

AEREO deserves a lot of credit for their effort. It was a long and expensive shot to do what they went for. But they went for it. And they attempted to pivot after their SCOTUS loss. I was watching with interest, because it is something we had examined 15 years ago at Broadcast.com

The technology has obviously gotten better on all sides of the equation, but sometimes a good idea is a good idea. Even if it is hard to make work. This is from January of 2000. What is fascinating is the alliances and attempts that were being made or considered. We also did the same kind of work to determine if we could set up antennas and a server for individual users and see if that was legal

**Below it you will find a doc from 1999 where we tried to do the same thing in a different way a few months earlier.**

It's not Supreme Court worthy, but it was interesting. Everything old is always new again in tech

**McDermott, Will & Emery**

Washington, D.C.

**memorandum**

**January 4, 2000**

This memorandum analyzes whether, under recently-adopted amendments to the Copyright Act, Yahoo! broadcast could form a business alliance with a satellite carrier in order to deliver broadcast television signals under the satellite carrier's statutory license.

Based on changes enacted to the Satellite Home Viewer Act ("SHVA") this year, we believe that Yahoo! broadcast would have a strong argument that it is entitled to enter into a contract as a "distributor" of satellite transmissions of local broadcast signals under Section 122, and thereby benefit from that carrier's statutory license to carry local broadcast signals. However:

This interpretation would rely on attaching a new meaning to the functional understanding of "distributor" under prior provisions from which the present language was, with significant changes, derived;

It will be necessary to negotiate such an agreement with a satellite carrier rather than demand one as a matter of right;

Reliance on this path could be read by some as weakening the case for Service Providers claiming, under present law, a direct statutory license under Section 111, or for achieving a change in the law to that end;

This interpretation would cover redistribution of local signals, but would not extend to signals of "superstations," as to which more direct negotiations would still be necessary; and

Great care would have to be taken to comply with limitations as to which subscribers are entitled to receive such "local" signals, and apportioning potential liability for errors may be a difficult issue to negotiate with a satellite carrier.

Insofar as we are aware, the possible avenue outlined below is novel and has not been publicly discussed, so might be considered "aggressive." It would not, however (provided that the satellite carrier is comfortable with our interpretation), require any prior FCC authorization. It would also be necessary to think through the reactions of other market participants, including those who may not welcome competition arising by an unexpected means.

## **Distributors and Copyright Law**

Federal copyright law, as now amended, has two statutory provisions that govern television broadcast signal delivery by satellite carriers: Sections 119 and 122. Section 119, which was enacted in 1988 to keep pace with consumer usage of large "C-Band" satellite dishes, allows satellite carriers to retransmit distant broadcast signals to subscribers that cannot receive local broadcast signals using antennas. In those days, the "satellite" operator was, essentially, a wholesale distributor of signals to cable system operator earth stations, using the "C-Band." Copyright issues arose when C-Band earth station equipment became cheap enough that individual consumers were able to buy them and, without authorization, receive signals that were meant for distribution by or to cable operators.

Signal distributors (e.g., HBO) were paid by cable distributors and did not want to furnish the same service free to unauthorized consumers. Hence, they began scrambling their "feed." Consumer complaints (and concerns about the imminent or successful "hack" of Digicypher encryption) compelled Congress in 1988 to step in and provide for an authorized "retail" window for satellite signal reception through the original version of SHVA. With respect to superstation and network broadcast signals, a statutory copyright license was established in Section 119 for the satellite carrier to provide such signals directly to retail "subscribers," or through a "distributor." **The concept of a "distributor" at this time, however, was *not* meant to imply further carriage of the signal after it reached a dish and receiver ("earth station").** Rather, a "distributor" was someone – typically an earth station retailer or a local cable operator – who would perform the task of "marketing" and "packaging" the service to a subscriber, including arranging for the authorizations for the right and ability to descramble the signal. (Cable operators entered this business because, at the time, the reach of their own wired cable systems was still limited, and the "satellite" operator was also in the cable business rather than, as today, a direct competitor. So the cable operator/"distributor" would provide the "subscriber" with an earth station and signal package, much as a DirecTV retailer does today.)

The limitation of a "distributor" to a marketing/packaging function was enforced through a series of nested definitions. Section 119 defines a "distributor" as:

[A]n entity which contracts to distribute secondary transmissions from a satellite carrier and, either as a single channel or in a package with other programming, provides the secondary transmission either directly to individual subscribers **for private home viewing** or indirectly through other program distribution entities.

