

Still No Online Cable System

In the Sky Angel case, online video distributors take another regulatory hit.

By Carl E. Kandutsch ■ *Attorney*

Last year, in an article called “No Online Cable Systems – For Now,” (Broadband Communities, May/June 2011), I told the story of ivi, a small, start-up online video distributor (OVD) that was sued and put out of business by large programming content owners for distributing copyrighted content without the owners’ consent. At issue in the ivi case was whether the OVD was a cable system that qualified for a compulsory copyright license under Section 111 of the Federal Copyright Act.

Ivi claimed it was a cable system under the Copyright Act (thus qualifying it for a compulsory copyright license) but denied that it could be regulated as a cable operator under the Federal Communications Act (thus exempting it from the requirement to obtain a broadcaster’s consent prior to retransmitting proprietary programming signals). The court ruled that ivi is not a cable system entitled to a compulsory copyright license under the Copyright Act.

The moral of the ivi story was that unless legacy regulatory classifications are either flexible enough or updated to

Sky Angel believed its affiliation with Discovery Channel was terminated for anticompetitive reasons.

accommodate innovative technology, entrenched business models (which are to some extent based on outdated regulatory classifications) will succeed in undermining or slowing down the broadband future – which everyone acknowledges will be shaped by online video distributors. Now online video has taken another small but significant regulatory hit.

IS AN OVD ENTITLED TO PROGRAM ACCESS?

Sky Angel’s case against Discovery Channel arrived in the FCC’s Media Bureau as a complaint under the Commission’s program access rules.¹

Sky Angel describes itself as a Christian IPTV distributor. Its service is similar to that of most cable and satellite video providers: For a monthly fee, customers can subscribe to a lineup of programming – in this case, one designed to appeal

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to religious Christian viewers and free of content considered inappropriate for that audience. However, unlike Comcast, Verizon or DISH Network, Sky Angel doesn’t own physical facilities. Instead, like ivi, Sky Angel delivers its programming through an Internet connection. Several popular cable channels affiliated with the Discovery Channel were included in Sky Angel’s programming package.

The FCC’s program access rules are intended to preserve competitive access to programming content affiliated with multichannel video programming distributors (MVPDs). Because an MVPD might use its control over programming content for anticompetitive purposes, the program access rules require that programming networks affiliated with an MVPD act in good faith to prohibit “unfair” or “anticompetitive” practices vis-a-vis rival MVPDs. Discovery Channel is affiliated with DIRECTV, an MVPD.

Discovery notified Sky Angel that it would terminate the affiliation agreement prematurely because it had decided Sky’s distribution methods were “not satisfactory.” In its FCC complaint, Sky Angel alleged that Discovery’s decision was based on DIRECTV’s desire to suppress competition from a rival MVPD. In other words, according to the complaint, DI-

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The FCC said Sky Angel, an online distributor, did not provide "transmission paths" and so could not file a complaint against Discovery Channel.

RECTV cut off Sky Angel's access to affiliated programming because DIRECTV didn't want to compete with an online video distributor – potentially a violation of the program access rules.

Under the Communications Act (47 U.S.C. § 548(d)) and the FCC's rules (47 C.F.R. § 76.1003(a)), only MVPDs have standing to file program access complaints. An MVPD is defined as a "person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming."

THE ANSWER IS 'NO'

In its preliminary order dismissing Sky Angel's complaint, the FCC Media Bureau ruled that Sky Angel was not an MVPD and therefore was not part of the class of video service providers legally entitled to pursue a program access complaint.

The Media Bureau's logic is noteworthy: The word "channel" in the definition of MVPD means not only a stream of video programming but also a physical "transmission path" over or through which the video signal is sent. Because the subscriber's Internet access provider, not Sky Angel, provided the transmission path, Sky Angel did not fall within the definition of MVPD and therefore did not have legal standing to pursue a program access complaint.

This analysis, though preliminary, could create more problems than it solves. If an MVPD must provide multiple transmission paths, then any IPTV video provider using a single digital stream to provide multiple channels of video programming is not an MVPD

and not entitled to nondiscriminatory access to MVPD-affiliated programming. I hope the Commission will refine its analysis in its final ruling on the case.

For now, however, the Media Bureau's reasoning remains circular, not unlike the court's question-begging mode of analysis in the *ivi* case: Video distribution by means of an unfixed Internet connection is just not sufficiently similar to traditional cable or satellite subscription service to be classified as an MVPD. After all, OVDs had not yet been invented when those classifications were created and written into the law. Therefore, OVDs cannot receive the regulatory benefits associated with being classified as a cable system or an MVPD – even if everyone agrees that online distribution represents the future of television.

The failure of the federal courts (in the *ivi* case) and the FCC (so far, in the Sky Angel case) to think prospectively means that if OVDs are to compete on a level playing field with traditional cable and satellite providers, Congress will have to rewrite the traditional regulatory classifications. Congress, however, remains largely captive to the special interests that finance political campaigns and may be even less inclined to disrupt established business models than are federal courts or the FCC. Ultimately, the question is not whether OVDs will replace traditional video distribution models (they will) but whether entrenched political, economic and institutional interests will allow OVDs to realize their fully disruptive potential. ♦

ENDNOTES

- 1 In the Matter of Sky Angel US, LLC, Emergency Petition for Temporary Standstill, Order, DA 10-679 (rel. April 21, 2010), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-10-679A1.pdf.

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