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Keep Online Video Free from FCC Regulation

by

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High-speed broadband Internet services are transforming the video market. In ever-increasing numbers, consumers are turning to online video services. Movies, TV programs, and other video content can now be purchased readily either individually or in bundled subscriptions. Online video distributors (OVDs) such as Apple's iTunes, Microsoft's Zune, Netflix, Hulu Plus, and Amazon Prime are fast becoming household names.

The FCC's [Video Competition Report](#), released on July 20, devotes an entire section to online video services. It describes online video as "a thriving industry" that has "undergone dramatic transformation" in just the last few years. The *Report* describes online video delivery as "in its infancy" while OVD business strategies and consumer conduct "all remain in flux." It also states, "OVDs are entering new partnerships and innovating in products and services in order to retain and attract consumers." According to data cited in the *Report*, online video viewing has surpassed 50% of the U.S. population, with the number of persons that watch video on the Internet increasing 21.7% between the third quarter of 2008 and the third quarter of 2011. That same time interval saw "an increase of 79.5 percent in the amount of time spent watching video online." Netflix alone boasted over 23 million subscribers in June 2011.

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Given the rapid rate of change that now drives the video market, one can expect even more online video price and service offerings are likely to emerge in the years ahead. But the once largely unregulated Internet is already being subjected to network neutrality mandates bearing resemblance to Title II legacy telephone regulations. And now a slate of legacy cable regulations poses a new threat that could significantly constrain the future of online video.

Pro-regulatory advocates are now urging the government to intervene more directly in the emerging online video market. On July 12, the U.S. Court of Appeals for the D.C. Circuit denied Sky Angel's mandamus petition to require the FCC to do precisely that. Sky Angel sought a court order compelling the FCC to act on its review of Sky Angel's program access complaint against Discovery Communications. In resolving its program access dispute, Sky Angel wants the FCC to construe the agency's definition of multichannel video programming distributor or "MVPD" expansively, and thereby to extend FCC video regulation to online video services. While the D.C. Circuit declined to order any immediate decision by the FCC, the agency's ultimate decision on Sky Angel's program access complaint now awaits.

Under review by the FCC is a 2010 decision by its Media Bureau that declined to construe "MVPD" expansively, and therefore declined to extend FCC video regulation to online video services. That Media Bureau decision was occasioned by Sky Angel's program access complaint against Discovery Communications, whose networks include Animal Planet. Sky Angel provides online video subscription packages of movie and TV programming, delivered through a small Internet-accessible TV set-top box. Sky Angel sought designation as an MVPD so that it could lodge a program access complaint against Discovery when the latter terminated its affiliation.

In conducting its review, on March 30 the FCC issued a [notice seeking public comments](#) on whether it should expand its definitions of the terms "MVPD" and "channel" so as to include OVDs who do *not* provide transmission pathways to consumers the way that cable, DBS, or telco MPVDs do using their own infrastructure. Depending on how the FCC construes those terms, a host of previously unregulated independent OVDs and OVDs offered by vertically integrated MVPDs would be governed by retransmission consent and program access regulations. Among other things, an expanded definition of "MVPD" could result in the proliferation of program access complaints, and significantly expand the FCC's power over the online video through its adjudication of those complaints.

It is highly doubtful that the FCC has the authority to extend regulations from the early 1990s designed for analog cable services to online video. Regulation of video on the Internet runs contrary to Congress's ostensible hands-off policy toward the Internet. Unfortunately, the FCC has already engaged in a deliberate backslide from that policy.

In a January 2011 *FSF Perspectives* essay titled "[Opening the Internet to Regulation](#)," I described how the FCC assumed for itself extensive new powers to shape and dictate the future of broadband Internet practices. The FCC's order imposing network neutrality

regulations lacked a sound analytical foundation and principled basis for disciplining and limiting future regulatory intervention in the broadband Internet market. And in [a follow-up Perspectives essay](#), I explained how merger conditions involving set-top boxes and online video in the *Comcast-NBCU Order* as well as the FCC's "AllVid" proposal to comprehensively regulate video navigation devices and video navigating functionalities marked further FCC forays into Internet regulation.

