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Part One

In the early 1990s, there was concern that two aspects of the cable industry might hamper the development of new, competing "*multichannel video programming distribution*" ("MVPD") technologies, such as direct broadcast satellite ("DBS") services (e.g., DirecTV and DISH) or "*wireline*" services (e.g., Verizon FiOS and AT&T U-verse). First, cable was the dominant means for such distribution nationally, as well as in most local market (due to local franchising requirements).[1] Second, there was a substantial amount of vertical integration of cable operators and programming vendors. This provided the potential for incumbent, inter-related players to deny new distributors "*access*" to desirable programming and, thereby, hamstring their ability to compete for subscribers. Finally, as the MVPD industry continued to grow, operators might try to increase their actual or effective control over programmers, squeezing out independent programming and, thereby, diminishing programming competition and diversity.[2]

To address these concerns, the Cable Television Consumer Protection and Competition Act of 1992 (the "*1992 Cable Act*")[3] put in place two related, but distinct, regimes: "*Program Access*" and "*Program Carriage*." Broadly speaking, "*Program Access*" protects MVPDs by ensuring a certain degree of "*access*" to programming. Thus, the complaining party in a Program Access proceeding is the MVPD. By contrast, Program Carriage polices MVPDs with respect to their treatment of programming vendors in

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contracting for carriage of programming. In a Program Carriage proceeding, the MVPD is the respondent.

For nearly twenty-five years, the Program Access and Program Carriage rules have evolved through four administrations, eight FCC Chairs, the tremendous expansion of video distribution and programming choices, and ever-changing technologies. And they have done so in decidedly very different ways.

The Program Access regime has been nimbly retooled in multiple rounds to strike the right balance between protecting against potential vertical-integration abuses and yet allowing industry participants to address legitimate business concerns and respond creatively to a rapidly changing market. The FCC's Program Access rules and actions have overwhelmingly survived challenges based on the First Amendment and Administrative Procedure Act. And, for the most part, Program Access proceedings have been brief and resolved without hearing or multiple appeals. The result is a marketplace more than two decades later that is more competitive than ever before—and preparing for still more to come as internet linear and on-demand video services continue to grow.

By contrast, the Program Carriage regime has ground along at a slow, deliberate pace, focusing on factually intense issues of whether video programmers have been "*coerced*," "*retaliate*[ed] *against*," or the targets of discrimination "on the basis of affiliation" that "*unreasonably restrains*" the programmer's ability to "*compete fairly*." Exceedingly few proceedings have been brought and not a single, reported victory for the protected class (unaffiliated programmers) has ever survived the multi-layer appeal process. Yet, it would be hard to argue that the video programming industry lacks fresh, high quality, and extremely diverse sources of content. The critical question now is whether the Program Carriage regime (or some form of it) can and should be used to ensure continued program diversity and competitiveness as the distribution arm of the industry skinnies up, repackages, and revamps to compete with the growing field of new services.

This article proceeds in two parts. Part One reviews the Program Access regime and its current status and key issues. Part Two (in a forthcoming issue) will turn to the Program Carriage regime and compare the progress and issues there.

I. The Program Access Regime

A. Preliminaries

Before delving into the structure and substance of Program Access, two preliminary points for orientation are helpful.

First, some useful navigation. The "*Program Access*" regime is rooted in Section 628 of the Communications Act of 1934, 47 U.S.C. § 548. It is implemented by the FCC under its "*Program Access Rules*," 47 C.F.R. § 76.1000-1004, which set forth applicable definitions, the substantive standards, and rules governing FCC adjudication of Program Access complaints.

Second, some (hopefully) useful terminology and distinctions to parse the exceedingly dense language of the Program Access statute and rules.

MVPDs: The Program Access regime protects MVPDs. As discussed below, the FCC currently is considering whether and to what extent so-called "*Over The Top*," internet-based distributors fall within the definition of MVPD. More generally, however, the FCC's rules provide that certain representatives of MVPDs—"buying groups" and "agents"—are deemed MVPDs for Program Access purposes. 47 C.F.R. § 76.1000(c), (e).

