like microwave and apparently laser beam transmissions that are on the drawing board if not in actual operation."[6]

In the 43 years since the act's last general update, television delivery methods have expanded to include cable, microwave, satellite and now the internet. Typically, in response to court rulings, Congress has enacted limited updates along the way to address specific technologies. For example, in 1988, Congress created a separate licence for satellite providers. And in 1994, Congress amended the definition of a "cable system" in the Copyright Act to expressly include "microwave" transmissions, another early form of wireless transmission.[8]

But none of these fixes provides a comprehensive framework for market competition of constantly evolving technology. Since 1994, Congress has not modified the Copyright Act's statutory definition of a cable system.

Regulatory response

Regulatory agencies, in particular the US Copyright Office and the FCC, play a critical role, although regulatory agencies are presently hamstrung by the directive to blindly reduce regulation. Although there may be good policy reasons behind the general principle of reducing regulation, such a directive should not be divorced of all context. In this case, regulation would likely benefit consumers by facilitating competition.

For decades, the Copyright Office has been hostile to the statutory copyright licence.[9] Although the office has concluded AT&T, U-Verse and Verizon FiOS are eligible for the licence,[10] it has been far less hospitable

to less established companies like Aereo and FilmOn. The Copyright Office's reluctance to treat certain internet-based services as "cable systems" may be traceable in part to the fact that the FCC does not currently regulate them.

On 17 December 2014, the FCC adopted a Notice of Proposed Rulemaking (NPRM) that could have brought certain internet-based services within its existing regulatory framework as multichannel video-programming distributors (MVPDs).[11] Given that the FCC is charged with determining what, if any, regulations a cable system must comply with to benefit from the statutory copyright licence,[12] affirmative regulation of OTT providers would have clarified that those providers are permissible under FCC regulations and should be entitled to the benefits of a statutory copyright licence.

Facing strong opposition from established industry interests, the FCC's proposed rule-making failed to gain steam and stalled on the regulatory agenda. When President Trump took office and demanded the wholesale reduction of regulation, much of the progress the FCC had made toward updating the regulatory regime to embrace OTT providers ground to a halt.

Today, although the NPRM remains technically open, it has been sitting on the shelf for years. During a public discussion on OTT providers in January 2017, then FCC Chairman Ajit Pai expressed concern about regulation of the internet: "For me, the way forward on over-the-top video is simple. There is no market failure. There is no problem to be solved. There is thus no need for the FCC to get involved."[13] But regulatory guidance may be exactly what smaller, disruptive OTT content providers need to establish legitimacy in the market.

As a result of the FCC's failure to affirmatively regulate OTT providers, innovative services seeking to deliver broadcast television over the internet have encountered hostility from the Copyright Office and courts to the claim that they qualify as a cable system and are entitled to a statutory copyright licence.

In December 2017, the Copyright Office issued its own notice of proposed rule-making, in which the office proposed to change the regulatory definition of a cable system to exclude internet-based services.[14] This proposal has spurred mixed reactions from different industry interests, and its fate is unclear. Regardless of how this proposal is resolved, inaction by the FCC and the hostility of the Copyright Office towards new market entrants that seek to deliver programming over the internet has stacked the decks in favour of the existing multimedia giants that have benefitted from years (or decades) of regulatory protection.

The courts

In today's political climate, the chances of an update to legislation as complex and far-reaching as the act are slim. With regulatory agencies essentially frozen, the task of interpreting outdated statutes and regulations has been left to the courts, which do not offer an efficient solution.

In 2014, the US Supreme Court issued its decision in *American Broad Cos v Aereo, Inc*,[15] in which it ruled that a service that allows subscribers to record and view streams of broadcast television on internet-connected devices engages in public performances. At the time, our firm argued in an *amicus* brief that Aereo met the statutory definition of a cable system under the act and thus was able to retransmit broadcast programming. The court seemed to embrace this logic. Remarkably, though the case did not directly involve the statutory copyright licence for cable systems, the court used the word "cable" 44 times in its decision, reasoning that Aereo is "substantially similar to" and "is for all practical purposes a traditional cable system."[16]

Two years later, in 2016, our firm argued the case of *FilmOn X, LLC v Fox Television Stations, Inc*[17] (*FilmOn*) before the D C Federal Circuit Court of Appeals. In that argument, we urged the court to find OTT video providers were within the act's definition of a "cable system". We argued that the plain statutory text and the legislative history demonstrate that the statute was drafted in a flexible manner to cover new technologies as they appeared. Such a finding would have facilitated consumer access to additional video content options over the internet. This content in all likelihood would have come from large market players, such as Amazon, Apple and Google; but, more importantly, smaller market players would have been empowered to offer consumers additional content choices. The *FilmOn* case settled shortly after the two-hour argument, and another opportunity for the courts to update the interpretation of outdated legislation passed.

Comment

The Apples and Googles of the world have established consumer bases and the market power necessary to leverage content deals. But, absent such incumbent status, smaller market players are relegated to the fringes, and their content offerings often lack the basic programming many consumers expect (eg, local broadcast television). If these video streamers are unable to provide sufficient content choices, they are unlikely to survive.

The market has clearly voted for OTT video delivery. Now it is up to the relevant government agencies to either promulgate fair and technologically neutral regulations or interpret existing law in a technologically neutral fashion. The right government action will provide consumers with more choice, as well as more control over the content they receive and how they receive it.

Footnotes

1. 392 US 390 (1968).
2. 415 US 394 (1974).
3. 17 USC § 111(f)(3).
4. See HR Rep No 94-1476, at 88 (1976).
5. HR Rep No 94-1476, at 47 (emphasis added).
6. *Copyright Law Revision Hearings: Hearings before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the Comm. on the Judiciary,* 94th Cong 1820 (1975) (statement of Barbara Ringer, Register of Copyrights) (emphasis added).
7. 17 USC 119.
8. Satellite Home Viewer Act of 1994, Pub L 103-369, 108 Stat 3477 (18 October 1994)
9. See US Copyright Office, *Satellite Home Viewer Extension and Reauthorization Act § 109 Report* 188, 219 (2008).
10. Id at xi.
11. *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Services*, Notice of Proposed Rulemaking, MB Docket No. 14-261 (rel 19 December 2014).
12. See 17 USC § 111(c)(1) (a cable system's secondary transmissions must be "permissible under the rules, regulations, or authorisations of the Federal Communications Commission").
13. Colin Dixon, FCC Chairman Pai faces tough job protecting online video, ScreenMedia (January 24, 2017, accessed June 12, 2019, 12:30 PM), https://www.nscreenmedia.com/fcc-chairman-pai-faces-tough-job-protecting-ott-video/.
14. *Statutory Cable, Satellite, and DART License Reporting Practices*, 82 Fed Reg. 56926, at 56932 (1 December 2017) (proposing to add a new sentence to the definition of the term "cable system" in the rules implementing the statutory copyright licence to state: "a provider of broadcast signals must be an inherently localised and closed retransmission medium of limited availability to quality as a cable system").
15. 134 S Ct 2498 (2014).
16. Id at 2506-07.
17. Case No 16-7013.

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