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Aaron M. Cooper

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**MASS MEDIA MESS:
THE OPTIMISTIC DEREGULATORY GOALS OF
THE "NEXT GENERATION TELEVISION
MARKETPLACE ACT"**

"America's television regulatory policies have come to look like that old closet in your basement that you keep promising yourself that one day you will finally clean out."¹

I. INTRODUCTION

Americans love their television. Today, 99% of American homes contain a television set.² Collectively, Americans watch 250 billion hours of television annually.³ In addition to viewing the traditional free, over-the-air channels that have been the foundation of broadcast media since its inception, there are a substantial number of Americans (about 87%) willing to pay cable or satellite companies hundreds of dollars a year to gain access to all of their premium shows, news stations, movies and sports channels.⁴ This subscription number remains high, despite a 60% increase in subscription fees over the past eight years.⁵ Currently,

1. *Outdated Ownership Rules Compulsory License: Hearing on H.R. 3675 and S. 2008 Before the S. Comm. on Commerce, Sci. & Transp.*, 112th Cong. (2012) (statement of Preston Padden, Senior Fellow, Silicon Flatirons Ctr., Colo. Law, Univ. of Colo.), available at <http://www.siliconflatirons.com/documents/publications/policy/PaddenTestimony.pdf>.

2. *Television & Health*, CALIFORNIA STATE UNIVERSITY-NORTHRIDGE, <http://www.csun.edu/science/health/docs/tv&health.html> (last visited Oct. 28, 2012).

3. *Id.*

4. GLEN O. ROBINSON & THOMAS B. NACHBAR, COMMUNICATIONS REGULATION 304 (2008) (noting today cable predominates over satellite by a margin of more than two to one, but that the margin has been steadily declining as satellite has increased its market penetration at the expense of cable); Eliana Dockterman, *Cable Wars. Why Channel Blackouts are Getting Worse*, TIME, Aug. 6, 2012, at 20.

5. Dockterman, *supra* note 4, at 20.

cable and satellite television generate hundreds of billions of dollars per year.⁶ Media is, without question, big business.

The broadcast media landscape is rapidly changing and is nearly as diverse as the scope of human imagination. In addition to a wide range of programs and targeted niche networks, there is a growing and increasingly diverse system for how signals and programs get delivered: traditional over-the-air broadcast, cable, satellite, internet, or by-mail subscription. Yet, even as new choices in programming become available and technology continues to change the ways media is transmitted and delivered, the current regulatory structure under which broadcasting operates remains largely outdated. It is in this context that Congress now seeks to reexamine the government's role in regulating such programming, and its role in the business of acquiring and distributing (or redistributing) that programming to viewers.⁷

With this changing broadcast landscape as a backdrop, this article will address two Bills recently proposed in Congress that seek to dramatically change the way broadcast and non-broadcast signal owners negotiate financial agreements for their signal and program rights with the companies that transmit those programs to the viewers through cable and satellite.⁸ These two Bills together, collectively referred to as the Next Generation Television Marketplace Act ("NGTMA"), would repeal compulsory copyright licenses, various mandates regarding retransmission consent rules, cable "must-carry" and satellite "carry one, carry all" requirements, as well as Federal Communications Commission (FCC) broadcast and media ownership rules.⁹ Specifically, the

6. *Other Industry Data*, NAT'L CABLE & TELEVISION ASS'N, <http://www.ncta.com/StatsGroup/OtherIndustryData.aspx> (last visited Oct. 28, 2012).

7. *See* Next Generation Television Marketplace Act, H.R. 3675, 112th Cong. (2011); Next Generation Television Marketplace Act, S. 2008, 112th Cong. (2011).

8. *See* H.R. 3675; S. 2008. The main difference between a broadcast and a non-broadcast signal is a viewer's ability to receive a broadcast signal using a traditional television antenna while a non-broadcast signal requires a viewer's connection to some other signal-receiver, either through a cable or satellite provider. 47 C.F.R. § 101.1407 (2012).

9. H.R. 3675; S. 2008.

Bills would also revise the 1976 Copyright Act and the Satellite Acts passed in 1999 and 2004 to the extent the acts relate to these rules.¹⁰ Among the proposed changes, NGTMA would amend 17 U.S.C. § 111 and repeal 17 U.S.C. §§ 119, 122 of the Copyright Act, as well as repeal 47 U.S.C §§ 325(b), 338, 534 of the Communications Act.¹¹

There has not been fundamental reform to the compulsory copyright structure since Congress passed the Cable Television Consumer Protection and Competition Act in 1992 (“Cable Act of 1992”).¹² Additionally, legitimate lingering issues remain with the regulation of satellite television since the last reform in 2004. NGTMA provides Congress with an opportunity to reexamine the most outdated elements of the regulatory system that in many ways have not kept pace with technology and the practical realities of today’s marketplace. Although the proposed Bills are politically ideological and impracticable to implement, they nevertheless create dialogue regarding the Federal Government’s proper role in regulating television, cable, and satellite broadcasting.¹³ With so many people affected and so much money at stake, it is an area of regulatory law worth reconsidering.

Even with the ideological and rather overly optimistic goals of NGTMA understood, it is clear the system will eventually need fundamental reform, making discussion of the proposals outlined in the Bills particularly relevant. Ultimately, nearly every party involved in the creation, distribution, and consumption of media has a potential stake in the outcome here—from the copyright owners of the programs to the broadcasters to the satellite and

10. H.R. 3675; S. 2008; Press Release, Congressman Steve Scalise, Scalise, DeMint Introduce Legislation to Deregulate Television Market (Dec. 11, 2011), available at <http://scalise.house.gov/press-release/scalise-demint-introduce-legislation-deregulate-television-market>.

11. H.R. 3675 §§ 2-3; S. 2008 §§ 2-3.

12. Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

13. Ideological in that the Bills tend to have support from Congress’s more fiscally conservative members and are largely seen as consistent with other overall deregulatory goals, and impracticable regarding the sheer scope of the Bills and the logistical concerns involved in such comprehensive reform. See *infra* Part IV.C.

cable companies, as well as the viewers. Concerns over the cost of television programming are illustrated by the rising number of carriage disputes between broadcasters and satellite and cable companies.¹⁴ There is also debate over whether the current system provides fair market compensation to copyright owners or if the rates have been set intentionally low.¹⁵

The scope of NGTMA is too broad and the subject matter so intertwined for a complete analysis within this article. The Bills essentially seek to overhaul decades of administrative law, dismantling large parts of the current regulatory structure in the process. Consequently, this article will address two main components of NGTMA: (1) the revisions to the copyright compulsory license provisions of 17 U.S.C. §§ 111, 119, 122 and (2) the changes to the provisions of the Cable and Satellite Acts codified in 47 U.S.C. §§ 325(b), 338, 534.¹⁶ This article will also consider the various ways these changes are meant to encourage fair compensation for programming rights while also protecting Congress's long-held concerns for localism and diversity in the media.¹⁷

14. A carriage dispute occurs when a signal owner disagrees with the company licensed to retransmit that signal over compensation, either financial or otherwise, for the right to retransmission. See Dockterman, *supra* note 4, at 20; BATTLEGROUND: THE MEDIA 69-75 (Robin Anderson & Jonathan Gray eds., 2008), available at <http://newmediagr.files.wordpress.com/2009/10/17171370-battleground-themedia.pdf>. While often resolved without notice, carriage disputes have othertimes led to signals and programs being dropped or "blacked out" from the programming lineups of the cable or satellite provider involved, leading to viewing disruptions for consumers and lost revenue. See Dockterman, *supra* note 4, at 20. See also discussion *infra* Part IV.B.

15. U.S. COPYRIGHT OFFICE, SATELLITE HOME VIEWER EXTENSION AND REAUTHORIZATION ACT SECTION 109 REPORT 69 (2008), available at <http://www.copyright.gov/reports/section109-final-report.pdf> [hereinafter SHVERA 109 Report].

16. H.R. 3675; S. 2008.

17. BRUCE W. OWEN, MERCATUS CTR. AT GEORGE MASON UNIV., CONSUMER WELFARE AND TV PROGRAM REGULATION 10 (2012), available at <http://mercatus.org/sites/default/files/Consumer-Welfare-TV-Program-Regulation.pdf>. The continuing benefit to promoting localism is that local stations provide a particularly unique public service regarding their ability to relay information of local concern, such as severe weather, school closings, and

Part II of this article discusses the background of the Bill, recounting a brief history of telecommunication regulation in the United States. This will provide the necessary context for understanding the existing law, as well as illustrate the vast areas of current telecom law that are clearly outdated.