"Private home viewing" means "the viewing, for private use **in a household by means of satellite reception equipment** which is operated by an individual in that household and which serves only such household, of a secondary transmission delivered by the satellite carrier...." Similarly, the definition of "subscriber" contained the "private home viewing" (through satellite reception equipment) limitation. Thus, it made no sense to consider as a "distributor" anyone who carried

the signal from a satellite earth station to the subscriber, because the subscriber himself must use a satellite earth station in the household to receive the signal. Subsequent FCC proceedings explicitly confirmed this interpretation.

This year's SHVA bill did not repeal Section 119. It did, however, add a Section 122, governing the statutory license for "local into local" transmissions of broadcast signals. While it carried forward and borrowed the definition of "distributor," it **omitted** the words "for private home viewing" from the definitions of "distributor" and "subscriber" and eliminated the defined term – and, along with it, the "household" and "by means of satellite reception equipment" limitation. Arguably (but not explicitly), these omissions were made out of recognition that, in a world in which the satellite operators are already retail operations, a "distributor" may include someone who further extends the reach of the service by further carriage of the signal, rather than an entity that simply markets and packages the means of reception, as retail "distributors" now do. But it may also be argued that the changes were made simply to allow operators such as DirecTV, and its present retail "distributors" (e.g., Circuit City), to serve the business market and well as "households."

The legislative history of the SHVA debate suggests that, in fact, the deletion of the "private home viewing" limitation was sought by EchoStar (and possibly DirecTV) to do away with **both** the "private household" **and** the redistribution limitations in prior law. The testimony of Charles Ergen before the House Commerce Committee in 1998 directly addresses this point:

H.R. 3210 ... authorizes satellite delivery of broadcast signals for private home viewing only. Satellite providers should already have the right, just as cable does, to offer their service to Multiple Dwelling Units and commercial establishments offering some true choice to the millions of MDU subscribers. As the law stands today, EchoStar could not be here in this hearing room demonstrating its product because we're restricted to home viewing.

The reference to Multiple Dwelling Units clearly implies that the signal would be *redistributed* by further technical means rather than merely packaged and authorized for sale.

In Section 122, the definition of "distributor" reads:

The term 'distributor' means an entity which contracts to distribute secondary transmissions from a satellite carrier and, either as a single channel or in a package with other programming, provides the secondary transmission either directly to individual subscribers or indirectly through other program distribution entities.

Thus, according to the argument made above, the absence of the term and associated definition of "private home viewing" and the phrase "satellite reception equipment" in Section 122 expands, to include physical redistribution of the signal, the scope of business arrangements that satellite carriers may pursue in order to gain distribution of local broadcast signals to subscribers. If such is the case, there is no apparent reason why delivery via the Internet is not such a means, provided that the "distributor" is able to comply with the local geographic and record-keeping requirements of this provision.

#### ***Elaboration of the Argument that Section 122 Allows Redistribution of Local Broadcast Signals***

A strict reading of the express language of Section 122 leads to the conclusion that satellite carriers can deliver local broadcast signals to residential or business locations. This conclusion is supported by a simple comparison of Sections 119 and 122. The statute also supports an argument that service can be delivered via means other than traditional satellite reception equipment because Congress eliminated this language from Section 122 but left it in Section 119. Taking these two modifications together, it would appear as though Congress intended to give satellite carriers more flexibility in how they deliver local programming to their customers. This conclusion is supported by the legislative history.

In enacting Section 122, Congress said it wanted to create parity between services available from satellite versus cable system operators. Congress thus gave satellite carriers the same right as cable systems to deliver local broadcast signals to business and residential subscribers located in the station's local market.

Unfortunately, in the report accompanying the new statute, Congress was silent on why it removed the reference to "satellite reception equipment." One possible conclusion, and the one on which our proposal depends, is that by eliminating the requirement that subscribers use satellite reception equipment, Congress moved away from a model where the satellite carrier controlled the signal delivery network to a model where some of the physical delivery network is controlled by distributors. This is a departure from the distributor approach historically implemented under Section 119 and Yahoo! broadcast must be prepared to defend why this interpretation of Section 122 is correct.

