

# Impossible, Impractical, & Irresistible

John Pietila

Davis Brown Law Firm



©2015 DAVIS BROWN KOEHN SHORS & ROBERTS P.C.



# Or: the Future of Broadcast Channels on MVPD Systems

John Pietila

Davis Brown Law Firm



©2015 DAVIS BROWN KOEHN SHORS & ROBERTS P.C.



# The more things change ...

- **CONTENT** is king
- Media as **GLASS**: competing for viewers on screens connected to the internet
  - Phones
  - Tablets
  - Laptops
  - Monitors
  - TV sets

# The more they stay the same

- Retransmission consent
- Cable copyright
- Network non-duplication
- Syndicated exclusivity

# CONTENT

- The market for local broadcast **CONTENT** is evolving in ways that increase MVPD costs:
  - Broadcaster consolidation
  - Rights fees for live sporting events
  - “Reverse retransmission” payments
  - Increasing competition from OVDs

# Retransmission Consent

- Each broadcast station must decide every 3 years whether to elect retransmission consent or must carry
- If a station elects retransmission consent, no MVPD may retransmit the station's signal without express consent of the broadcaster

# Retransmission Consent

- Virtually all network affiliates elect retransmission consent, allowing the station to demand payment from an MVPD in exchange for carriage
- Retransmission fees are in addition to any royalties a station receives pursuant to cable compulsory copyright license

# Retransmission Consent

- MVPDs and broadcast stations are required to negotiate retransmission consent agreements in “good faith”
- Narrow FCC involvement in carriage disputes
- FCC rules permit broadcast stations to enforce privately negotiated network non-duplication and syndicated exclusivity rights



# Retransmission Consent

- **CONTENT** vs. distribution
- Local programming vs. network programming
- Reversal of traditional network-affiliate relationships
- Network affiliates commonly pay compensation to networks (ABC, CBS, NBC and FOX) to carry network programming

# Retransmission Consent

- From 2006 to 2014, retransmission fees have increased from \$215 million to \$4.9 billion in the aggregate
- SNL Kagan projections:
  - network affiliates will soon pay nearly 60% of retransmission fees to national networks
  - retransmission fees will increase to \$9.8 billion in the aggregate by 2020

# Retransmission Consent

- More than 300 broadcast station blackouts since the beginning of 2012
- Impact of media consolidation on negotiations and blackouts
- Limited impact of FCC retrans reform ... so far
- Congressional action?
  - Next Generation Television Marketplace Act
  - Local Choice

# Good Faith Negotiations

- *Per Se* Standards
  - Refusal to negotiate retransmission consent
  - Refusal to designate a representative with authority to make binding representations on retransmission consent
  - Refusal to meet and negotiate retransmission consent at reasonable times and locations, or acting in a manner that unreasonably delays retransmission consent negotiations

# Good Faith Negotiations

- *Per Se* Standards (cont.)
  - Refusal to put forth more than a single, unilateral proposal
  - Failure to respond to a proposal of the other party, including the reasons for the rejection of any such proposal
  - Refusal to execute a written agreement that sets forth the full understanding of the parties

# Good Faith Negotiations

- *Per Se* Standards (cont.)
  - Execution of an agreement with any party, a term or condition of which restricts or prohibits entering into a retransmission consent agreement with any other station or MVPD

# Good Faith Negotiations

- *Per Se* Standards (cont.)
  - Joint negotiation by stations that are ranked among the top 4 stations in a market, except where the stations are commonly controlled
  - Limit on MVPD ability to import a significantly viewed out-of-market station, except where the stations involved are commonly controlled

# Totality of the Circumstances

- Demonstrate, based on the totality of the circumstances of a particular retransmission consent negotiation, that the other party breached its obligation to negotiate in good faith
- Facts which reflect an absence of a sincere desire to reach an agreement that is acceptable to both parties



# Totality of the Circumstances (2000)

- While [the FCC] will not ordinarily address the substance of proposed terms and conditions or the terms of actual retransmission consent agreements, we will entertain complaints under the totality of the circumstances test, alleging that specific retransmission consent proposals are sufficiently outrageous, or evidence that differences among MVPD agreements are not based on competitive marketplace considerations, as to breach a broadcaster's good faith negotiation obligation

# Marketplace Considerations

- Presumptively consistent
  - Proposals for compensation above that agreed to with other MVPDs in the same market
  - Proposals for compensation that are different from the compensation offered by other broadcasters in the same market
  - Proposals conditioned on a broadcaster obtaining channel positioning or tier placement rights