Part III considers the two NGTMA Bills currently proposed in Congress and summarizes the full breadth of the proposed changes to the law. Part IV will specifically analyze the effects the proposed Bills would have on the copyright compulsory licenses and the (1) retransmission consent, (2) must-carry and (3) carry one, carry all rules created in the Cable Act of 1992 and Satellite Acts of 1999 and 2004. The analysis examines who is in favor of the changes and who opposes them, as well as the fundamental public policy considerations involved. Part IV also discusses the practicality of implementing the comprehensive reforms NGTMA proposes. While the Bills are meant to eliminate areas of the Copyright and Communications Acts that many in the cable and satellite industries, and in Congress, believe are unnecessarily complex and long outdated, the logistical requirements involved in negotiating for each station and program individually is still likely unworkable given current technological capabilities. Indeed, these technological limitations were a driving force behind the statutory requirements agreed to initially.¹⁸ Finally, this section will discuss how the proposed amendments to the current regulations are meant to help consumers, which is also a significant goal of NGTMA.

All of the policy goals are worthy and well-intentioned. However, while the proposals would undoubtedly allow for a more competitive, free market environment for primary and secondary broadcasters to negotiate their rights, the practicality of passing

road closures, quickly and efficiently. See Paul Cowling, *An Earthy Enigma: The Role of Localism in the Political, Cultural and Economic Dimensions of Media Ownership Regulation*, 27 HASTINGS COMM. & ENT. L.J. 257, 266 (2005).

18. Interview with John C. Roberts, Dean Emeritus and Professor of Law, DePaul University College of Law, in Chi., Ill. (Oct. 12, 2012).

such comprehensive reform as currently written is, nevertheless, unlikely.¹⁹

Finally, Part V concludes the article with a summary of the various positions asserted along with a reflection of the obstacles Congress faces in passing the Bills.

II. BACKGROUND

A. Telecommunication Regulation in the United States

Despite often claiming otherwise, the Federal Communications Commission (FCC) has a long history of being anti-competitive and being particularly protective of established modes of communication.²⁰ Much of this protectionist policy comes from the FCC's fundamental belief in aligning mass communication with the public interest.²¹ To understand the policy, consider the beginnings of telecommunication regulation in the United States. In the aftermath of the *Titanic* disaster, the Federal Government issued new licensing requirements through the Radio Act of 1912, which forbade radio broadcasting without a license, and granted the Secretary of Commerce the ability to allocate broadcast frequencies and times.²²

19. A primary broadcaster broadcasts directly to viewers (such as a local station does) while a secondary broadcaster must first pick up a signal from a primary broadcaster before retransmitting that signal to viewers (such as most cable and satellite companies do). 17 U.S.C. § 111(f)(1)-(2) (2006). Today, when the term "broadcaster" is used in a technical sense it tends to refer to primary broadcasters, while secondary broadcasters are generally referred to as "distributors" or "multiple video programming distributors" (MVPDs). Interview with John C. Roberts, *supra* note 18.

20. Interview with John C. Roberts, *supra* note 18.

21. Philip M. Napoli, *Retransmission Consent and Broadcaster Commitment to Localism*, 20 COMMLAW CONCEPTUS 345, 346 (2011).

22. Gregory M. Prindle, *No Competition: How Radio Consolidation Has Diminished Diversity and Sacrificed Localism*, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 279, 284-85 (2003) (noting that prior to the 1912 Act, "[g]overnment and business use . . . conflicted with amateur radio operators, who interfered with official broadcasts and crowded out naval and business communications. A few agitators even posed as admirals and issued phony orders to naval ships"); John S. Leibovitz, *The Great Spectrum Debate: A*

However, under the original 1912 Act, the Secretary of Commerce had no power to deny radio licensing or re-assign those frequencies, a denial of authority confirmed by a U.S. federal court in 1926 in response to then-Commerce Secretary Herbert Hoover's attempts to reduce overcrowding of the broadcast frequency spectrum.²³ Through the Radio Act of 1927, Congress created the Federal Radio Commission, which allowed the government to intervene and abolish radio stations that were deemed non-useful to the public.²⁴ At the time, this was sufficient to address the policy concerns of both the radio stations and the courts. Congress followed with the Communications Act of 1934, which provided for the creation of the FCC and brought radio, telephone and broadcast communications under the same regulatory scheme.²⁵

Both the 1927 Radio Act and the 1934 Communications Act provided that licenses be granted in accordance with "the public convenience, interest, or necessity," language still codified in the law today.²⁶ While the statutory language does not define "public interest," both the FCC through its regulations and courts through affirmative case law have made clear that satisfying the public

Commentary on the FCC Spectrum Policy Task Force's Report on Spectrum Rights and Responsibilities, 6 YALE J. L. & TECH. 390, 413 (2004) (noting that "[w]hen a breakdown in radio communication prevented other nearby ships from hearing the Titanic's distress calls, popular opinion and political forces turned against unfettered access to the airwaves").

23. Prindle, *supra* note 22, at 287.

24. *Id.* at 287-88; *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 375-77 (1969) (explaining the reasoning behind the Radio Act: "[b]efore 1927, the allocation of frequencies was left entirely to the private sector, and the result was chaos. It quickly became apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government. Without government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard. Consequently, the Federal Radio Commission was established to allocate frequencies among competing applicants in a manner responsive to the public 'convenience, interest, or necessity.'").

25. *See generally* Communications Act of 1934, 47 U.S.C. §§151-615(b) (2006).

26. 47 U.S.C. § 307(a) (2006).

interest includes promoting policies that protect diversity and localism, particularly with regard to local news and public affairs.²⁷

Over the several decades following the Communications Act of 1934, it became increasingly clear that viewers largely prefer national network programs to those produced locally; local broadcast stations quickly complied by affiliating themselves with national network programming, especially in prime time.²⁸ Today, local television stations rarely produce local programming apart from local news and the occasional political roundtable or debate,²⁹ because the costs are too high and the viewership just too low. Nevertheless, the FCC never abandoned its preference for localism, which translated into the retransmission consent rules, as well as the must-carry cable rules and the carry one, carry all satellite rules.³⁰

B. Cable and Satellite Compulsory Copyright Licenses

As local stations began to decrease their number of locally-produced, locally-broadcast programs in favor of national network programming and as more cable and satellite companies began to compete with local broadcasters for viewers, the programming-distribution market became increasingly complex. Programming today often goes through a lengthy distribution and retransmission process before it reaches the viewer, creating new copyright concerns for rights owners in the process. Today, potential

27. Prindle, *supra* note 22, at 289.

28. OWEN, *supra* note 17, at 10. In the United States, “prime time” generally refers to the time between 8:00 p.m. and 11:00 p.m. in the Eastern and Pacific Time Zones, and 7:00 p.m. and 10:00 p.m. in the Central and Mountain Time Zones, when viewership and advertising revenue is highest. 47 C.F.R. § 79.3(a)(6) (2012).

29. Deborah Potter, Katerina-Eva Matsa & Amy Mitchell, *Local TV: By the Numbers*, THE STATE OF THE NEWS MEDIA: AN ANNUAL REPORT ON AMERICAN JOURNALISM, (Pew Research Ctr.’s Project for Excellence in Journalism 2011), available at <http://stateofthemedias.org/2011/local-tv-essay/data-page-3/> (noting that in the span between 2007-2010, local news airing on the local affiliates of the four major networks—ABC, CBS, Fox, and NBC—lost more than 2 million viewers of their early evening newscasts, or about 8.5% of the audience).

30. OWEN, *supra* note 17, at 10. See also discussion *supra* Part II.C.

copyright holders include local stations, broadcast networks, syndicators and other independent program producers (including various production companies, movie producers, and professional sports leagues). Each of these copyright holders want to ensure they are fairly compensated for their programming, but free market negotiation of individual copyright licenses for hundreds of shows ultimately proved impracticable.³¹ Thus, to help facilitate the process, Congress established a system of compulsory copyright licenses codified in 17 U.S.C. §§ 111, 119, 122. Many of the current copyright issues NGTMA addresses arise from the way these compulsory licenses are determined and the outdated assumptions the current law still applies.

I. Copyright Act of 1976, 17 U.S.C. § 111

The early function of cable television was to facilitate over-the-air (OTA) reception to areas that could not receive a strong broadcast signal because of their geographic location.³² Cable operators, then known as community antenna television (CATV) systems, provided signals to these areas.³³ Up until the 1970s, a cable system's channel lineup consisted almost entirely of retransmitted broadcast signals, with little original cable programming.³⁴ Today, however, the vast majority of a cable system's channel lineup consists of non-broadcast networks, with the cable industry having evolved into the leading supplier of subscription-based video programming.³⁵ It was under the outdated system of the 1970s that the Copyright Act addressed the needs of cable broadcasting.