Besides relying on the fact that Congress used different language in Section 119 and 122, an argument can be made that giving satellite carriers and distributors more flexibility makes sense when considered **in light of Congress' goal of allowing satellite carriers to serve the same subscribers historically served by entities operating under the cable statutory license**. Satellite carriers have only been able to penetrate the market for residential subscribers that have access to the open space needed to place a satellite dish (e.g., single-family homes and multi-tenant buildings where the resident has access to balconies, gardens, etc.). However, many potential subscribers lack this kind of access, especially in multi-tenant buildings. In these circumstances, satellite service cannot be a viable alternative to cable service because subscribers lack the right or ability to place traditional receiving equipment in areas that they do not own or control.

This problem is even more pronounced in the business context because of the size and design of many multi-tenant office buildings. For example, it is unlikely that occupants of the World Trade Center or Sears Tower could place individual earth station antennas out every office window in order to have access to satellite-delivered programming. Instead, the occupants are more likely to be relegated to receiving services from entities covered by Section 111 (e.g., cable, multipoint distribution or satellite master antenna service providers).

It could be argued that Section 122 eliminates a critical barrier to satellite carrier penetration of the residential and business markets by removing an unnecessary technological limitation in the way subscribers receive the satellite carrier's service. Congress gave satellite carriers the flexibility to deliver their services to subscribers using a variety of technological solutions. Service delivery via the Internet provides an ideal solution in any multi-tenant circumstance because the service can be carried over existing telephone wires without the need for a satellite dish.

While the above approach appears consistent with the express language and legislative history of Section 122, Yahoo! broadcast would still likely face regulatory obstacles and competitive opposition to this interpretation.

Because Section 122 is a new provision, both the Federal Communications Commission and U.S. Copyright Office will likely exercise their respective jurisdiction over satellite delivery of broadcast signals and initiate rulemaking proceedings to implement the legislation. It is possible that comment could be sought on the role distributors can play in delivering local broadcast signals and whether any limitations should be placed on the type of equipment subscribers can use to

receive such services. If these issues arise, Yahoo! broadcast would be given an opportunity to present its position. However, the FCC or Copyright Office could adopt a different viewpoint that would have to be challenged in court.

### ***Distant Signals***

The above analysis only applies to the distribution of local signals under Section 122. Although Section 119 provides satellite carriers with a statutory license to deliver distant network and superstation signals, it also includes the language noted above that limits delivery of such signals only to subscribers using satellite reception equipment for "private home viewing." Consequently, if Yahoo! broadcast wants to deliver distant signals, it has two choices. It can deliver distant broadcast and superstation signals under negotiated agreements or it can strive to be considered an entity covered by the statutory license in Section 111 of the Copyright law.

### **Alliance Structure**

Since the distributorship arrangement between a satellite carrier and Internet Service Provider is untested, we believe that both parties will have some flexibility over how the arrangement is crafted. The most likely satellite partners are EchoStar and DirecTV.

Because the arrangement must be negotiated, there are two inter-related benefits that Yahoo! broadcast could present to try to entice DirecTV or EchoStar into discussing a distributor relationship with Yahoo! broadcast. The satellite companies have publicly shared their interest in serving a broad subscriber base and would like to enter the market quickly. In order to do this, they must be able to gain physical access to potential subscribers. Access is not a problem when the subscriber owns the property where the satellite dish will be placed. However, where the subscriber leases space from a third party, the property owner has the ability to control whether the subscriber can receive satellite service by controlling access to the physical space needed to place the antenna. This means that the satellite carrier must negotiate with two parties: the subscriber and the building owner. Yahoo! broadcast can eliminate the third party because delivery via the Internet will not require the subscriber to use a dish.

Furthermore, Yahoo! broadcast offers a turn-key solution that can be implemented immediately in most environments. The satellite carrier or Yahoo! broadcast could market service to individual building occupants and then deliver service via existing infrastructure: the telephone lines and computers already in use by the new subscriber. The delay associated with landlord approval is eliminated and installation would be minimal when compared to the alternative of placing a satellite dish on the building and then running wires to televisions in individual offices.

If the satellite carriers are truly interested in improving their market penetration and competing with cable, Yahoo! broadcast's ability to make service available quickly to subscribers in multi-tenant buildings presents an timely solution.

We have contacts with DirecTV and EchoStar, either directly or with some of their key business partners. If you are interested, we would be happy to try to determine if either company might be interested in exploring business opportunities with Yahoo! broadcast.

Once Yahoo! broadcast identifies an interested satellite partner, matters that would likely need to be addressed in a distributor agreement include:

**Geographic Scope:** Because the service arrangement between the satellite carrier and Yahoo! broadcast will be based on Section 122, the agreement would have to address measures both parties will take to ensure that service is not delivered to subscribers outside the local broadcast station's market. This may include addressing a subscriber's ability to store and forward broadcast signals outside the local market.