Cable Operators: The Program Access regime principally targets cable operators and their affiliated programming vendors. However, Congress also extended the Program Access provisions to "*common carriers*" (e.g., AT&T, Verizon, etc.) and their "affiliates" if the common carrier (or affiliate) "provides video programming by any means directly to subscribers." 47 U.S.C. § 548(j); 47 C.F.R. § 76.1004.[4] To date, common carrier MVPDs have not had significant market power, nor have they been vertically integrated with programming vendors. Therefore, the Program Access rules have remained focused on cable operators and their affiliated programming vendors. The recent acquisition of DirecTV (which has interests in multiple networks) by AT&T will bring all of the former DirecTV networks under the Program Access regime.[5]

"*Satellite*" v. "*Terrestrial*" Programming: Section 548 repeatedly refers to "satellite" cable programming. These are not references to programming delivered by satellite to subscribers (e.g., DBS services such as DirecTV or DISH). Rather, the "*satellites*" at issue are those that deliver programming to cable systems, which in turn distribute the programming by various means to subscribers. The vast bulk of the programming consumers watch through their cable or other MVPD service is, thus, "*satellite*" programming. However, some programming, particularly local or regional programming such as "*regional sports networks*," is delivered to MVPDs terrestrially. As discussed below, concerns were expressed for many years about the extent to which the Program Access regime could or would apply to programming delivered through the so-called "*terrestrial loophole*." Following a series of FCC Orders in 2010 and 2012, the core Program Access provisions now apply equally to all programming regardless of how it is delivered to the MVPD system.

B. The Structure of the Program Access Regime

The purpose of the Program Access regime is to "*increase[*e] *competition and diversity*" in the market for "*multichannel video programming*" and to "spur the development" of video distribution

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technologies. 47 U.S.C. § 548(a). Congress also sought to "increase the availability" of cable and broadcast programming to rural areas. Id.

Mindful that the video programming and distribution industries were (and are) complex, and that a central purpose of the Program Access provisions was to foster changes in the both the "*upstream*" and "*downstream*" markets, Congress sketched out the Program Access regime in broad contours, leaving it to the FCC to determine how best to address Congress' concerns about the potential impact of vertical integration.

1. General Prohibition on Unfair Acts and Practices

The heart of the Program Access regime is Section 548(b). Section 548(b) is targeted at "cable operators" and their affiliated programming vendors. It broadly declares that "*unfair methods of competition*" and "*unfair or deceptive acts or practices*" by such operators and vendors are "*unlawful*" when the "*purpose or effect*" of such conduct is to "*hinder significantly*" (or actually prevent) any MVPD from providing "*satellite cable programming*" or "*satellite broadcast programming*" to subscribers or consumers. 47 U.S.C. § 548(b).

Congress did not attempt to catalogue the types of conduct that would violate Section 548(b) or even dictate standards and criteria to be used to determine whether there was a violation. Instead, it directed the FCC to promulgate regulations "to specify particular conduct that is prohibited by [Section 548(b)]." 47 U.S.C. § 548 (c)(1). Congress did, however, require that such regulations include a few, key provisions. The specific prohibitions directed by Congress in Section 548(c) are discussed below.

Before turning to the specific prohibitions, it is important to observe several overarching points about Section 548(b):

- Section 548(b) applies to all "*cable operators*." By contrast, the specific prohibitions of Section 548 (c) apply only to vertically integrated cable operators (i.e., those with an "attributable interest" in a programming vendor).[6]
- But unlike the specific prohibitions of Section 548(c) ---which are considered "*implicitly harmful*"[7] ---, an MVPD asserting a violation of Section 548(b) must prove harm. Specifically, an MVPD must prove that the challenged conduct has the actual purpose or effect of "*hinder*[ing] *significantly*" or preventing an MVPD from providing programming to consumers.
- In 2010, the FCC sought to close the so-called "*terrestrial loophole*" by interpreting Sections 248 (b) to apply to conduct that directly affected terrestrially delivered programming---such as an exclusive license for cable-affiliated, terrestrial sports programming---on the theory that such conduct might nonetheless significantly "*hinder*" an MVPD in their general business of providing satellite delivered programming to subscribers.[8]
    - In 2011, the D.C. Circuit largely upheld the FCC's interpretation of Section 548(b) as reasonable. [9] As such, conduct implicating terrestrially delivered programming is no longer exempt from the Program Access regime and may be challenged under Section 548(b).