31. SHVERA 109 Report, *supra* note 15, at 81 (noting that "Congress recognized 'that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was transmitted by a cable system.'" (quoting H.R. Rep. No. 1476, 94th Cong., 2d Sess. 89 (1976))). *See infra* text accompanying note 42.

32. SHVERA 109 Report, *supra* note 15, at 82.

33. *Id.* at 2.

34. *Id.*

35. *Id.*

Two Supreme Court cases decided in the years just prior to the 1976 Act—*Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), and *Teleprompter Corp. v. CBS, Inc.*, 415 U.S. 394 (1974)—noted particular copyright implications regarding the retransmission of OTA broadcast signals by CATV cable companies.³⁶ In *Fortnightly Corp.*, the Court held that CATV systems were (1) more like viewers than they were to broadcasters; (2) that CATV systems did not broadcast or rebroadcast, but “simply carri[ed], without editing, whatever programs they receive[d]”; and (3) that CATV operators did not “perform the programs they receive[d] and carr[ie]d,” and thus did not violate the original broadcaster’s copyright.³⁷ The *Teleprompter Corp.* decision additionally protected CATV operators against copyright infringement liability for picking up “distant” signals and importing them from one community into another.³⁸

When the Copyright Act of 1976 was passed, a valid concern for broadcasters was whether cable companies could or would face copyright liability for cable retransmissions.³⁹ The *Fortnightly Corp.* and *Teleprompter Corp.* decisions distressed both the original broadcasters whose signals were being retransmitted as well as local broadcasters in the receiving end communities, who, as the decision noted, “watched the cable companies importing into their markets the very programs that they were themselves showing, and to which they had purchased exclusive broadcast rights.”⁴⁰ As stated in the post-1976 Copyright Act decision, *United Video, Inc. v. FCC*, 890 F. 2d 1173 (D.C. Cir. 1989), essentially, “cable companies were free, as far as copyright law was concerned, to pick up signals aired by broadcasters and

36. ROBINSON & NACHBAR, *supra* note 4, at 314.

37. *Id.* (citing *Fortnightly Corp. v. United Artists Television, Inc.* 392 U.S. 390, 400-02 (1968)).

38. *Id.* Distant signals are signals carried by cable systems which cannot be received over the air in the area covered by the cable system. 17 U.S.C. § 111(5)(a)(i).

39. SHVERA 109 Report, *supra* note 15, at 2.

40. *United Video, Inc. v. FCC*, 890 F.2d 1173, 1177 (D.C. Cir. 1989).

retransmit them throughout the country.”⁴¹ The *United Video, Inc.* opinion goes on to note, however, that while the FCC for a period of time attempted to review the importation of distant signals into any of the top one hundred local television markets, this proved “an administrative impossibility.”⁴²

Thus, Congress was next concerned with how to provide cost-efficient ways for the cable and satellite operators to obtain rights for the programming they retransmitted.⁴³ Although at that time cable systems were not the hundred-plus channel, subscription-based carriage systems they are today, they nevertheless carried signals with programming owned by dozens, if not hundreds, of separate copyright owners.⁴⁴ With the aim of creating a more practical system, Congress adopted 17 U.S.C. § 111 of the Copyright Act of 1976, implementing a compulsory licensing scheme where cable companies would pay an administratively set fee in exchange for the right to carry the distant signals and programs.⁴⁵ In its 2008 Report, however, the Copyright Office claimed that under the system developed by the 1976 Copyright Act, cable companies had been paying statutory rates that economists believed were far below the rates the cable companies would pay if the regulations disappeared in favor of the free market.⁴⁶ This apparent discrepancy in fees is a main reason why tensions have risen in recent years between broadcasters and cable companies and one of the principal concerns of NGTMA.

2. *Satellite Home Viewer Act (SHVA), 17 U.S.C. § 119*

During the late 1980s and early 1990s, a new participant in broadcasting emerged:⁴⁷ the growth of direct broadcast satellite (DBS) during the two decades after the passage of 1976 Copyright

41. *Id.* at 1176-77.

42. *Id.* at 1177.

43. SHVERA 109 Report, *supra* note 15, at 2.

44. *Id.* at 3.

45. *Id.*

46. *Id.* at 69.

47. ROBINSON & NACHBAR, *supra* note 4, at 365.

Act was “phenomenal.”⁴⁸ The 1976 Act never addressed the copyright issues of DBS, which “were not then in existence or even under active development.”⁴⁹ Consequently, problems—and lawsuits—began to arise, concerning satellite carriers that did not fit directly into, yet still claimed to operate under, the 17 U.S.C. § 111 rules.⁵⁰ Notably, differences in technology and similar recurring issues of localism underscored the debate.⁵¹ First, in 1988, and then several times throughout the 1990s, Congress tried to address some of these uncertainties through additional legislation.⁵²

During these early days of home satellite, DBS systems were unable (because of channel capacity limitations) to offer local stations into each local market (known as “local-into-local” service), but were able to—and did—offer distant signals of network programming.⁵³ This was done by the DBS operators essentially intercepting the “wholesale” signal that broadcast networks would relay to their local affiliates and then directing that intercepted signal to the home satellite subscribers.⁵⁴ Much of

48. Thomas Hildebrandt, *Unplugging the Cable Franchise: A Regulatory Framework to Promote the IPTV Cable Alternative*, 42 GA. L. REV. 227, 238 (2007) (noting DBS as one of the “fastest growing electronic consumer products of all time” (quoting Richard L. Weber, *Riding on a Diamond in the Sky: The DBS Set-Aside Provisions of the 1992 Cable Act*, 40 WM. & MARY L. REV. 1795, 1798 (1999))). Additionally, the period between 1994 and 1999 saw vast changes come to the home satellite television industry, with major companies like DirecTV emerging and growing from under a million subscribers in 1994 to over ten million by 2001. *The History of DirecTV*, SATELLITE COMPANION, <http://www.satellitecompanion.com/Television/DirecTVHistory.aspx> (last visited Nov. 8, 2012).

49. ROBINSON & NACHBAR, *supra* note 4, at 368.

50. SHVERA 109 Report, *supra* note 15, at 9.

51. *Satellite Broad. & Commc’ns Ass’n v. FCC*, 275 F.3d 337, 345 (4th Cir. 2001) (noting that “[w]hereas cable systems deliver their signals to subscribers over local wire networks, satellite is primarily a national service.”).

52. ROBINSON & NACHBAR, *supra* note 4, at 368-69.

53. *Satellite Broad.*, 275 F.3d at 347 (noting that “[early DBS carriers] had enough capacity to carry the signals of network affiliates in a major city (usually New York) throughout the entire country, but not enough capacity to carry local network affiliates in smaller cities.”).

54. ROBINSON & NACHBAR, *supra* note 4, at 368.

the Satellite Home Viewer Act (SHVA) of 1988 was passed to protect local cable systems and local affiliate stations from DBS competition.⁵⁵ The Act did allow, however, for DBS systems “to retransmit the signals of distant network broadcast stations to unserved households that were unable to receive an adequate over-the-air signal” through a limited copyright license.⁵⁶

Recognizing satellite providers would need compulsory copyright regulation as well, Congress codified 17 U.S.C. § 119 through the 1988 Act.⁵⁷ The legislation created a statutory copyright licensing scheme similar to the one granted to cable in 17 U.S.C. § 111, yet calculated differently.⁵⁸ Under the structure established in 1988 and still in place today, satellite carriers pay a flat royalty fee based on their number of subscribers while cable companies pay royalties based on a complex formula tied to system size and gross receipts.⁵⁹

However necessary they were at the time they were implemented, the statutory licenses in 17 U.S.C. § 119 were not meant to last indefinitely.⁶⁰ These rules were intended to expire in 1994, as Congress expected satellite providers to be able to independently negotiate licensing agreements for the retransmission of broadcasts.⁶¹ However, in 1994, Congress reauthorized 17 U.S.C. § 119 for five more years with the agreement that satellite carriers would pay rates that reflected market price, unlike cable systems which pay royalty rates

55. *Id.* Satellite Home Viewer Act, Pub. L. No. 100-667, 102 Stat. 3935 (1988).

56. ROBINSON & NACHBAR, *supra* note 4, at 373. A “distant” signal refers to television stations broadcast to viewers from outside their Designated Market Area (DMA). 17 U.S.C. § 111(5)(a)(i). Designated Market Area (DMA) refers to the geographic area that is able to receive an over the air broadcast signal from a local broadcast station and from which the majority of a local station’s viewers originate, as defined by Nielsen Media Research. 47 C.F.R. § 79.3(a)(1) (2012).

57. ROBINSON & NACHBAR, *supra* note 4, at 368.

58. SHVERA 109 Report, *supra* note 15, at 10.

59. *Id.*

60. *Id.*

61. *Id.*

adjusted only for inflation.⁶² By matching the statutory rates with market rates, Congress believed it could eliminate the need for the statutory licenses by the end of 1999.⁶³ That never happened.