**Subscription Service:** Section 122 requires that the satellite carrier charge a fee for the service. The charge can be assessed directly on the subscriber or indirectly through the distributor. . Yahoo! broadcast and the satellite carrier would have to reach some agreement on the fee arrangement. One possible scenario would be for the satellite carrier to charge some portion of the typical monthly satellite fee for a subset of the programming; e.g., to offer the service for \$x.95 per month to the in-office market, concentrating on free local programming plus government, business and technology channels (such as C-Span, Bloomberg and ZDTV).

**Content Access:** The agreement must address the specific content that the satellite carrier will deliver to Yahoo! broadcast and how such content will be delivered to subscribers. For example, will Yahoo! broadcast be given rights to deliver all content carried by the satellite carrier? Do existing retransmission consent or other content agreements limit the satellite carrier's ability to allow a third party such as Yahoo! broadcast to deliver signals to subscribers? Can such agreements be renegotiated?

**Exclusivity:** Unlike Section 119, Section 122 does not include a provision that explicitly prevents a satellite carrier from discriminating between distributors. Consequently, it could be argued that Yahoo! broadcast and the satellite carrier can negotiate an agreement that gives the parties exclusive rights. However, such terms could heighten any opposition to the arrangement, especially by competitors. Yahoo! broadcast must consider whether it is better served by an agreement with exclusive terms or by an arrangement that others could also pursue. The latter approach might convert some of the potential opposition into supporters.

**FCC Compliance:** Satellite carriers operating under Section 122 will be subject to FCC rules that have not yet been adopted. For example, these carriers will be required to comply with certain mandatory carriage rules. They could also be subject to customer service requirements, advertising limitations and other public interest requirements historically imposed on cable systems. As the regulatory framework is developed, Yahoo! broadcast and the satellite carrier may have to adapt the business relationship to ensure that neither party is engaged in activities that would violate the new regulations.

**Liability and Indemnification:** Yahoo! broadcast will have to determine the extent to which it is willing to assume responsibility for actions that may lead to regulatory violations, copyright infringement, breach of contract or other legal problems for the satellite carrier. For example, how will Yahoo! broadcast and the satellite carrier allocate responsibility for determining whether a subscriber is in a local market?

This list is intended to flag subjects that should be addressed in any agreement between a satellite carrier and Yahoo! broadcast and are in addition to the traditional provisions included in any joint venture agreement. Once we have a better idea of the type of arrangement Yahoo! broadcast would like to pursue, we can more fully develop this list.

### **Other Internet Alliances**

Finally, you asked us whether any satellite carrier has already entered into an agreement with an Internet Service Provider that is akin to the one under consideration by Yahoo! broadcast. At this point, we have not found any information that suggests that either EchoStar or DirecTV have entered into or are negotiating agreements to allow any Internet Service Provider to deliver local broadcast signals. Thus, Yahoo! broadcast appears to have some time to consider its options. Nonetheless, new partnerships are announced daily so it is possible that other companies are considering similar options and timely action is still important.

While we did not find information on anything on a distributor arrangement, we have included a short discussion on some of the other alliances that Internet companies have formed with satellite companies.

**AOL/DirecTV:** Earlier this year, AOL and DirecTV announced that they would be working together to introduce two new service arrangements. The first involves developing a new set-top box to allow DirecTV subscribers to access AOL Internet services via their televisions. This is akin to the service currently available through WebTV. The second project takes advantage of DirecTV's satellite downlink capacity to allow AOL to deliver Internet content to subscribers at higher speeds.

Neither of these arrangements appears to involve television broadcast signal delivery to computers via the Internet from DirecTV to AOL subscribers. However, because we have been unable to secure copies of the agreement between AOL and DirecTV, we cannot say whether their relationship could be expanded under the existing agreement to include a service comparable to that being contemplated by Yahoo! broadcast. In addition, we do not know whether DirecTV's relationship with AOL would prevent or militate against entering into a joint venture with Yahoo! broadcast.

**WebTV/EchoStar:** WebTV and EchoStar have developed the DishPlayer, which gives subscribers interactive TV viewing, e-mail and e-commerce capability. As is the case with the AOL/DirecTV project, the focus is on bringing internet-related services to the subscriber via the television. We did not locate any information that suggests that EchoStar will deliver broadcast programming via the Internet to computers.