    - However, the D.C. Circuit rejected the FCC's additional attempt to apply Section 548(c)'s specific prohibitions to terrestrially delivered programming (by deeming such conduct categorically "*unfair*" for purposes of Section 548(b)).
- Although the FCC has generally embraced a case-by-case approach to Section 548(b) complaints, there is a growing trend toward creating more formal rules and presumptions to govern the agency's analysis.
    - In 2010, the FCC (1) established a rebuttable presumption that withholding a terrestrially delivered regional sports network ("RSN") affiliated with a cable operator had the "*purpose or effect*" of "significantly hindering or preventing" the MVPD from providing programming to subscribers and (2) ruled that conduct affecting SD and HD versions of the RSN could be evaluated separately for the purpose of a Section 548(b) complaint.[10]
    - In 2012, the FCC expanded the RSN rebuttable presumption to satellite delivered RSNs affiliated with cable operators and, more generally, ruled that SD and HD versions of networks would be examined separately in assessing whether an exclusive contract between a cable operator and a cable-affiliated programmer violated Section 548(b).
    - In 2012, the FCC also proposed to adopt a series of additional rebuttable presumptions with respect to regional and national

2. Specific Prohibitions (Section 548(c)(2))

a. Undue Influence (Section 548(c)(2)(A))

To avoid the potential abuse of vertical integration within the cable industry, Congress sought to prevent a cable operator from exerting undue influence on an affiliated programmer. Again, however, Congress largely left it to the FCC to determine the method and degree of separation. Section 548(c)(2)(A) simply directs the FCC to "*establish effective safeguards*" that would prevent a cable operator from "unduly or improperly influencing" any affiliated programming vendor in deciding whether to license programming to an "*unaffiliated MVPD*," or the prices, terms, or conditions of the license. The FCC has thus far given the "*undue influence*" provisions of Section 548(c)(2)(A) only a supporting role to potentially bolster claims of alleged violations of other aspects of the Program Access regime, such as unlawful price or non-price discrimination under Section 548(c)(2)(B). [11]

b. Discrimination (Section 548(c)(2)(B))

Section 548(c)(2)(B) prohibits vertically integrated cable programmers from "*discriminating*" among MVPDs in licensing programming. However, in negotiating and setting the pricing, terms, and conditions of their agreements with MVPDs, such programmers can reasonably seek to address and account for issues such as "creditworthiness," financial stability, technical qualifications, "*actual and reasonable*" cost differences, as well as "*economies of scale*" and other "direct and legitimate economic benefits" related to an MVPD's subscribership. 47 U.S.C. § 548(c)(2)(B)(i)-(iii).

In contrast to the anti-discrimination provisions of the Program Carriage regime (to be discussed in Part Two), the Program Access rules do not require proof that the programmer discriminated in its dealings with MVPDs based on any affiliation or lack of affiliation of the MVPD. Instead, the FCC will find discrimination under Section 548(c)(2)(B) when:

1. "*the same or essentially the same programming service*;"
2. is sold or offered to "*competing*" distributors (i.e., MVPDs with overlapping local or national service areas);
3. at different prices or pursuant to different terms or conditions;"
4. even though the distributors are "*similarly situated*" such that "*the differential is not justified*" under one or more of the legitimate licensing considerations set forth in Section 548(c)(2)(B)(i)-(iii).[12]

The first three elements above establish only the existence of "*differential*" treatment. The FCC has emphasized that "differential" treatment by a cable-affiliated programmer is not necessarily unlawful "*discrimination*" for Program Access purposes. To distinguish between "*legitimate*" differential treatment and unlawful "*discrimination*," the FCC focuses on whether the competing MVPDs are "similarly situated." Id. Factors taken into account in comparing MVPDs include, for example, what "secondary services" the MVPD is willing and able to provide as consideration for the license (e.g., marketing and promotion), the particular attributes of the MVPD (e.g., history of ignoring or breaching contracts, new entrant with better quality of service), the relative "penetration" level of the MVPD, and its attractiveness to advertisers. Id.

The FCC has also emphasized the need for a judicious approach to Program Access discrimination claims to avoid restraining "legitimate business practices common to a competitive marketplace." Id. at ¶ 100. In particular, it has noted that "*legitimate*" and "*creative*" differentials in pricing and other aspects of program licensing are important to allow programming vendors to respond to and promote new technologies and business models, as well as to incentivize "widespread availability and penetration to all subscribers." Id. Accordingly, the FCC has thus far eschewed per se categories and rigid price differential standards for assessing Program Access discrimination. Id. at ¶¶ 103-04. At the same time, it has also rejected suggestions to import tests and standards from antitrust law, reasoning that the antitrust statutes and Section 548 address "similar, but not identical" concerns. Id.

