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"Low-Ranking" Counterproductive Video Regulations Offer Valuable Lessons

by

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With the Internet and online media, we live in an era of instant polling and constant rankings. Just opening a web browser often reveals another new "Top Ten" list of the "best of" everything from U.S. colleges and professional sports teams to local restaurants. There are even websites that rank the rankings lists.

Having spent some time as a media lawyer and regulator, I have established a list of my own. In the interest of full disclosure, my list, which focuses on video service regulation, is based on personal experience and observation rather than on surveys or scientific public opinion polls. Moreover, the list identifies not the best or most successful video service regulations, but the "lowest-ranking" – those that have become the most counterproductive and problematic. Here I reveal and briefly discuss some of the regulations of my list with hopes that policy makers who have begun to re-examine video service regulation will take note.

Common Characteristics of Unsuccessful Regulatory Approaches

Any reform effort targeting video services regulation should examine and learn from the following regulatory schemes: (1) must carry and retransmission consent; (2) network non-duplication and syndicated exclusivity; (3) commercial leased access; and (4) the cable television rate regulation (as conceived in the 1992 Cable Television Consumer Protection and Competition Act).

Each one has something in common with the others. All were adopted by the FCC or imposed by Congress with good intentions. Over time, however, each one of them not only placed unreasonably heavy restrictions and burdens on the regulated video service providers but also led to unfortunate unintended consequences. The regulations on my list became baffling and annoying to both the regulators and the entities they regulated. More important, however, many of them came to be greatly disliked by the public.

Finally, each of those regulatory approaches was designed to address two marketplace factors: (1) technological limitations on the number of outlets for delivery of information and entertainment to the audience; and (2) lack of competition in the video services marketplace. None of the circumstances that formed the original underpinning of these regulatory schemes still exists today. Communicators have an unprecedented variety of options for delivering content to the public, and media consumers have many more choices for receiving those communications. The FCC's most recent annual video competition report confirms the existence of unprecedented competition in the video services marketplace, a conclusion supported by surveys published by the Pew Research Center, Aspen Institute, the Knight Foundation, and other research organizations.

Ranking Regulatory Approaches to Video Services

1) Must carry and retransmission consent rules

Under this regulatory approach, TV broadcasters that elect "must-carry" status can invoke statutory rights carriage rights from multi-channel video program distribution services ("MVPDs") such as cable television and direct broadcast satellite ("DBS") providers. In addition to requiring cable and satellite services to distribute local television stations that request carriage, the rules also provide for priority channel placement and impose other conditions of carriage. Alternatively, TV broadcasters can forego "must-carry" status and negotiate with MVPDs for retransmission of their broadcast signal, subject to certain conditions and restrictions.

When established by Congress in the 1992 Act, this regulation was touted as a "market solution" because the retransmission consent option involved private negotiation between the MVPD and the broadcast station. But a negotiation is not necessarily a "free market negotiation" when the government puts in place the circumscribing ground rules.

In tandem, must carry and retransmission consent often have resulted in public outrage. Cable systems and local TV stations must renegotiate retransmission consent rights every three years, and the negotiations sometimes end up in a stalemate. As a result cable systems must cease providing the station as part of their service package. Interestingly, such stalemates often occur just prior to a marquee event such as the Super Bowl, the NCAA Final Four, or the Academy Awards, leaving viewers who rely on cable TV for video programming unable to watch a highly-anticipated program.

2) Network non-duplication and syndication exclusivity rules

Network non-duplication regulations permit local TV broadcast stations to block cable providers who carry the network's local broadcast affiliate from importing network programming from another affiliate of the same broadcast network. These rules can impede cable systems from obtaining the right to carry the network programs in question through negotiation of carriage rights with an out-of-market broadcast network affiliate. Syndicated exclusivity ("syndex") regulations allow local TV broadcast stations to block cable providers from carrying those same programs from a more distant broadcast source. This set of questionable regulations result in more frequent deprivation of certain channels or certain stations for the viewing audience, particularly those living on border areas between two television markets. While the rules may have served a purpose when the first cable systems began operating decades ago, the network nonduplication and syndex regime's place in today's video marketplace is questionable.

3) Commercial leased access rules

Commercial leased access regulations required cable or DBS providers to set aside some of their channels for use by unaffiliated programmers. Under that regulatory scheme, MPVDs essentially lost editorial control over programming that appeared on those leased channels. In addition, FCC rules dictated the prices and terms on which the MVPD must lease channel time to the programmer. Leasing of channel time on a periodic or sporadic basis subject to governmentally dictated pricing formulas and negotiating procedures proved to be quite burdensome for all concerned. In fact, in 2008, the Office of Management and Budget disapproved newly revised FCC leased access rules after finding that the rules imposed burdens in violation of the federal Paperwork Reduction Act.

An even more serious problem is that commercial leased access was never a good business model for channel lessees. The more savvy programmers who considered using leased access for obtaining cable carriage were quick to recognize its flaws. From the beginning, the only viable commercial proposition for channel leasing featured program-length advertising or "infomercials." When the Internet took off, however, even programmers who had used leased access somewhat successfully for infomercials quickly realized that online advertising had much greater promise.

4) The 1992 Cable Act rate regulation

Pursuant to the Cable Television Consumer Protection and Competition Act of 1992, local franchising authorities were permitted to regulate basic cable rates. The regulatory scheme devised by the FCC imposed both onerous administrative burdens and financial constraints. While intended to keep cable service rates reasonable for subscribers, those rate-making rules consisted of such complicated formulas that they were too complex and administratively burdensome for many municipalities to handle. The FCC's lengthy rulemaking process thus resulted in the unintended consequence of forcing communities either to seek the assistance of high-priced outside consultants or forego regulating entirely.

Conclusion

When considering current and future regulatory approaches for video services regulation, remembering the fate of the four regulatory approaches on my "Low Ranked Regulatory Scheme

List" should encourage use of a regulatory lighter touch. Surely any regulatory reform vehicle for video services must take into account the enormous changes in the video marketplace.

With the technology moving so rapidly and the marketplace undergoing such dramatic change, regulators should proceed boldly to clear away burdensome, unproductive, and unnecessary regulation. They also should proceed with caution in considering imposition of new regulations. The story of four regulatory approaches on my list suggests potential advantages of employing "test beds" for new services before across-the-board rules become written in stone. With video marketplace regulation, history shows that less is often more. The "Next Generation Television Marketplace Act" introduced in the last Congress proposed elimination of some of the regulatory approaches on my list as well as others. I hope that similar legislation will be introduced and that members of Congress will support it.

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