Additionally, rapid growth in the DBS industry in the decades since 17 U.S.C. § 119 was established has led the U.S. Copyright Office to conclude that satellite companies have also been paying statutory rates for the import of distant signals into local markets that are set below their fair market value.⁶⁴ Ultimately, the Copyright Office proposed the phase out of both 17 U.S.C. §§ 111, 119 in their 2008 report, with the primary goals of (1) simplifying the existing statutory licenses and (2) increasing the parity between cable systems and satellite carriers.⁶⁵ Just as it does with the cable licenses under 17 U.S.C. § 111, the proposed legislation seeks to address the statutory rate discrepancies under 17 U.S.C. § 119.⁶⁶

3. *Satellite Home Viewer Improvement Act of 1999 (SHVIA), 17 U.S.C. § 122*

By 1999, advancements in satellite technology allowed DBS carriers to offer local-to-local service in some markets.⁶⁷ The localism concerns that led Congress to pass SHVA a decade earlier—in large part to protect local cable and broadcast stations from satellite competition—seemed to dissipate some as Congress began to see DBS as an effective competitor to cable that could drive down the price of subscription television.⁶⁸ In order to encourage the development of DBS local-to-local service, Congress included a royalty-free license within 17 U.S.C. § 122.⁶⁹

62. *Id.*

63. *Id.*

64. SHVERA 109 Report, *supra* note 15, at 10.

65. *Id.* at 56 (noting “[t]he overall findings . . . are that royalty rates are below marketplace rates, that the current distant signal licenses have served their purpose but are no longer necessary, and that [17 U.S.C. § 111, 119] have outlived their original purposes.”).

66. H.R. 3675 § 3; S. 2008 § 3.

67. Hildebrandt, *supra* note 48, at 239.

68. ROBINSON & NACHBAR, *supra* note 4, at 373.

69. SHVERA 109 Report, *supra* note 15, at 11.

Generally, 17 U.S.C. § 122 is similar to 17 U.S.C. § 119, but instead addresses satellite retransmissions of local programming within the station's own market (local-to-local).⁷⁰ One of the motivating factors behind the 17 U.S.C. § 122 royalty-free license was Congress's desire to decrease the number of distant signals delivered to subscribers in favor of those of local network affiliates, thus, preserving the network-affiliate relationship in the local television market.⁷¹ In the same 2008 report, the Copyright Office explained that Congress justified the royalty-free license by adopting the principal that "copyright owners are not harmed by the retransmission of programming into local markets" since "the copyrighted programming contained on local broadcast programming is already licensed with the expectation that all viewers in the local market will be able to view the programming."⁷²

Part of the urgency in passing reform is that the particular compulsory copyright licenses granted to satellite operators are set to expire at the end of 2014.⁷³ Congress can (and given its recent history of doing so, perhaps likely will) simply extend the current license again. However, the pending expiration of the satellite compulsory licenses provides Congress as good an opportunity as any to reexamine the current system.

C. Cable Act of 1992, Satellite Home Viewer Improvement Act of 1999, and Satellite Home Viewer Extension and Reauthorization Act of 2004: 47 U.S.C. §§ 325(b), 338, 534

In 1992, Congress passed the Cable Television Consumer Protection and Competition Act, containing additional localism protection measures.⁷⁴ For one, the 1992 Act restored a provision

70. 17 U.S.C. § 122 (2006).

71. SHVERA 109 Report, *supra* note 15, at 13.

72. *Id.*

73. 17 U.S.C. § 119(c)(1)(E) (2006).

74. Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992). *See also Cable Television*, NET INDUSTRIES, <http://law.jrank.org/pages/4968/Cable-Television.html> (last visited Oct. 28, 2012).

that requires cable systems to carry all local broadcast channels in a given market, known as “must-carry” rules, and prohibits cable operators from charging local broadcasters for the cable system to carry the broadcaster’s signal.⁷⁵ Surviving two U.S. Supreme Court challenges regarding their constitutionality under the First Amendment, these must-carry rules are meant to ensure that every local station—in essence, every local voice—is assured carriage through the local cable system.⁷⁶

The 1992 Act also created a new “retransmission consent” right, allowing broadcasters to demand payment from the cable and satellite companies (herein referred to as “multichannel video programming distributors” or “MVPDs”) for the broadcast signals that they carry other than those included under the must-carry requirement.⁷⁷

Notably, the retransmission consent requirements are not attached to the particular broadcast programs an MVPD carries, but instead are attached to the signals themselves.⁷⁸ The issue comes up particularly in smaller designated market areas (DMAs) and other rural areas of the country where there may be only one or two network-affiliated local channels, or none at all.⁷⁹ Often the programming of local, non-network-affiliated stations will consist largely of imported syndicated programming that is not locally produced.⁸⁰ Thus, the negotiations between local broadcast stations and MVPDs regarding retransmission consent rights may also involve negotiations between the stations and the various

75. *Id.*

76. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 645 (1994) (noting “[t]he rules benefit all full power broadcasters who request carriage—be they commercial or noncommercial, independent or network affiliated, English or Spanish language, religious or secular.”). *See also Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997).

77. ROBINSON & NACHBAR, *supra* note 4, at 357. The term “multichannel video programming distributor” (MVPD) is an industry-recognized term referring to cable or satellite companies that retransmit both over-the-air (OTA) signals and non-broadcast networks (such as popular networks ESPN and USA). 47 U.S.C. § 522(13) (2006); 47 C.F.R. § 76.64(d) (2012).

78. ROBINSON & NACHBAR, *supra* note 4, at 357.

79. Interview with John C. Roberts, *supra* note 18.

80. *Id.*

programs' copyright owners as well, further complicating the process.⁸¹

Every three years, local stations are statutorily required to decide between exercising their retransmission consent or must-carry rights.⁸² Thus, under the provisions, local stations can—and often do—choose to waive their must-carry right in favor of retransmission consent and the accompanying fees they can charge.⁸³ Generally, the decision comes down to the bargaining positions of the particular broadcaster and MVPD. For example, a popular, network affiliated local channel will more likely assert its retransmission consent right, knowing the cable or satellite provider will be at a significant competitive disadvantage within the local market if it were not able to offer the channel to subscribers, given the popularity of the network programming.⁸⁴ Conversely, a small, local non-commercial station will generally opt instead for must-carry.⁸⁵

While retransmission consent applies to both cable and satellite providers, however, the must-carry rules are cable specific.⁸⁶ In order to rebalance the competitive scale, Congress created an additional mandatory carriage requirement, this time directing it towards DBS.⁸⁷ Known as the “carry one, carry all” rule, the requirement, also created as part of SHVIA in 1999, mandates that an MVPD providing satellite service to a local area must carry all local channels if it chooses to carry any one.⁸⁸ Unlike cable, DBS is not required to carry any of the local channels in a given area, but if it chooses to carry one, it does so under an all-or-none

81. ROBINSON & NACHBAR, *supra* note 4, at 357.

82. 47 U.S.C. § 325(b)(3)(B); 47 C.F.R. § 76.64(f)(2) (2012).

83. ROBINSON & NACHBAR, *supra* note 4, at 357-58. Current estimates suggest between 80-90% of all local stations choose retransmission consent. *Id.* at 378. The risk is, however, that if a local broadcaster chooses the retransmission consent option and fails to negotiate a deal with the MVPD, it waives its must-carry right and will not be carried. *Id.* at 357.

84. Interview with John C. Roberts, *supra* note 18. See also *infra* Part IV.B.

85. *Id.*

86. ROBINSON & NACHBAR, *supra* note 4, at 840.

87. *Id.* at 375.

88. 47 U.S.C. § 338 (2006).

format.⁸⁹ The idea was to prevent satellite carriers from “cherry-picking”—choosing to carry only the local network-affiliated stations—a reasonable concern and one Congress sought to avoid.⁹⁰

The difference in law again reflects the differences in technology.⁹¹ The theory at the time SHVIA was passed was that while cable systems are local and have enough channel capacity to carry all the local broadcast stations and still have room on their systems to offer an “attractive mix” of national and regional non-broadcast programming, the capacity of DBS was substantially more limited.⁹² Along with the carry one, carry all requirement, SHVIA additionally brought satellite under the same network non-duplication and syndicated exclusivity rules that originally applied only to cable.⁹³

The regulatory history reflects Congress’s attempts to keep legislative pace with rapidly changing technologies and an increasingly complex marketplace. Yet ultimately, in the view of many of the proponents of reform, the current regulatory structure is an overly complicated, outdated system that fails to protect the very policy interests it is meant to support. It is under this context that Congress has introduced NGTMA.