The FCC has adopted a similarly flexible, case-by-case approach to claims of non-price discrimination among MVPDs. Again, the agency has sought to strike a balance between illegitimate discrimination that could threaten to undermine a robust and diverse universe of MVPDs and legitimate differentiation among actual or potential licensees. In particular, the FCC has sought to avoid allowing Program Access "discrimination" claims to be used to drag the agency into the middle of contentious contract negotiations or disputes. Thus, the agency distinguishes between "*unreasonable*" refusals to deal by a cable-affiliated programmer (e.g., offering some MVPDs a la carte carriage rights, but refusing to offer such rights to other groups of MVPDs) and situations in which a failure to license is due to (1) impasse in otherwise good faith negotiations, (2) a history of default by the MVPD with other programmers (or an extant contract dispute with the particular cable-affiliated programmer), and (3) the programmer's "preference" simply not to sell certain programming in a particular region for reasons separate and apart from the identity of the particular MVPD seeking the license. Id. at ¶ 116.

c. Exclusive Licenses (Section 548(c)(2)(D))

When Congress enacted the Program Access regime in 1992, it was particularly concerned about the potential for the development and expansion of non-cable MVPDs to be unduly hampered by a "trifecta" of (1) national and local cable dominance, (2) significant vertical integration of cable operators and important programmers, and (3) exclusive licenses between cable operators and their affiliated programmers making it impossible for non-cable MVPDs to secure competitively important programming. To address this, the 1992 Cable Act specifically prohibited exclusive programming licenses between vertically integrated programmers and cable operators in areas served by cable operators as of October 1992, unless the programmer/operator could show that the exclusive license was in the "*public interest*" under a defined set of factors. Section 548(c)(2)(D), (c)(4). However, the "*exclusive contract*" prohibition was intended to "sunset" when no longer "necessary to preserve and protect competition and diversity in the distribution of video programming." 47 U.S.C. § 548(c)(5).

After twice extending the "*exclusive contract*" prohibition, the FCC allowed it to sunset on October 5, 2012. In re Revision of the Commission's Program Access Rules, 27 FCC Rcd. 12605, 2012 WL 4802073 (FCC Oct. 5, 2012). In doing so, the FCC stated that the potential for anticompetitive conduct by vertically integrated cable programmers "*remain*[ed] *a concern*" for the agency. However, the FCC also observed that the market for multichannel video programming and distribution had changed substantially since 1992. Cable was far less dominant nationally, although some operators still served substantial portions of households in some local markets. And programmers affiliated with cable operators controlled a smaller portion of the overall programming universe (which exploded between 1992 and 2012), as well as a smaller portion of the most important cable and broadcasting networks. The FCC called it a "*mixed picture*." Id.

As discussed below, the sunset of the Section 548(c) "*exclusive contract*" prohibition does not take exclusive contracts between cable operators and their affiliated programmers outside the Program Access regime entirely. When the FCC allowed Section 548(c)(2)(D) to sunset, it specifically observed that exclusive contracts remained subject to challenge under other Program Access provisions, principally Section 548(b)'s general prohibition on "unfair" competition, practices, or acts.[13] In addition, Comcast-NBCU is effectively prohibited from exclusively licensing its networks until after 2018 because the FCC Order approving that merger in 2011 provides that any MVPD that cannot reach a programming deal with Comcast-NBCU can force the issue to arbitration in which the arbitrator's only option is to award a carriage contract either on terms put forth by the MVPD or on terms put forth by Comcast-NBCU in baseball-style, final offer arbitration.

d. Delivery to Historically Unserved Areas (Section 548(c)(2)(C))

As noted above, one of Congress's goals in passing the 1992 Cable Act was to encourage the delivery of multichannel video programming to areas that, at the time, were not served by cable operators. 47 U.S.C. § 548(a). These were principally rural areas that, it was hoped, would be served by the expansion of DBS or other distribution technologies (including new cable systems). To facilitate service to such "unserved" areas, the Program Access regime categorically prohibits all "practices, understandings, arrangements, and activities" by cable operators (or common carriers) that prevent any MVPD from obtaining programming from a vertically integrated programmer or broadcaster to the extent that the MVPD is seeking to deliver the programming to areas that were not served by a cable operator as of October 5, 1992. 47 U.S.C. § 548(c)(2)(C); 42 C.F.R. § 76.1002(c)(1).

