



Programmer-Distributor Negotiations: Retransmission Consent and Other Federal Rules

Terrance I. O'reilly

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When conflicts arise between a programmer (a broadcaster or a cable network owner) and a multi-channel video programming distributor (MVPD, usually a cable or satellite operator) about the carriage of particular video programming, the price for that programming, or the tier on which the programming is to be offered to the end user, many consumers can be affected. Recently there have been several incidents in which a negotiating impasse between a programmer and a distributor has resulted in the programmer refusing to allow the MVPD to carry, or the MVPD choosing not to carry, a program network. While contractual terms, conditions, and rates are determined by private negotiations, they are strongly affected by a number of federal statutory provisions and regulatory requirements, including the statutory retransmission consent and must-carry rules, the FCC program exclusivity rules, local-into-local and distant signal provisions in satellite laws, copyright law provisions relating to cable and satellite, statutory commercial leased access requirements and program carriage and non-discriminatory access provisions, and the FCC's media ownership rules. The recent increase in negotiating impasses appears to be the result of structural market changes that have given programmers with "must-have" programming much greater leverage, particularly when they are negotiating with small distributors. Competitive entry in distribution -- almost all cable companies now face competition from two satellite companies, and are beginning to face competition from telephone companies -- has emboldened programmers with popular programming to demand cash payment from distributors for the right to carry that programming. In particular, local broadcasters increasingly are using the statutory retransmission consent requirement to demand cash payment from small cable companies who could lose subscribers to the satellite providers and new telephone entrants if they reach an impasse with the broadcaster and can no longer carry the local broadcast signals. In the past, the cable companies were the only MVPD in a market and could use that countervailing power to refuse to pay cash for carriage. Thus, ironically, competition in the distribution market may be resulting in higher programming costs that MVPDs may have to pass on to their subscribers. The small cable companies have argued that some of the existing statutory and regulatory requirements were implemented at a time when cable was a monopoly and were intended to protect broadcasters. Now that the market dynamics have changed, they argue, some of these rules should be changed to allow for more even-handed negotiations. At the same time, however, as a result of consolidation and clustering in the cable industry there are a few very large cable companies, which primarily serve major markets, as well as the two national satellite operators, that appear to have sufficient market strength to be able to withstand many of the demands of the programmers with must-have programming and to place small independent programmers at a negotiating disadvantage.

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