89. ROBINSON & NACHBAR, *supra* note 4, at 375.

90. Rob Frieden, *Analog and Digital Must-Carry Obligations of Cable and Satellite Television Operators in the United States*, 15 MEDIA L. & POL’Y 230, 241 (2006).

91. ROBINSON & NACHBAR, *supra* note 4, at 375.

92. *Id.* (noting that satellite carriers, “in contrast [to cable systems], currently beam the same 450 to 500 channels throughout the continental United States and thus could not comply with a rule requiring them to retransmit the signals of each of the country’s roughly 1,600 local broadcast stations.”).

93. *Id.* at 383. Generally, network non-duplication rules prevent MVPDs from importing duplicate network signals into a given market, while syndicated exclusivity rules prevent MVPDs from importing duplicate syndicated programming. *Id.* at 836. Together, these rules are important areas of the current regulatory system; however, this article will limit its analysis of them to the specific areas relevant to the other provisions discussed.

III. THE PROPOSED LEGISLATION:

NEXT GENERATION TELEVISION MARKETPLACE ACT ("NGTMA"), HOUSE BILL 3675 (2011), AND SENATE BILL 2008 (2011)

In December of 2011, Representative Steve Scalise (R-Louisiana) and Senator Jim DeMint (R-South Carolina) introduced House Bill 3675 and Senate Bill 2008, respectively, as a means of addressing some of the most outdated sections of the current law.⁹⁴ Much of the general structure of the two Bills mirrors each other throughout and, thus, the Bills will be outlined here congruently. It is noted when the structure of the two Bills differ.

Section 1 provides that the Bills will be cited as the "Next Generation Television Marketplace Act" (H.R. 3675) and "Next Generation Television Marketplace Act of 2011" (S. 2008).⁹⁵

Section 2 amends or repeals sections of the Communications Act of 1934, including an amendment to 47 U.S.C. § 338 and a repeal of 47 U.S.C. § 534 that would essentially eliminate the cable must-carry and the satellite carry one, carry all rules.⁹⁶ The changes would in effect make the existing requirements applicable only to qualified noncommercial educational television stations and eliminate the protections for commercial stations.⁹⁷ The Bills would also eliminate 47 U.S.C. § 325(b), effectively erasing broadcasters' retransmission consent rights and restoring 47 U.S.C. § 325 to its pre-1992 state.⁹⁸ Additionally, section 2 would repeal the network non-duplication rule codified in 47 U.S.C. § 340, as well as the syndicated exclusivity rule codified in 47 U.S.C. § 612.⁹⁹

Section 3 amends or repeals those provisions regarding the compulsory copyright licenses created under the Copyright Act of

94. Press Release, Congressman Steve Scalise, *supra* note 10.

95. H.R. 3675 § 1, S. 2008 § 1.

96. H.R. 3675 § 2, S. 2008 § 2.

97. H.R. 3675 § 2, S. 2008 § 2.

98. Ryan Radia, *A Free Market Defense of Retransmission Consent*, OPENMARKET.ORG (Apr. 11, 2012), <http://www.openmarket.org/2012/04/11/a-free-market-defense-of-retransmission-consent/>.

99. H.R. 3675 § 2, S. 2008 § 2.

1976.¹⁰⁰ Specifically, the proposals include amending 17 U.S.C. § 111, and repealing 17 U.S.C. §§ 119, 122. As discussed, these three sections of the Copyright Act of 1976 allow the U.S. Federal Government to issue statutory licenses permitting MVPDs to retransmit broadcast signals without having to negotiate each copyright license individually.

Specifically, 17 U.S.C. § 111 addresses secondary transmissions of broadcast programming by cable.¹⁰¹ Section 119 addresses secondary transmissions of distant television programming by satellite¹⁰² while 17 U.S.C. § 122 addresses secondary transmissions of local television programming by satellite.¹⁰³

Section 4 repeals several additional current FCC rules related to cross-media ownership and, in doing so, eliminates: (1) restrictions on the number of television stations that a person or entity may own, operate, or control in the same designated market area under the local television multiple ownership rule; (2) the radio-television cross-ownership rule; and (3) limitations on the direct or indirect ownership, operation, or control of a broadcast television station by a person or entity that owns, operates, or controls a daily newspaper under the daily newspaper cross-ownership rule.¹⁰⁴

Section 5 (Section 6 in S. 2008) provides that the Acts shall take effect on July 1, 2014.¹⁰⁵

Section 6 (Section 5 in S. 2008) sets forth transitional provisions preserving certain contracts, understandings, and arrangements related to retransmission consent and the distribution of video programming entered into prior to the enactment of NGTMA.¹⁰⁶

The following analysis section addresses specifically the proposed changes to (1) the compulsory copyright licenses for both cable and satellite providers codified in 17 U.S.C. §§ 111, 199, 122; and (2) the repeal of sections of the Communications Act relating to carry one, carry all and must-carry rules (codified

100. H.R. 3675 § 3, S. 2008 § 3.

101. 17 U.S.C. § 111 (2006).

102. 17 U.S.C. § 119 (2006).

103. 17 U.S.C. § 122 (2006).

104. H.R. 3675 § 4, S. 2008 § 4.

105. H.R. 3675 § 5, S. 2008 § 6.

106. H.R. 3675 § 6, S. 2008 § 5.

in 47 U.S.C. §§ 338, 534, respectively), as well as the elimination of the retransmission consent rules codified in 47 U.S.C. § 325(b).

IV. ANALYSIS

This section examines two key provisions of the Next Generation Television Marketplace Act (NGTMA): (1) the amendment to 17 U.S.C. § 111 and repeal of 17 U.S.C. §§ 119, 122 that would eliminate the current compulsory copyright licenses and (2) the amendment to 47 U.S.C. § 338 and repeal of 47 U.S.C. §§ 325(b), 534 that would effectively erase the retransmission consent, must-carry and carry one, carry all rules of the Communications Act. First, this section explains the competing arguments for and against deregulation, with a particular focus on why some level of change to the current system is needed. Then, this section explains the logistical issues NGTMA faces and a summary of why the well-intentioned Bill is unlikely to pass.

A. Disposing of the Compulsory Copyright Licenses

As discussed, Congress created the compulsory copyright licenses codified in 17 U.S.C. §§ 111, 119, 122 of the Copyright Act as a way to facilitate efficient negotiations between broadcasters and MVPDs. While the system in place has undoubtedly made it easier for both sides to negotiate the copyright royalties of the hundreds of channels and thousands of programs involved every week, broadcasters and other program copyright owners have started to voice complaints that the current royalty rates set within 17 U.S.C. §§ 111 (cable) and 119 (satellite as it relates to distant signals) are significantly lower than the fair market value copyright holders could receive if they negotiate in a deregulated market.¹⁰⁷

A 2008 U.S. Copyright Office report identified that the current statutory license rates are set below fair market values.¹⁰⁸ While

107. SHVERA 109 Report, *supra* note 15, at 69. As noted, 17 U.S.C. § 122 is a royalty-free license. 17 U.S.C. § 122(c) (2006).

108. SHVERA 109 Report, *supra* note 15, at 69.

the report indicates the Copyright Office's belief that below-market rates may have been justifiable earlier in the history of the broadcast industry, it proceeds to conclude that the current rates have lost their relevance.¹⁰⁹ Proponents of the Bill argue that while emerging MVPDs may have benefited from a heavier regulatory environment in the past, the industry in its current state would benefit more if copyright owners could themselves negotiate fair market rates with respect to copyright royalty fees.

A key component of 17 U.S.C. § 119 remaining today comes from Congress's original intent to serve "unserved households;" that is, areas of the country that cannot receive traditional OTA broadcast signals nor has access to cable service.¹¹⁰ These transmissions will often include retransmission of distant network television stations, usually from a major market such as New York or Los Angeles, or, in the early days of satellite, nationwide "superstations," such as WTBS out of Atlanta or WGN from Chicago.¹¹¹ These networks cannot rely solely on local advertising revenue to cover the value cost of the additional viewers to the program owners' copyrights (the idea being that local advertisers are generally not willing to pay increased advertising rates for viewers in distant markets who the advertisers cannot reasonably expect to purchase their goods and services locally).¹¹² Congress determined that retransmission of distant signals affected the value of copyrighted broadcast programming since the content was reaching larger audiences, but nonetheless also determined MVPDs had no reason to pay additional costs to copyright owners for the additional viewers outside a particular designated market area (DMA) since those viewers could not increase local broadcasters' advertising revenue.¹¹³

109. *Id.* at 212.