The Section 548(c)(2)(C) per se prohibition applies only to satellite-delivered programming. And, again, the restrictions apply only to programmers or broadcasters that are vertically integrated with a cable operator (or common carrier).

The practices prohibited by Section 548(c)(2)(C) include exclusive licenses with cable operators, but, again, only to the extent that the exclusive license prevents another MVPD from licensing the programming for delivery to an historically unserved area. Id. Importantly, unlike the general prohibition on exclusive licenses provided under Section 548(d), Section 548(c)(2)(C)'s per se prohibition (i) has no "sunset" provision and continues, to this day, to apply with respect to areas that were unserved as of 1992 and (ii) has no "public interest" exception.

Likely because it is a per se prohibition and of limited application, the "unserved areas" provision of the Program Access regime has generated the least amount of litigation before the FCC. Only one reported decision addresses any alleged violation of Section 548(c)(2)(C). That decision, In re World Satellite Network, Inc. v. Tele-

Communications, Inc., et al., 14 FCC Rcd. 13242, 1999 WL 599217 (F.C.C. Aug., 11, 1999), dismissed the complaint because the Cable Services Bureau found that World Satellite Network was not an MVPD and, therefore, lacked standing to bring a Program Access claim. Id. at 13253.

C. Program Access Proceedings

The 1992 Cable Act gives MVPDs aggrieved by an alleged violation of the Program Access provisions the right to commence an "*adjudicatory proceeding*" before the FCC. 47 U.S.C. § 548(d). Only MVPDs may bring a Program Access proceeding.

The FCC is required to provide "*expedited review*" of Program Access complaints. 47 U.S.C. § 548(f)(1). While some of the more complex proceedings have been lengthy, most Program Access complaints have been resolved in relatively short order (months) based on written submissions and discovery. Current FCC rules provide a relatively short "pleading cycle," followed by the opportunity for discovery, and written submissions. In complaints alleging denial of programming, the FCC requires the Media Bureau to issue its decision (reviewable by the full Commission) within six months of filing of the complaint. 47 C.F.R. § 76.1003(m).

If the Program Access complaint concerns renewal of an existing carriage agreement, the MVPD may seek a "*temporary standstill*" when it files its complaint. The request for a temporary standstill must be made before the contract expires. As a practical matter, it is incumbent on the MVPD to make the request far enough in advance of the end of the contract to allow the programmer to respond and the Commission (or, more likely, Media Bureau) to rule. The standards for a temporary standstill are essentially identical to those for a TRO. 47 C.F.R. § 76.1003(l).[14]

Although it has not been without its critics, the relatively expeditious Program Access proceedings stand in stark contrast to Program Carriage proceedings, which often mirror full-scale antitrust proceedings or complex commercial arbitrations in length, discovery, the use of live testimony, intensity of staffing, etc. The nature, cost, and length of the different proceedings may also account, in part, for the fact that dozens of Program Access complaints have been filed since 1992, while there have been only fifteen or so Program Carriage proceedings in the same period.

The Commission is empowered to award an "*appropriate remedy*," including an award establishing the "*prices, terms, and conditions of sale*" of programming to the aggrieved MVPD. 47 U.S.C. § 548 (e)(1).

D. Key Program Access Issues

1. Definition of MVPD

One of the most (if not the most) significant changes in the video programming industry is the rapid development and deployment of new distribution technologies, platforms, and business models. If DBS and wireline distribution were the first and second waves that gradually eroded the market share of cable providers since 1992, internet-based distribution is a potential tsunami. Moreover, at least one FCC Commissioner has observed that the Program Access regime played a material role in the rise of non-cable distribution through the 1990's and early 2000's. Statement of Commissioner Copps re: In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992, 2007 WL 2668539, at *3 (Sept. 11, 2007) ("[i]t is no exaggeration to say that without these rules, the DBS industry as we know it would not exist."). The most significant question for the Program Access regime now is whether its protections will extend to the incoming wave of internet-based distribution.