The trade press reports that this joint venture is non-exclusive, with both companies retaining revenue generated from their core service offerings (*i.e.*, EchoStar keeps the video revenues while WebTV retains internet revenues).

**iBeam Broadcasting:** Of all the companies we researched, iBeam appears to have adopted a distribution plan that is most similar to what Yahoo! broadcast is considering. iBeam is a streaming media company that delivers video and audio programming over the Internet using a combination of satellite and terrestrial communications connections. The primary distinction is that iBeam is not securing content from its satellite carrier. Instead, it uses satellites to moving third party content to information hubs that then serve as content access and distribution points for iBeam subscribers. However, the fact that iBeam has constructed a network based on satellite technology may make it easier for the company to adopt Yahoo! broadcast's approach were iBeam to learn of it.

iBeam has content distribution rights granted through negotiated agreements with Bloomberg, snap.com, ZDTV, Entertainment Boulevard and others. The company recently announced a business relationship with Sony America. The trade press is speculating that this relationship will give iBeam access to Sony's music and movie libraries, and possibly games.

**Geocast Network Systems:** Unlike Internet-based arrangements, Geocast uses excess capacity in digital television broadcast spectrum to deliver video and audio content via receivers connected to subscriber PCs. In addition to developing its own content, Geocast will deliver traditional and customized broadcast content, as well as interactive services. Subscribers continue to use their own Internet Service Provider for e-mail, web access and transactions over the Geocast service.

The trade press is reporting that Geocast has entered into agreements with Hearst-Argyle and A. H. Belo television that allows Geocast to carry their stations' content as well as using their spectrum. The company is also in discussions with CBS.

If you are interested in additional information on any of these companies, we would be happy to provide you with copies of our research materials.

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We will continue to explore additional options that may interest Yahoo! broadcast. In the meantime, if you have any questions about the content of this letter, please let us know.

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***This is from 1999***

**McDermott, Will & Emery**

Washington, D.C.

**memorandum**

We wanted to provide you with our initial response to your questions about ways in which broadcast.com could secure authority to provide television broadcast programming over the Internet. While we have assessed some of these options on your behalf in the past, the law has continued to evolve in ways that may help broadcast.com.

We wrote to you previously about the possibility of broadcast.com becoming a cable system or open video system ("OVS") operator to deliver television broadcast programming via the Internet. These options were attractive because of federal copyright and communications laws that give such entities certain rights to deliver television broadcast signals to subscribers. However, at the time, we also voiced uncertainty about how the rules might apply to Internet-based delivery methods and concern over the regulatory burdens associated with each option. While some of the same issues still exist, we wanted to revisit these possibilities with an eye towards finding a way of allowing broadcast.com to expand its service offerings.

In addition to updating our past assessment, we also want to discuss an option stemming from the *Satellite Home Viewer Improvement Act of 1999* that was signed into law last week.

### **Broadcast.com's Proposed Service Offering**

For purposes of this letter, we are relying on several assumptions about broadcast.com's capabilities and its proposed service offering:

Broadcast.com would deliver television broadcast programming on a subscription basis.

The service would not be available on a dial-up basis and would only be available at speeds of 300 Kbps or greater.

Subscribers would pay a fee for the service. The fee would be paid with a credit card that has a billing address that corresponds to the subscriber's access location.

As a result of the first three assumptions, broadcast.com would have the ability to identify a subscriber's physical location in a large majority of cases.

Broadcast.com would only provide service to subscribers in locations that correspond to any geographic limits imposed by the applicable copyright and FCC regulations.

Broadcast.com would implement procedures to disconnect service for any subscriber whose location cannot be verified as being within the geographic area required by the applicable rules.

### **Business Options**

Based on our review of the FCC's rules, there are currently three ways that broadcast.com can gain permission to deliver television broadcast signals via its own Internet service. First, broadcast.com can negotiate directly with television broadcast stations and networks for the right to deliver signals. Second, broadcast.com can become one of the entities allowed under federal copyright laws to transmit television broadcast signals pursuant to a statutory license. However, broadcast.com would still have to comply with retransmission consent or must-carry obligations under federal communications laws. Third, broadcast.com can form business alliances with third parties that would allow the company to deliver television broadcast signals under the authority of the third party. As the first option described above is well known to broadcast.com, this letter will focus on the issues associated with the second and third options.