# Marketplace Considerations

- Presumptively consistent (cont.)
  - Proposals conditioned on carriage of any other programming, such as a broadcaster's digital signals, an affiliated cable programming service, or another broadcast station either in the same or a different market
  - Proposals for compensation in the form of commitments to purchase advertising on the broadcast station or broadcast-affiliated media

# Marketplace Considerations

- Presumptively consistent (cont.)
  - Proposals that allow termination of retransmission consent agreement based on the occurrence of a specific event

# Marketplace Considerations

- Presumptively **inconsistent**
  - Proposals that specifically foreclose carriage of other programming services by the MVPD that do not substantially duplicate the proposing broadcaster's programming
  - Proposals that result from agreements not to compete or to fix prices
  - Proposals for contract terms that would foreclose the filing of complaints with the Commission

# Marketplace Considerations

- Presumptively **inconsistent** (cont.)
  - Proposals involving compensation or carriage terms that result from an exercise of market power by a broadcast station or that result from an exercise of market power by other participants in the market (e.g., other MVPDs) the effect of which is to hinder significantly or foreclose MVPD competition

# Totality of the Circumstances (2015 NPRM)

- MVPDs that face competition have stronger incentives to negotiate retransmission consent agreements with broadcast stations because much broadcast network television programming continues to be “must-have” programming for MVPDs and an MVPD that is unable to reach a retransmission consent agreement with a broadcast station may permanently lose subscribers to rival MVPDs – including subscribers to its associated voice and broadband services

# Totality of the Circumstances

- Specific practices (2015 NPRM)
  - practice by broadcasters of preventing consumers' online access to the broadcaster's programming as an apparent tactic to gain leverage in a retransmission consent dispute
  - broadcasters' relinquishing to networks or other third parties their right to grant retransmission consent or to approve agreements



# Totality of the Circumstances

- Specific practices (2015 NPRM) (cont.)
  - a broadcaster’s insistence on bundling broadcast signals with other broadcast stations or cable networks
  - a broadcaster’s insistence on contract expiration dates, or threats to black out a station signal, in the time period just prior to the airing of a “marquee” sports or entertainment event

# Totality of the Circumstances

- Specific practices (2015 NPRM) (cont.)
  - a broadcaster's preventing an MVPD from temporarily importing an out-of-market signal in cases where the broadcaster has blacked out its local signal after negotiations failed to produce an agreement by the contract expiration date
  - a broadcaster's demand that an MVPD place limits on its subscribers' use of lawful devices and functionalities

# Totality of the Circumstances

- Specific practices (2015 NPRM) (cont.)
  - a broadcaster's demand that MVPDs pay per-subscriber fees not only for viewers of the broadcaster's retransmitted signal, but also for subscribers that receive the broadcaster's signal over-the-air or who receive an MVPD's Internet or voice service, but not its video service
  - an MVPD's or broadcaster's refusal to provide information substantiating reasons for positions taken when requested to in the course of bargaining

# Totality of the Circumstances

- Specific practices (2015 NPRM) (cont.)
  - an MVPD's or broadcaster's engaging in "surface bargaining," i.e., conduct designed to delay negotiations, but that does not necessarily constitute an outright refusal to bargain
  - an MVPD-affiliated broadcaster's discrimination in the prices, terms and conditions for retransmission consent among or between MVPDs based on vertical competitive effects

# Totality of the Circumstances

- Specific practices (2015 NPRM) (cont.)
  - an MVPD's or broadcaster's demanding or negotiating retransmission consent based on “most favored nation” provisions
  - a broadcaster's demand for tier placement commitments, which compel MVPDs to place their affiliated networks in the most popular programming packages

# Totality of the Circumstances

- Specific practices (2015 NPRM) (cont.)
  - a broadcaster's imposition of minimum penetration requirements, which require MVPDs to guarantee that broadcaster-affiliated cable networks will reach a specified percentage of customers
  - a broadcaster's failure to make an initial contract proposal at least 90 days prior to the existing contract's expiration

# Totality of the Circumstances

- Specific practices (2015 NPRM) (cont.)
  - a broadcaster's preventing an MVPD from disclosing rates, terms and conditions of a contract proposal or agreement to governmental or regulatory entities in connection with a retransmission consent complaint or other legal or administrative proceeding
  - a broadcaster's discrimination in price among MVPDs in a market absent a showing of direct and legitimate economic benefits associated with such price differences