The FCC first grappled with this issue in a 2010 Program Access complaint filed by Sky Angel. In response to a temporary standstill petition from Sky Angel, the Media Bureau found that Sky Angel could not show a likelihood of success on its complaint because only MVPDs can obtain Program Access relief and Sky Angel did not meet the definition of MVPD. Sky Angel U.S., LLC, Order, 25 FCC Rcd. 3879, 3882, 2010 WL 1622432 (FCC Apr. 21, 2010). The Media Bureau reasoned that the definition of MVPD required the operator to make multiple "channels" of video programming available to its subscribers and that a "channel" for purposes of the MVPD definition referred not just to streams of content, but to the provision of the actual transmission path. Id. at 3883 and n. 40. Based on the record before it, the Media Bureau found that Sky Angel merely provided multiple streams of programming, but it was "the subscriber's Internet service provider" that provided the actual "transmission path" to bring the streams to the subscriber. Id.

Following its denial of Sky Angel's petition, the Media Bureau solicited comments on how to interpret MVPD and "channel" for purposes of Program Access proceedings. 27 FCC Rcd. 3079, 2012 WL 1095923 (FCC May 30, 2012). More than two years later, in late 2014, the FCC issued a Notice of Proposed Rulemaking on the definition of MVPD more generally. In re Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services, Notice of Proposed Rulemaking, 29 FCC Rcd. 15995, 2014 WL 7331852 (Dec. 19, 2014). The FCC tentatively concluded that, for purposes of Program Access and other MVPD benefits and obligations, the definition of MVPD (1) includes "internet-based distributors" that make available "continuous, linear streams of video programming" on a "subscription basis" and (2) applies regardless of whether the distributor also provides the "transmission path" itself for delivery of the streaming video. Id. at ¶ 18.

As the FCC recognized, interpreting the Program Access rules to apply to internet-based, linear video subscription services raises a host of issues, including:

- Whether cable-affiliated programmers would be forced to negotiate programming licenses with large number of new, internet MVPDS;
- Whether extending Program Access to internet MVPDs would impact the value of the cable-affiliated programming (e.g., Bravo) licensed to other MVPDs, as well as the value of cable-affiliated programming in comparison to non-cable-affiliated programming (e.g., Game Show Network);
- Whether granting internet MVPDs Program Access rights would provide an unwarranted competitive advantage over incumbent MVPDs with different cost structures and commitments or, conversely, whether excluding internet MVPDs from the Program Access regime would grant traditional cable, DBS, and wireline MVPDs an undue advantage and stall innovation; and
- Can cable-affiliated programmers sufficiently protect the security of their programming for transmission over the internet without undue risk of Program Access complaints claiming violations of Sections 548(b) and (c)(2)(B)?

2. Proof of Harm

The FCC has shed surprisingly little light on the what is required to prove that "*unfair*" conduct under Section 548(b) has the "*purpose or effect*" to "hinder significantly" the ability of a complaining MVPD to provide video programming to customers. For many years, Section 548(b) largely played only a supporting role. Since 2010, however, the agency has moved Section 548(b) out front and center in the Program Access regime. And, if internet-based distributors are brought under the Program Access umbrella, the reliance on Section 548(b) is only likely to increase further.

The agency has explained only that the evidence needed to prove this element of a Section 548(b) claim "will vary based on the facts and circumstances of each case and that the appropriate facts and analysis may depend on whether the MVPD is a new entrant (more vulnerable to be "*hindered*," but potentially harder to prove what would happen in the but-for world) or an "*established competitor*", as well as whether the specific programming at issue is new (harder to prove value and potential impact on MVPDs and potentially more likely to justify at least short-term exclusive contracts) or old. In re Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements, 25 FCC Rcd. 746, 2010 WL 236800 (FCC Jan. 20, 2010). It also has suggested that the potential for conduct to "hinder" an MVPD may be show thru regression analyses showing how the MVPD's market share would improve with the programming or, conversely, surveys estimating the likelihood that customers either would not subscribe to or would switch away from an MVPD that did not carry the programming at issue. In re Matter of Revision of the Commission's Program Access Rules, 27 FCC Rcd. 12605, 12642, 2012 WL 4802073 (FCC Oct. 5, 2012).

On its face and in context, "*hinder significantly*" cannot require proof, for example, that an MVPD will go out of business (in the relevant locale or completely). Conduct that takes an MVPD out altogether "*prevents*" delivery of programming. But Section 548 (b) allows an MVPD to proceed under Section 548(b) if the conduct would either "*prevent*" or "hinder significantly" deliver of programming, so "hinder significantly" must mean something less than drive an MVPD out of business.