Finally, when revising the *Satellite Home Viewer Improvement Act of 1999* to remove language on the delivery of television programs over the Internet, several Senators said they intend to hold hearings on this subject early next year. These hearings could present an opportunity to seek new legislation that would give broadcast.com authority to deliver television broadcast signals via its Internet system. We will put together some alternative legislative options in a future memorandum.

### **Option 2: Seek Classification as a Covered Service Provider**

#### **Summary of Recommendation**

Broadcast.com should assess whether it can become an OVS operator by:

Confirming that its system configuration conforms to the definition of an open video system.

Identifying target service communities based on broadcaster's must-carry elections and state or local franchise laws.

#### **Discussion**

In order to deliver television broadcast services, broadcast.com must ensure that its service offerings are authorized under both federal copyright and communications laws. Federal copyright law gives cable, OVS and satellite entities a statutory license to deliver television broadcast signals to their subscribers. Broadcast.com could take advantage of this authority if its proposed service could be classified as either cable or OVS service.

#### **System Classification**

Broadcast.com must first determine if its system configuration fits the definition of a cable or open video system.

The FCC's rules define a cable system as: "A facility consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include: (1) A facility that serves only to retransmit the television signals of one or more television broadcast stations; (2) A facility that serves subscribers without using any public right-of-way; (3) A facility of a common carrier ... except that such facility shall be considered a cable system to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services; (4) A qualified open video system; or (5) Any facilities of any electric utility used solely for operating its utility systems." This definition is based on Congress' express statutory language. Consequently, the FCC has less flexibility to classify as a cable system any system configurations that depart from this definition.

Due to the narrow language of the statute, the FCC has historically viewed cable systems as having physical transmission facilities. For example, exception (2) above says that service delivered via a facility that does not use public rights-of-way does not fall under the definition of a cable system. The agency reads the definition with its exceptions as implying that a cable system includes transmission facilities owned or controlled by the operator. Thus, while broadcast.com could try to become an authorized cable system operator, the FCC or state and local franchise authorities could deny the request based on the fact that broadcast.com

does not own or control closed transmission paths.

Based only on the physical configuration of broadcast.com's proposed service offering, it would be easier to get open video system authority versus cable system authority.

An open video systems is defined as: "A facility consisting of a set of closed transmission paths and associated signal generation, reception and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, provided that the Commission has certified that such system complies with [the appropriate regulations.]" Congress was less prescriptive in its definition of what constitutes an open video system and gave the FCC broader authority to promote competition in the multichannel video programming market by encouraging entities to become OVS operators.

The definition of an open video system does not include the same exceptions set forth in the cable system definition. The FCC staff responsible for OVS have stated informally that they interpret the definition broadly and want to give system operators flexibility on how they choose to construct their systems. Thus, the staff stated that they do not believe that it is necessary for an OVS operator to own or control the transmission facilities over which subscribers receive OVS video programming; the OVS operator can make use of third-party facilities.

#### Service Classification

Next, broadcast.com must determine if its service offering fits the definition of an OVS or cable "service." In this instance, the FCC's rules for both OVS and cable service mirror each other: the services are defined as "the one-way transmission to subscribers of video programming, or other programming service; and, subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service." Video programming is defined as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station; and, "other programming service" is information that a cable operator makes available to all subscribers generally.

Despite the interactive nature of Internet services in general, broadcast.com's proposed service offering could conform to the definition of cable service, both in terms of the nature of the service to be delivered – a video programming – and the fact that the service will be provided to paying subscribers.

#### Advantages and Disadvantages of Option 2

The above discussion demonstrates that broadcast.com could make a viable argument that its proposed service offering qualifies as an OVS service. The primary reason for becoming classified as an OVS operator is to improve the ease by which broadcast.com could secure rights to deliver television broadcast programs via the Internet. While such a classification could deliver this benefit, it is important that broadcast.com understand the interplay between the copyright laws providing a statutory license to deliver broadcast services and the federal communications laws that give broadcasters the ability to control who can deliver their signal.

#### *Retransmission Consent and Must-Carry*

Federal communications law says that:

[N]o cable system or other multichannel video programming distributor [including OVS] shall retransmit the signal of a broadcast station, or any part thereof, except:

(A) with the express authority of the originating station;

or

(B) in the case of a station electing [must-carry]...

Thus, even though copyright law provides a compulsory license, cable systems and other MVPDs cannot carry a broadcast signal without the consent of the broadcast station except in very limited circumstances.