110. *Id.*

111. *Id.* WTBS has since spun off as a non-broadcast network, TBS, that is popular on both cable and satellite lineups. *Id.* at 48-49. In 2007, the station officially split from the local Atlanta OTA channel WTBS, effectively ending operation as a "superstation." *WTBS to Become Peachtree TV*, ATLANTA BUS. CHRONICLE (June 27, 2007, 10:11 PM), <http://www.bizjournals.com/atlanta/stories/2007/06/25/daily32.html?surround=lfm>.

112. SHVERA 109 Report, *supra* note 15, at 4.

113. *Id.*

However, the access concerns that Congress considered in developing the compulsory copyright licenses of 17 U.S.C. §§ 111, 119, while far from being irrelevant, nevertheless no longer completely reflect the economic realities of today's multi-billion dollar cable and satellite industry. The 2008 U.S. Copyright Office report points to one of the rare case studies that has been able to break apart the various regulatory layers by looking at statutory compensation for the TBS network since it became a non-broadcast cable network in 1998 separate from its distant WTBS superstation signal.¹¹⁴ Finding that as a cable network, "carrying the same programming as it had as a distant signal, TBS was able to immediately obtain license fees that exceed[ed] the entire 1998 royalty fund (\$165 million for TBS vs. \$108 million for the royalty fund)," and by 2004, more than double the amount (\$287 million to \$134 million), the report seeks to demonstrate the incredible valuation increases that are possible under deregulation.¹¹⁵ However, it is worth noting, that TBS is also one of the most popular non-broadcast networks currently offered, with programming including "Conan" and Major League Baseball, and may not alone reflect potential value increases for other networks.

Yet, even recognizing such findings, many broadcasters nevertheless oppose discontinuing the current statutory rates.¹¹⁶ Officially, the National Association of Broadcasters opposes the proposed changes related to NGTMA.¹¹⁷ Generally, localism concerns aside (discussed below), many broadcasters favor the current system because it provides them with stable compensation for their programming and copyrights, while facilitating

114. *Id.* at 68.

115. *Id.*

116. Press Release, Nat'l Ass'n of Broadcasters, NAB Statement on Introduction of Next Generation Television Marketplace Act, (Dec. 16, 2011), available at <http://www.nab.org/documents/newsroom/pressRelease.asp?id=2659>.

117. *Id.* (noting "NAB respectfully opposes the legislation. Current law ensures access to quality local news, entertainment, sports and life-saving weather warnings. The proposed changes to the Communications Act strike at the core of free market negotiations and broadcast localism, thereby threatening a community-based information and entertainment medium that serves tens of millions of Americans each day.").

negotiations with potentially hundreds of copyright owners. This year alone the system is expected to generate more than \$2 billion to be divided between local stations and the networks.¹¹⁸ It is understandable that disrupting the current system would give broadcasters some pause.

There is, however, an alternative proposal that may allow broadcasters to overcome both their compensation concerns as well as the logistical concern of having to individually negotiate each copyright license. The “rights aggregator model” would essentially have broadcasters consolidate the performance rights to all of their programs before entering into negotiations with an MVPD, thereby offering a “single point” or “one-stop-shop” for negotiation.¹¹⁹ As one media lawyer notes, the rights aggregator model is already in place with respect to many non-broadcast channels which, today, successfully allows “more than 500 non-broadcast television channels [to be] distributed by MVPDs nationwide without any need for government compulsory licensing.”¹²⁰ The suggestion is that, should NGTMA repeal the current compulsory copyright licensing system, broadcasters could “easily . . . aggregate the rights in the programs on their schedule and then negotiate with MVPDs,” just as many media companies already do with respect to their non-broadcast channels. Additionally, since many media companies today own both broadcast and non-broadcast networks, the difficulty in implementing this “new” business model would be, theoretically, minimal.

Some commentators suggest that broadcasters’ hesitation to support regulatory change instead has more to do with a fear of the unknown than it does with their purported concerns for localism

118. Harry A. Jessell, *Now’s Not the Time for Copyright Overhaul*, TVNEWSCHECK (July 20, 2012, 4:07 PM), <http://www.tvnewscheck.com/article/60912/nows-not-the-time-for-copyright-overhaul>.

119. Padden, *supra* note 1.

120. *Id.* (noting that “[t]he success of the marketplace ‘rights aggregator’ model in facilitating the distribution of the programs on non-broadcast channels demonstrates that there is no longer any need for government [c]ompulsory [l]icensing of broadcast programming.”).

and logistics.¹²¹ Specifically, one commentator, calling the statutory licenses the “original sin” of video marketplace regulation, suggests the copyright owners’ fear of “the uncertainty of a truly deregulated marketplace” causes the hesitation.¹²² As a result, he suggests broadcasters have adopted a near-universal “if it ain’t broke, don’t fix it” attitude.¹²³

The argument has weight. Economic theories have long recognized the power of loss aversion, or the preference of avoiding losses over acquiring gains. Yet, repealing a compulsory licensing structure that seems clearly set below fair market value, would theoretically benefit broadcasters and copyright owners overall.¹²⁴

B. Ending Must-Carry, Carry One, Carry All, and Retransmission Consent: The Changing Economics of Localism

When considering the potential implications of repealing the retransmission consent, must-carry, and carry one, carry all rules, it is important to evaluate the original purpose of the rules and whether that purpose still requires regulatory protection. Many of the statutory requirements Congress has put in place, from the compulsory copyright licenses to the must-carry and retransmission consent rules, go to a very specific purpose of encouraging competition between broadcast, cable and satellite in order to keep high quality, low cost programming available to

121. Adam Thierer, *Toward a True Free Market in Television Programming*, FORBES (Feb. 19, 2012, 12:21 PM), <http://www.forbes.com/sites/adamthierer/2012/02/19/toward-a-true-free-market-in-television-programming/2/>.

122. *Id.*

123. *Id.*

124. The FCC has also endorsed support for repeal of the 17 U.S.C. §§ 111, 119 licenses: “We hereby recommend that the Congress re-examines the compulsory license with a view toward replacing it with a regime of full copyright liability for retransmission of both distant and local broadcast signals Our analysis suggests that American viewers would reap significant benefits from elimination of the compulsory license.” Padden, *supra* note 1 (quoting *In re Compulsory Copyright License for Cable Retransmission*, 4 FCC Rcd 6562 (1989)).

consumers. Furthermore, Congress also wanted to protect localism and related interests of the consumer.

In its report to Congress on retransmission consent and exclusivity rules, pursuant to the Satellite Home Viewer Extension and Reauthorization Act of 2004, the FCC notes that when Congress revived the must-carry rules in 1992, it “recognized that television broadcast stations rely on advertising dollars to provide free over-the-air local service and that competition from cable television posed a threat to the economic viability of television broadcast stations.”¹²⁵ It was a similar calculus that went into the development of satellite’s carry one, carry all rule. The 2005 FCC report recognized that these three rules, along with network non-duplication and syndicated exclusivity rules, “were adopted to ensure that broadcasters are compensated fairly for the MVPDs’ retransmission of their signals, that MVPD retransmission of distant signals does not undermine exclusivity protections negotiated by broadcasters and their programming suppliers, and that sports leagues’ contractual arrangements for the exhibition of sporting events are preserved.”¹²⁶

When Congress first introduced must-carry (first in 1962 before doing away with it for sometime in the 1980s and then bringing it back again in 1992), there was a legitimate degree of concern that, without such a requirement, cable companies would decline to carry some local broadcast channels, especially the non-network affiliated ones.¹²⁷ The theory was, and to a large extent still is, that the must-carry requirement offered added protection to ensure the viability of free, over-the-air television.¹²⁸ Even today, when Congress or an MVPD suggests finally abandoning the must-carry requirements, network and local broadcasters alike bring up

125. FED. COMM’NS COMM’N, RETRANSMISSION CONSENT AND EXCLUSIVITY RULES: REPORT TO CONGRESS PURSUANT TO SECTION 208 OF THE SATELLITE HOME VIEWER EXTENSION AND REAUTHORIZATION ACT OF 2004 25 (2005), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260936A1.pdf [hereinafter SHVERA 208 Report].

126. *Id.* at 18.

127. Andrew L. Shapiro, *Aiding the Final Push to the Digital Transition*, 5 CARDOZO PUB. L. POL’Y & ETHICS J. 339, 347 (2006).

128. *Id.*

original arguments of localism. In July 2012 testimony before the Senate Commerce Committee regarding “The Cable Act at 20,” National Association of Broadcasters President and CEO Gordon Smith explained his view of the importance of localism, saying “local television stations are an indispensable source for quality entertainment, high-profile sporting events, emergency weather warnings and disaster coverage that can literally make the difference between life and death.”¹²⁹

However, others have noted that the same localism concerns that existed in 1962, did not exist when the Cable Act reestablished the must-carry rules in 1992, and are even less of a concern today.¹³⁰ The business models and technology that existed twenty and fifty years ago have changed significantly—with more and more local channels owned by multi-billion dollar corporations and bandwidth of cable systems allowing for hundreds of channels.¹³¹ It raises questions as to whether the original worries that cable operators would refuse to carry local broadcast signals are still relevant.