On the flip side, how low is the threshold to prove significant hindrance? For a new MVPD entrant, is it enough that the conduct makes it somewhat more difficult to secure subscribers or must the complaining party in that case prove or must it show that the conduct is closer to a barrier to entry? For new entrants or established competitors, should the FCC consider how the conduct may impact the relative margins of the complaining MVPD and its competitors? What is the import of whether the programming at issue is "r*eplicable*" and what makes non-sports programing "*replicable*"? How is significant hindrance assessed in cases that do not involve withholding or denial of programming?

3. What Is "Unfair"?

In the early years of Program Access, the specific prohibitions of Section 548(c) loomed larger. Now Section 548(b)'s general prohibition on "*unfair*" conduct takes center stage. As the industry transforms, we can expect to see greater resort to Section 548(c) proceedings. A critical question will be what are the limits of what is "*unfair*"?

Some edges have been staked out. Past decisions have held that conduct "*permitted*" by other sections of the Communications Act or the Commission's rules "*cannot, without more, form the basis of a claim of unfair competition*."[15] Nor can Section 548(b) be used to circumvent or interfere with "non-frivolous" contract disputes.[16]

The decisions also have resisted allowing Section 548(b) to expand into an FCC version of Section 5 of the FTC Act. For example, in In re Am. Cable Co., *supra*, the Cable Services Bureau rejected a challenge by one cable company to three-year, discounted plans offered by a competitor. The Bureau found that the complaining party had not shown a sufficient "nexus" between the challenged conduct and the ability of the complaining party to distribute satellite cable programming and that challenges to "rate" issues were governed by a separate provision of the Communications Act (Section 623(d)). But, to justify expanding Section 548(b) to eliminate the "*terrestrial loophole*," the FCC seemed to lower the threshold to allow a relatively attenuated "*nexus*" to invoke Section 548(b). Thus, the coming years may see a series of new and creative Section 548(b) theories further and further afield from actual interference with program access.

A potential harbinger of a new, "*creative*" approach to Section 548 (b) was seen in DISH's 2010 program access complaint.[17] DISH claimed that MSG insisted on negotiating for carriage only of a "*tied*" set of channels. DISH alleged that the "*tying*" was an unfair practice that violated Section 548(b). Tying, of course, can constitute an antitrust violation. (Notably, Cablevision (which had been named as a respondent in DISH's complaint) later sued Viacom in federal court, successfully alleging a claim that Viacom unlawfully "tied" it's more popular channels to carriage of its less popular "suite" networks.[18]) By invoking Section 548(b), DISH may have sought to avoid the burdens of proving the technical requirements under the antitrust laws of separate products, relevant markets, and market power. The FCC also suggested, in 2007, that it might promulgate rules prohibiting program "tying" arrangements under its delegated authority to implement Section 548(b).[19]

Whether and how "*tying*" of networks is actionable under Section 548(b) remains unclear. DISH and MSG settled their dispute[20] and the FCC did not engage in further rulemaking after soliciting comments on Section 548(b) "*tying*" claims. As MVPDs seek ways either to "*slim*" their bundles or price compete with new entrants, they may increasingly seek to claim that programmers are engaged in unfair "*tying*" practices. Conversely, new entrants may seek to invoke similar antitrust-ish theories to use Section 628(b) to attack Most Favored Nation provisions on the notion that the MFNs effectively prevent new entrants from gaining access to programming (because the programmer is unable or unwilling to incur the MFN "cost" to provide programming to the new entrant at a competitive price). A critical, and as yet unanswered, question is the extent to which the Program Access rules can go beyond the antitrust laws to restrain distributor conduct, but without violating the First Amendment under intermediate scrutiny. Indeed, the continued vitality of the Program Access regime largely turns on whether it allows the FCC to regulate from an antitrust "*light*" basis---an issue that has been, and will likely continue to be, hotly debated as the industry evolves.[21]

Endnotes

[1] Cablevision Sys. Corp. v. FCC, 597 F.3d 1306, 1308 (D.C. Cir. 2010)

[2] Id. (citing Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Services, 5 FCC Rcd. 4962, 5006-08 (1990)).

[3] Pub.L. No. 102-385, 106 Stat. 1460.

[4] Certain aspects of the Program Access regime also apply to "Satellite Broadcast Programming Vendors" regardless of whether they are affiliated with a cable operator or common carrier. E.g., 47 U.S.C. § 548(b).