# Totality of the Circumstances

- Specific practices (2015 NPRM) (cont.)
  - an MVPD's or broadcaster's failure to negotiate terms and conditions for retransmission consent based on actual local market conditions
  - an MVPD's or broadcaster's attempt to manufacture a retransmission consent dispute in the hope of encouraging government intervention



# Retransmission Consent (Recap)

- If a cable system retransmits any broadcast signal without complying with cable compulsory license, it risks liability for copyright infringement
- If a cable system retransmits a broadcast signal other than a must-carry signal without the station's express consent, it risks liability for significant FCC forfeiture

# Digital Video Rights

- Retransmission consent agreements typically do not include expansive digital video rights
- Additional friction and complexity in retransmission negotiations
- Who controls the **CONTENT**

# Digital Video Rights

- Retransmission consent agreements often do **NOT** include express OTT or other digital video rights
- Network affiliation agreements may restrict or prohibit local affiliate from licensing network **CONTENT** for OTT platforms
- “All Access” and other Network OTT platforms

# Digital Video Rights

## Network OTT (how do you really feel?):

Doesn't it seem amazing that we have a difficult time structuring an agreement allowing us to offer local channels in an OTT solution (keep in mind this is strictly within our network), while CBS (and now local affiliates – Sinclair included) are offering a pure OTT solution. I wonder what the affiliates are paying for this opportunity – probably using monies they received from scr\*wing us during “negotiations”.

# Digital Video Rights

Licensee's consent is limited to the linear retransmission by Operator of the Stations' Signals on the Systems for the private in-home viewing of authorized Subscribers using only analog or digital television sets located within each Stations' respective Service Area. In no event will Operator authorize, enable or otherwise make possible viewing of a Signal by or over any other video distribution technology, including but not limited to Internet, mobile or wireless media, video-on-demand, mobile video, or by or on any other device other than an analog or digital television set whether inside or outside the home.

# Digital Video Rights

Operator shall have no right to retransmit or distribute any portion of the DTV Signal of any Station (i) via the public network known as the Internet (i.e., the World Wide Web or other publicly available on-line service), (ii) via any wireless or cellular technology (except as necessary as part of Operator's infrastructure (such as wireless "hops")), or (iii) to any portable electronic devices, such as cell phones, any devices outside of the Subscriber's immediate location, or any computers or tablet devices.

# Digital Video Rights

Operator shall have no right to (and shall have no right to permit or facilitate others to) retransmit or distribute any Program Stream or any portion thereof (i) via the Internet; (ii) using any wireless or cellular technology; (iii) to any mobile or portable electronic devices, including but not limited to cell phones, computers or tablets; (iv) to residential Subscribers for viewing out-of-home; (v) to any re-seller; or (vi) to a person or Subscriber located outside of Station's DMA except as otherwise expressly set forth herein.

# Innovation and Competition

- FCC NPRM (Dec 2014)
- Commission proposes to “modernize” definition of MVPD to include some online video providers (OVDs)
- Linear Programming Interpretation
- Linear Programming: pre-scheduled by the programmer



# Innovation and Competition

- Expand definition of MVPD to include distributors of multiple linear video programming streams, including Internet-based
- Linear Programming Interpretation would not include OVD that distributes only its own **CONTENT**
- Linear Programming Interpretation would not include TVE functionality offered by MVPDs

# Innovation and Competition

- Classifies Internet-based video service offerings
  - Subscription Linear
  - Subscription On-Demand
  - Transactional On-Demand
  - Ad-based Linear and On-Demand
  - Transactional Linear

# Innovation and Competition

- Seeks comment on regulatory status of purely Internet-based linear video programming services offered by traditional MVPDs

# Innovation and Competition

If a cable operator delivers video programming service over the Internet, rather than as a managed video service over its own facilities we tentatively conclude that this entity would be (i) a cable operator with respect to its managed video service and (ii) a non-cable MVPD under our proposed Linear Programming Interpretation with respect to its OTT service

# Rise of OTT and the OVDs

- NetFlix
- Amazon Prime
- Hulu\*
- Apple TV\*
- You Tube
- Sony Playstation Vue\*
- Sling TV\*
- MLB.TV
- HBO Go

\*includes (?) some network programming

# Thank you

John Pietila

Davis Brown Law Firm

E-mail: [johnpietila@davisbrownlaw.com](mailto:johnpietila@davisbrownlaw.com)

Phone: 515.288.2500

Direct: 515.246.7871