Also, there is the argument that the economic realities of today’s marketplace have changed dramatically since 1992, altering the balance between retransmission consent and must-carry or carry one, carry all. Until recently, media companies, particularly broadcast networks that directly own local stations in many of the country’s largest cities (known as owned-and-operated stations or “O&O’s”), have commonly allowed MVPDs to bypass retransmission fees if the MVPD agreed to carry additional programming owned by the parent broadcast network, often in the form of additional, non-broadcast networks.¹³² These bypass

129. *The Cable Act at 20: Hearing Before the S. Comm. on Commerce, Sci. & Tech.*, 112th Cong. (2012) (statement of the Hon. Gordon H. Smith, President and CEO, National Association of Broadcasters), available at <http://www.nab.org/documents/newsroom/pressRelease.asp?id=2782>.

130. Shapiro, *supra* note 123, at 347.

131. *Id.*

132. Dockterman, *supra* note 4, at 20. WNBC-TV (NBC, New York), KABC-TV (ABC, Los Angeles), and WBBM-TV (CBS, Chicago) are all examples of O&O stations. NBC OWNED TELEVISION STATIONS, <http://www.nbcstations.com/multi-market/who-we-are/> (last visited Nov. 24, 2012); ABC OTV ONLINE, <http://abclocal.go.com/mediakit/index.html> (last

agreements also provided an easy way for media companies to negotiate their new or less popular channels into an MVPD's lineup.¹³³ It is also a main reason why so many new, niche cable channels were affordably launched over the past two decades.¹³⁴

A hypothetical example may offer some help in explaining the process: A small, local cable company approaches a local FOX affiliated station which has opted for retransmission consent to ask about fees or other compensation. The local FOX station refuses to negotiate, and instead tells the cable company to deal with Fox Entertainment Group in Los Angeles. Fox Entertainment Group tells the local cable company that to get the local FOX station's signal and programming it must also agree to carry an additional bundle of other Fox-owned non-broadcast networks, which the small, local cable company may or may not have initially wanted to carry.

The issue is even more pronounced for cable companies dealing with local ABC-affiliated stations. Since ABC owns ESPN, cable's most popular non-broadcast network, it has a significant advantage in negotiations; a local cable company must agree to carry additional ABC programming or risk losing the must-have programming available on ESPN. Larger cable companies such as Comcast may at least be in a better position to challenge the network owners because of their strength in local markets, but smaller, local cable companies play an important competitive role

visited Nov. 24, 2012); *Our Portfolio*, CBS CORP., <http://www.cbcorporation.com/portfolio.php?division=96> (last visited Nov. 24, 2012). Currently, an FCC rule limits the number of television stations one owner can control so that no one owner can reach more than 39% of the country's television households. 47 C.F.R. § 73.3555 (2012). Channels such as ESPN (ABC/Disney) and Nickelodeon (CBS/Viacom) are examples of non-broadcast networks. *ESPN*, NCTA, <http://www.ncta.com/OrganizationType/CableNetwork/1441.aspx> (last visited Nov. 24, 2012); *Nickelodeon*, NCTA, <http://www.ncta.com/OrganizationType/CableNetwork/1763.aspx> (last visited Nov. 24, 2012).

133. Dockterman, *supra* note 4, at 20. For example, if an MVPD wanted to carry an ABC-owned broadcast station, they may have also been required to carry ESPN, or a less popular network tied to it, such as ESPNU. *See id.*

134. *Id.*

in the marketplace as well and often do not have equally strong negotiating power. As the FCC notes, the retransmission consent bartering that has developed, trading consent for additional carriage commitments instead of fees, goes “beyond what Congress envisioned.”¹³⁵

Further complicating the issue, the media landscape today has reached a level of near-saturation, which has resulted in less room for new channels.¹³⁶ As a result, broadcasters are starting to ask for their retransmission consent fees instead of additional carriage commitments, which, as noted, they are legally allowed to do.¹³⁷ While the 2005 FCC report determined that, at the time, cash had still not “emerged as a principal form of consideration for retransmission consent,” new studies suggest that within the past seven years cash retransmission fees paid to broadcasters have increased from an estimated \$215 million in 2006 to nearly \$1.5 billion in 2011.¹³⁸ And since most MVPDs and their subscribers are not used to paying for the fees, cable and satellite companies have balked at the changes.¹³⁹

The problem is becoming an area of increasing frustration for everyone involved, from the MVPDs, to the broadcasters, and, ultimately, to the viewers. In roughly the first six months of 2012, there have been at least twenty-two disputes resulting in carriage refusal, channel dropping, or broadcast “blackouts.”¹⁴⁰ This number is up from fifteen in 2011 and just four in 2010.¹⁴¹ Recent blackouts include: (1) an eight and a half hour blackout of ABC, partly during the widely popular Academy Awards ceremony, on Cablevision in March 2010¹⁴², along with various other disputes during 2010 between both ABC and FOX, and Cablevision,¹⁴³

135. SHVERA 208 Report, *supra* note 125, at 25.

136. Dockterman, *supra* note 4, at 20.

137. *Id.*

138. Napoli, *supra* note 21, at 347.

139. Dockterman, *supra* note 4, at 20.

140. *Id.*

141. *Id.*

142. *Id.*

143. *US: Fox Stations Pulled in War with Cablevision*, MEDIASPY.ORG (Oct. 16, 2010), <http://www.mediaspy.org/2010/10/16/us-fox-stations-pulled-in-war-with-cablevision>.

including (2) a blackout of the first two games of the 2010 World Series on local Fox affiliates in New York and Philadelphia;¹⁴⁴ (3) a two-week blackout of Boston's WHDH-TV (NBC) and WLVI-TV (CW), as well as Miami's WSVN-TV (FOX), during the National Football League playoffs resulting from a dispute between DirecTV and Sunbeam;¹⁴⁵ and (4) a nine-day blackout of Viacom networks in June 2012 also stemming from a dispute with DirecTV.¹⁴⁶ Today, one of the lasting concerns regarding the 1992 Act is the impact on the cable and satellite subscribers caught in the middle.

While proponents of reform consistently point to outdated sections of the relevant Communications Act rules, or areas of the law they believe have resulted in the unintended consequences discussed above, the FCC's report suggests rather that Congress has sufficiently revised the provisions to "(1) enhance the viability of over-the-air broadcasting; (2) promote localism; and (3) advance regulatory parity between cable and DBS, while taking account of their different operational structures."¹⁴⁷ The FCC's position is that the retransmission consent, must-carry, and carry one, carry all rules complement one another and, together, "provide that all local stations are assured of carriage even if their audience is small, while also allowing more popular stations to seek compensation (cash or in-kind) for the audience their programming will attract for the cable or satellite operator."¹⁴⁸

However, this position must be rethought in light of changing economics, which have had a clear and substantial effect on localism as well. With respect to such concerns, it is important to note that the very rules Congress set in place to protect the public interest have, in fact, created situations that have harmed those

144. *Cablevision, Fox End Dispute Prior to World Series Game 3*, SPORTINGNEWS.COM (Oct. 30, 2010), <http://aol.sportingnews.com/mlb/story/2010-10-30/cablevision-fox-end-dispute-prior-to-world-series-game-3>.

145. David Lieberman, *DirecTV and Sunbeam Settle Boston and Miami TV Carriage Disputes*, DEADLINE.COM (Jan. 26, 2012), <http://www.deadline.com/2012/01/directv-and-sunbeam-settle-boston-and-miami-tv-carriage-disputes>.

146. Dockterman, *supra* note 4, at 20.

147. SHVERA 208 Report, *supra* note 125, at 18.

148. *Id.*

interests. Consider two carriage disputes from 2011, both involving LIN Television Corporation, where the broadcaster either refused carriage or threatened to refuse carriage of local signals to MVPDs in markets affected by Hurricane Irene and Tropical Storm Lee as those storms approached.¹⁴⁹ As one commentator aptly notes, “[g]iven the extent to which citizens necessarily rely on local broadcasting during such times of natural disaster, situations in which broadcasters are withholding signals before, during, or after such disasters raise serious questions whether the public interest is being served.”¹⁵⁰

Broadcasters insist, on the other hand, the problem lies not with them refusing carriage, but with large cable and satellite companies—mainly DirecTV, DISH Network, and Time Warner Cable—using their strong position in the market to gain unfair advantages in carriage negotiations:

It’s no coincidence that Time Warner Cable, DISH and DirecTV are responsible for three out of every four retransmission consent disruptions in 2012. Rather than negotiate in the free market for the most popular programming on TV, this cozy pay TV cabal is manufacturing a phony crisis in hopes that Congress will fix a ‘problem’ that these companies are creating.¹⁵¹

Broadcasters argue that these three, market-dominant companies are manipulating the marketplace through carriage disputes, especially in large cities, to pressure Congress into repealing the retransmission consent, must-carry, and carry one, carry all rules with the goal of achieving greater flexibility in the programming lineups they offer viewers.