[5] The FCC had confirmed that the Program Access rules will apply to the former DirecTV channels now acquired by AT&T. In re Applications of AT&T and DirecTV For Consent to Assign or Transfer

Control of Licenses and Authorizations, 30 FCC Rcd. 9131,9194-95, 2015 WL 4556648 (FCC July 28, 2015).

[6] An interest of at least 5% is the principle determinant for whether a cable operator has an "attributable interest" in a programming vendor. 47 C.F.R. § 76.1000(b).

[7] 1993 Program Access Order, 8 F.C.C. Rcd. 3359 at ¶¶ 47-48.

[8] In re Review of the Commission's Program Access Rules and Examination of Program Tying Arrangements, 25 FCC Rcd. 746, 2010 WL 236800 (FCC Jan. 20, 2010).

[9] Cablevision Sys. Corp. v. FCC, 649 F.3d 695 (D.C. Cir. 2011).

[10] In re Review of the Commission's Program Access Rules and Examination of Program Tying Arrangements, 25 FCC Rcd. 746, 2010 WL 236800 (FCC Jan. 20, 2010). The rebuttable presumptions were upheld as reasonable by the D.C. Circuit. Cablevision, 649 F.3d 695, 716-18.

[11] In re Implementation of Sections 12 & 19 of the Cable Television Consumer Prot. & Competition Act of 1992 Dev. of Competition & Diversity in Video Programming Distribution & Carriage, 8 F.C.C. Rcd. 3359, ¶ 145 (FCC Apr. 30, 1993) ("1993 Program Access Order").

[12] 1993 Program Access Order, 8 F.C.C. Rcd. 3359, ¶¶ 95-96.

[13] Importantly, however, the FCC did not appear to overrule a 1999 decision by the Cable Services Bureau that held that, absent vertical integration, the mere fact of an exclusive contract is not "unfair" for purposes of Section 548(b. In re Dakota Telecom, Inc. v. CBS Broadcasting, Inc., 14 FCC Rcd. 10500, 1999 WL 440407 (FCC July 1, 1999).

[14] A similar "temporary standstill" provision was promulgated under the Program Carriage regime in 2011, but vacated by the Second Circuit in 2013 for failure of the FCC to comply with the "notice and comment" requirements for rulemaking under the APA. Time Warner Cable Inc. v. FCC, 729 F.3d 137 (2d Cir. 2013). The FCC has not reinstituted a Program Carriage standstill provision.

[15] In re Am. Cable Co. and Jay Copeland, 11 FCC Rcd. 10090, 1996 WL 490244 (FCC Aug. 29, 1996). Accord In re Dakota Telecom, Inc., 14 FCC Rcd.10500, 1999 WL 440407 (FCC July 1, 1999) ("Section [548(b)] cannot be converted into a tool that, on a *per se* basis, precludes cable operators form exercising competitive choices that Congress deemed legitimate.")

[16] In re Echostar Comms. v. Speedvision Network, LLC, 14 FCC Rcd. 9327, 1999 WL 381800 (FCC June 14, 1999).

[17] See In re DISH Network, LLC v. Madison Square Garden, Inc., 26 FCC Rcd. 6729, 2011 WL1749141 (FCC May 6, 2011).

[18] Cablevision v. Viacom, 2014 WL 2805256 (S.D.N.Y. June 20, 2014).

[19] In re Implementation of the Cable Television Protection and Competition Act of 1992: Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements, 22 FCC Rcd. 17791, 2007 WL 2846428 (FCC Oct. 1, 2007), Appendix F, ¶6.

[20] 27 FCC Rcd. 13413 (F.C.C.), 27 F.C.C.R. 13413, 2012 WL 5361484 (Oct. 26, 2012)

[21] Compare In re Verizon Tel. Cos. v. Madison Square Garden, L.P., 26 FCC Rcd. 13145, para. 45 (Media Bureau Sept. 22 2011) ("Congress specifically adopted the program access regime, including Section 628(b), as a new remedy separate and apart from antitrust enforcement" and "that antitrust and program access laws address similar but not identical concerns.") and Cablevision Sys. Corp. v. FCC, 597 F.3d 1306, 1325 (D.C. Cir. 2010) Kavanaugh, J., dissenting (extension of ban on exclusive contracts violated First Amendment to the extent that concerns about exclusive contracts were inconsistent with antitrust laws).