The way this law works in practice is that a cable system or OVS operator must make capacity on its system available to local television broadcast stations that are licensed to operate in communities covered by the cable system or OVS service territory. The broadcast station then makes an election whether to mandate that the system operator carry its signal under the must-carry laws or to require the cable system to seek retransmission consent. This election process is repeated on a fixed three-year schedule, with the most recent election cycle ending on October 1, 1999.

If the broadcaster chooses must-carry, the process for carriage is relatively straight forward. The OVS operator must ensure that they have capacity to carry the broadcaster's signal and provide a means for the broadcaster to deliver its signal to the system. In return, the broadcaster must ensure that it provides a good quality signal to the OVS operator. Unless otherwise agreed, the OVS operator must carry the entire broadcast signal, without material degradation.

If broadcaster chooses retransmission consent, then the parties must negotiate carriage terms. While the system operator has obligations to negotiate in good faith and to work to arrive at an agreement, the FCC supports the right of the broadcaster to withhold its consent. Even if the cable system operator wants to carry the broadcaster's signal, there is no guarantee that it can do so unless the broadcaster agrees.

The only safeguard that protects the system operator is that a broadcaster cannot enter into exclusive carriage agreements with any given MVPD. However, this safeguard does not prevent the broadcaster from deciding that the terms of a retransmission consent agreement are not attractive enough to justify consent. **The implication to broadcast.com is that even if it were to go through the process of becoming a cable system or OVS operator, the retransmission consent laws show that the company may still have to negotiate carriage rights and it cannot be certain that broadcasters will ultimately consent.**

Having said this, the OVS rules include a loophole that could help broadcast.com in certain communities. On October 1, 1999, all broadcasters had to make their must-carry elections for the three-year period from January 1, 2000 to December 31, 2002. Under the OVS rules, a broadcaster's election for a cable community applies to OVS systems whose service territory mirrors the cable system community. Consequently, if an NBC affiliate in St. Louis elected must-carry for cable,

this election would apply to an OVS service in the same community.

Broadcast.com should identify communities in which it would like to provide OVS service. Once it has compiled this list, it would then be possible to review the most recent round of broadcast elections to identify stations that chose must-carry. Using this approach broadcast.com would be able to avoid negotiating retransmission consent with these stations by relying on the broadcaster's must-carry election for cable television.

Unfortunately, the FCC no longer keeps a central list of must-carry elections. Therefore, broadcast.com would have to seek this information directly from particular stations or from cable system operators in the targeted community. Broadcast stations are required to place their election materials in the station's public file. Anyone can go to the station and ask to review the file. Stations may also be willing to provide must-carry election information over the telephone. Similarly, cable system operators must maintain a list of all broadcast entities that have elected must-carry. This list is available for public inspection.

We would be happy to help broadcast.com develop a list of target communities and to gather the relevant must-carry election data.

#### *Regulatory Obligations*

As we have pointed out in our previous correspondence, cable system and OVS operators assume a variety of regulatory obligations in return for their authority to operate. Examples include the duty to:

Ensure that the rates, terms, and conditions of carriage are "just and reasonable" and do not "unjustly or unreasonably" discriminate between broadcasters.

Make a set amount of capacity available to programmers that request carriage.

Honor the Sports Exclusivity, Network Non-duplication and Syndicated Exclusivity provisions set forth in the law that protect a broadcaster's right to be a limited source for certain programming.

Provide carriage for public, educational and governmental (PEG) channels.

Pay franchise fees.

Conform to rate regulation.

Ensure customer service compliance.

Recognize advertising limits.

Conform to children's programming limits.

This is not a complete list, nor do the obligations apply to cable and OVS operators equally. However, for purposes of this letter, broadcast.com should focus on the first five items on the list, as these are the key obligations imposed on OVS operators.

We understand that broadcast.com could comply with the first four obligations so we will not discuss how they might affect broadcast.com's proposed offering. The fifth obligation – state and local franchise fees – deserves some additional discussion.

State and local governments have authority to collect franchise fees from OVS operators if they so choose. Franchise fees are generally based on the operator's gross revenues. Consequently, if broadcast.com decided to become an OVS operator it could be subject to local franchise requirements and forced to pay franchise fees. We want to point out, however, that franchise authority is usually tied to a state or local government's right to recover the costs associated with managing the use of public rights-of-way. Based on broadcast.com's proposed service, it would not be constructing any transmission facilities that make use of such rights-of-way, thereby eliminating the basis for franchise authority and fee assessment. Broadcast.com could use this argument as a way of avoiding franchise fee obligations. However, it is possible, if not probable, that this argument would have to be resolved by a court of law. If a legal challenge was mounted against broadcast.com, the decisions discussed below suggest that broadcast.com would have the possibility of a successful defense.