Extending outdated retransmission consent and video programming access regulations to online video services would amount to yet another regulatory intrusion into the Internet space. Piling on additional layers of regulation would mark a further departure from Congress's hands-off policy toward the Internet. Such a move would unnecessarily and arbitrarily constrain and slow down the nascent online video services. Now is the time when further experimentation and out-of-the box approaches to video delivery should be encouraged.

FSF President [Randolph May](#) and FSF Academic Board of Advisors Member [Bruce Owen](#) have identified many of the problems with the current FCC retransmission/must carry regime. That complex mesh of forced market restrictions is highly questionable in the context of today's competitive market for cable, DBS, and other MVPD services. Bringing the retransmission consent apparatus to online video is even more wrong-headed. Freely entered contracts and copyright licenses agreements between video content owners, MVPDs, and OVDs should shape the future of online video delivery.

On their own terms, the FCC's program access regulations regarding vertically integrated MVPDs are also problematic. Program access rules are forced-access mandates, requiring owners of video programming to make their programming available on terms and conditions not of their own choosing. The rules put government in the position of second-guessing value decisions of marketplace players. Such second-guessing can create opportunity costs or other economic dislocations, though such costs are extremely difficult to measure. To be sure, program access complaints can also be costly for MVPDs to defend against, particularly when adjudications work their way from an FCC administrative law judge, to the Media Bureau, to the full FCC, and even to the courts.

Extending program access regulations to online video also runs afoul of the First Amendment. Government is generally prohibited from telling speakers what they must say. Nor can government second-guess speakers' decisions about when or to whom they choose to direct their message. Forced access or forced sharing mandates constitute a form of regulation that burdens speech rights. Such is true in the video market regarding access to programming content the same as it is true of newspaper or magazine article content.

In the video context, the Supreme Court has found such regulation permissible only when based on clear findings by Congress of "bottleneck" conditions in the market. With the subsequent launch and success of two nationwide DBS providers and entry of telephone companies in the MVPD market, the FCC's *Video Competition Report*

confirms that the market share of cable operators for video subscriptions has shrunk from upwards of 90% in the early 1990s to approximately 60% today. And the *Report* acknowledges that "the growth and availability of OVDs adds another layer of choice that can be a complement or a substitute."

All of this suggests that [the current video market is competitive](#). The purported "bottleneck" in cable services from the early 1990s can scarcely be defended today. And Congress certainly never made any equivalent finding about scarcity or bottlenecks when it comes to online video services. Extending existing video regulations to online video would surely be struck down in the courts on First Amendment grounds.

In its *Video Competition Report*, the FCC states that "regardless of whether online video currently is a complement to or a substitute for MVPD service, it is potentially a substitute product." To the extent there are any concerns that OVDs acting as substitutes or potential substitutes for MVPD services may be subject to disparate regulatory treatment, the only proper approach for achieving equal treatment is to grant regulatory relief to MVPDs. In today's competitive and dynamic video market, parity should be achieved by ratcheting regulation down, not ratcheting it up.

FSF scholars have consistently urged the FCC to keep the Internet free from regulation. This includes keeping the Internet free from FCC regulation of video services as well. The FCC should resist dubious calls to assert control over terms in the online video market by redefining the terms of its regulations.

The FCC should uphold the Media Bureau's decision in the Sky Angel complaint regarding the definition of "MVPD." It should reject force-fitting already outdated retransmission consent and program access regulatory schemes onto online video. Preserving and furthering the most dynamic segment of the video market means the FCC must resist opening the Internet to even more regulation.

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Further Readings

Seth L. Cooper, "[FCC's Video Report Reveals Disconnect Between Market's Effective Competition and Outdated Regulation](#)," *Perspectives from FSF Scholars*, Vol. 7, No. 25 (September 6, 2012).

Randolph J. May and Seth L. Cooper, "[Accelerate New Video Breakthroughs by Rolling Back Old Regulations](#)," *Perspectives from FSF Scholars*, Vol. 7, No. 12 (June 18, 2012).

Randolph J. May, "[A Truly Free TV Marketplace – Part II](#)," *FSF Blog* (April 13, 2012).

Randolph J. May, "[A Truly Free TV Marketplace](#)," *FSF Blog* (March 30, 2012).