Finally, there is the lingering issue of ensuring media diversity. The retransmission consent, “must-carry,” and “carry one, carry

149. Napoli, *supra* note 21, at 349.

150. *Id.* at 350.

151. *NAB Statement on Free Market-Based Retransmission Consent Process*, NAB, July 18, 2012, <http://www.nab.org/documents/newsroom/pressRelease.asp?id=2778> (last visited Nov. 13, 2012).

all” rules, together with media-ownership regulations, were put into place to ensure diversity and promote a range of competitive and distinct media voices.¹⁵² The FCC still maintains an official public policy of promoting media diversity and ensuring competing viewpoints are heard.¹⁵³ However, as one long time media lawyer in testimony before the Senate Committee of Commerce, Science and Transportation in July 2012 notes, today, in large part thanks to the internet, media is now more diverse and accessible than ever before.¹⁵⁴ Alternatively, recent content sharing agreements among local news stations and the creation of collective local news services (LNS) in many top markets raise other questions as to whether diversity is instead being diminished.¹⁵⁵ The same localism and diversity concerns that

152. Federal Communications Commission, *2010 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 Promoting Diversification of Ownership In the Broadcasting Services 8*, available at <http://www.fcc.gov/document/fcc-releases-notice-proposed-rulemaking-media-ownership-rules> (noting that “[t]he Commission has relied on its media ownership rules to ensure that diverse viewpoints and perspectives are available to the American people in the content they receive over the broadcast airwaves. The policy is premised on the First Amendment, which ‘rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.’” (quoting *Assoc.’d Press v. United States*, 326 U.S. 1, 20 (1945))).

153. *See id.* at 7-8.

154. Padden, *supra* note 1 (“Today, I find myself almost drowning in the plethora of diverse news outlets competing for my time. I start each morning in Boulder, Colorado watching multiple channels of broadcast and cable news while combing through online news sources on my iPad – The New York Times, The Wall Street Journal, The Washington Post, The Denver Post, The Los Angeles Times, Salon, Drudge, Real Clear Politics, The Hill, Politico, The Daily Beast, The Wrap, Communications Daily, CableFax, etc. I even still read my local newspaper – The Daily Camera. Some mornings I have a hard time tearing myself away from all the diverse news sources at my fingertips so that I can actually start my day.”).

155. Michael Grotticelli, *Chicago Stations Join to Share Video Crews for ENG*, BROADCAST ENG’G (May 8, 2009), <http://broadcastengineering.com/news/chicago-stations-join-share-video-crews-eng>. LNS agreements allows local news channels that choose to participate to share news gathering resources, including photographers and assignment

Congress evaluated before passing the retransmission consent, must-carry, and carry one, carry all rules must be rethought with respect to today's economic and technological changes.

C. Logistical Problems with NGTMA

While, as discussed, there are several potential benefits to deregulation under NGTMA, the proposed Bills as written raise legitimate logistical concerns that will likely prevent such comprehensive regulatory reform from passing. In a very concrete way, NGTMA essentially looks to undo many decades' worth of government regulations purposefully designed and intended to protect both interests of localism and consumer access.

Much of Congress's hesitation to pass such full scale reform has to do with the same familiar uncertainty concerns. Notably, nearly every potential party has voiced a similar nervousness. The U.S. Copyright Office, again in its 2008 report, supported a general revision of the current system, but noted that "the provisions of [17 U.S.C. §§ 111, 119] to some extent, are tightly knotted together into a larger regulatory fabric."¹⁵⁶ The report acknowledges that "the addition or subtraction of certain provisions may have the unintended consequence of harming program distributors, copyright owners, and subscribers."¹⁵⁷ The Copyright Office also

editors, to cover press conferences and other commonly reported news events. *Id.* Proponents indicate that content sharing agreements free up news resources to allow greater coverage of news stories, while opponents suggest the agreements are easy ways for local broadcasters to cut personnel costs in tough economic times. *Id.* (noting that "[e]ach station pledged to preserve its 'editorial integrity' with the arrangement and argued it was necessary in these difficult economic times[.]" but also that "it would be easy for LNS to turn into a way for member stations to reduce newsroom personnel and other staff."). *But see* Michael Malone, *Atlanta Pool Springs Leak*, BROAD. & CABLE (July 13, 2009), http://www.broadcastingcable.com/article/314853-Atlanta_Pool_Springs_Leak.php (noting that Atlanta CBS-affiliate WGCL-TV pulled out of its market's content share agreement with Fox O&O WAGA-TV and Gannett's NBC-affiliated WXIA-TV, "citing the pool's limitation on station differentiation.").

156. SHVERA 109 Report, *supra* note 15, at ix.

157. *Id.*

recognizes that changes to the current system would “disrupt settled expectations.”¹⁵⁸ It notes that the current system is “the result of a carefully balanced legislative compromise and changes to even one provision could have a domino effect throughout the statute.”¹⁵⁹

Meanwhile, the 2005 FCC report notes that “[b]ecause of the interplay among these various laws and rules, when any piece of the legal landscape governing carriage of television broadcast signals is changed, other aspects of that landscape also require careful examination.”¹⁶⁰ The National Cable and Telecommunications Association (NCTA) states that the current compulsory copyright system, “with all its flaws, at least provides a measure of predictability and stability ensuring that cable customers in markets large and small can continue to enjoy programming on broadcast stations.”¹⁶¹ Likewise, the National Association of Broadcasters (NAB) warns that “the current cable statutory license system has become integrated into marketplace structures and relationships and warns that any type of proposed modifications could produce unintended consequences.”¹⁶²

Finally, there is the concern of how broadcasters and MVPDs would negotiate the thousands of weekly programming copyrights should NGTMA erase many of the statutory provisions that facilitate that process.¹⁶³ One suggestion would be to not completely eliminate the provisions, as NGTMA proposes, but rather reform the provisions to better reflect the changing

158. *Id.* at 106.

159. *Id.* at 106-07.

160. SHVERA 208 Report, *supra* note 125, at 18 (citing *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997)).

161. SHVERA 109 Report, *supra* note 15, at 105.

162. *Id.* at 105-06.

163. Padden, *supra* note 1 (noting that “[a]s memorialized in the House Report, the cable compulsory license was justified by the universal belief ‘that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system.’”).

technology and market realities of today, namely by unifying the licenses under which cable and satellite currently operate.¹⁶⁴

V. Conclusion

The intense attention the NGTMA is receiving indicates that the proposed legislation targets important areas of reform. While broadcasters and copyright owners want the compulsory copyright rates to better reflect where they believe the market prices would be if they were allowed to negotiate independent of the regulations, they nevertheless want the stability that comes from the current system because at least it ensures consistent returns on their programming investments. MVPDs favor the acknowledged low rates, but would prefer the retransmission consent rules, must-carry, and carry one, carry all rules lifted in order to have greater flexibility in deciding what programming to offer. Finally, consumers would prefer lower costs, more choices in programming, and a curtailment of some of the carriage dispute blackouts that have been escalating over the last several years.

The main impediment to necessary reform is economic uncertainty. The broadcasting industry has never operated under a free market system, and, while there inevitably would be some transitional growing pains, there could also be some significant benefits to deregulation, such as a fair market value for program copyrights, and negotiation rules that better reflect the current system. Of course, the country will never know how it might work unless a new system is put into effect.

While the NGTMA Bills provide an opportunity for Congress to update a clearly outdated regulatory system, the reality is that many of the key parties involved in the debate, though recognizing certain deficiencies, are not yet ready for such comprehensive reform. Though well-intentioned in its goals and worth consideration as Congress continues to review the current regulatory system, NGTMA nevertheless is likely more optimistic

164. SHVERA 109 Report, *supra* note 15, at 204-05 (noting that “[t]he cable and satellite industries are now more similar than they are different. Both offer local broadcast signals to subscribers and both offer approximately the same mix of regional and nationally delivered non-broadcast content.”).

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than it is practical. At least for now, it appears, comprehensive change will have to wait.

*Aaron M. Cooper**

* J.D. Candidate 2014, DePaul University College of Law; B.A. 2006, University of Georgia. I would like to sincerely thank Professors Roberta Kwall and John Roberts for their guidance and suggestions, as well as my editors for all of their help with this project.