#### *The ECI Case*

The Communications Act sets forth the framework for state and local franchise authority over cable service. The courts have found that "cable's use of public rights-of-way has been the predominant justification for local franchising." *Beach Communications v. FCC*, (D.C. Cir. 1992). A more recent FCC decision highlights the analysis that might be applicable to broadcast.com.

ECI provides video programming to subscribers through equipment it owns at both its headend and on a subscriber's premise. By this arrangement, ECI's equipment is located solely on private property. In order to deliver content from the headend to the subscriber, ECI leases supertrunking video transport services from Ameritech. Ameritech's facilities used to provide this service occupy public rights-of-way. Once ECI's signal leaves its headend, Ameritech controls all the routing of ECI signals until the traffic is delivered to ECI's equipment at the subscriber's building. ECI then delivers the signal to its subscriber's equipment. Because of this arrangement, ECI argued that the facilities that it owns or controls do not constitute a cable system and the Ameritech facilities used to deliver signals to ECI's equipment are not managed, owned or controlled by ECI. Therefore, ECI believed that it was not a cable operator subject to Title VI of the Communication Act.

The FCC agreed with ECI's argument that it is not a cable operator. While the Commission found that ECI provides cable service to its subscribers, it does not fit the definition of a cable operator because ECI relies on Ameritech's use of public rights-of-way and does not own or control such facilities.

The FCC was careful to note in its Order that ECI is exempt from cable regulation is based on the specific facts surrounding its business structure and offerings. In particular, the FCC relied on the following facts in making its decision:

There is a separation of ownership between ECI's headend and subscriber premise facilities and Ameritech's transmission facilities.

ECI's facilities are located on private property while Ameritech's facilities cross public rights-of-way.

ECI and Ameritech have no financial ownership interest in each other and are not affiliated.

Ameritech takes no part in selecting the programming ECI offers to its subscribers.

Once ECI delivers its signal to Ameritech for transport, ECI exercises no control over signal transport except for designating the ultimate delivery point.

Ameritech controls where supertrunking is available and ECI can only offer services to locations that Ameritech has chosen to serve with supertrunking.

Ameritech did not construct the supertrunking facilities at ECI's request.

The supertrunking facilities owned by Ameritech can be accessed on a common carrier basis by other providers at the same price and on the same terms and conditions applicable to ECI.

ECI promised to allow other programming providers to have access to its service drops at a subscriber's location.

Thus, the FCC found that ECI's facilities and Ameritech's facilities do not constitute a single integrated cable system and ECI is not a cable operator providing service to subscribers through a cable system.

Because, in its current system configuration, ECI's facilities do not cross public rights-of-way, the FCC found that it is subject to the private cable exemption and need not secure a local franchise in order to provide service. In explaining its finding, the FCC said that a cable operator's construction in and use of the public rights-of-way is a key underpinning for the franchise requirement. Where an entity relies on the facilities of another company that has an independent right to access public rights-of-way and does not deploy its own facilities in such rights-of-way, the underlying need for a franchise is not present. In this case, ECI relied on Ameritech's access to the public rights-of-way.

Relying heavily on the FCC's decision in ECI, a U.S. District Court in Texas held that Southwestern Bell Video Services did not need a franchise in order to deliver video services over a network based on third party supertrunks. The court found:

The rationale for allowing local authorities to require franchises for cable companies that are subject to federal regulation has long been the extensive use that such cable operators make of a locality's public rights-of-way. Quite simply, local authorities are entitled to compensation (1) for the physical intrusion of a cable operator's facilities on the public rights-of-way and (2) for the access that a franchise agreement gives the cable operator to those rights-of-way. Accordingly, the FCC has noted that "the dual federal-local jurisdictional approach to regulating cable television service is largely premised on the fact that cable systems necessarily involve extensive physical facilities and substantial construction upon and use of public rights-of-way in the communities they serve."

*City of Austin v. Southwestern Bell Video Services*, 1998 U.S. Dist. LEXIS 16332 (1998) *aff'd* 193 F.3d 309 (5th Cir. Tex. 1999).

Broadcast.com's proposed service arrangement is analogous to the facts in the ECI and Southwestern Bell cases. Based on the decisions applicable to these entities, it would appear that broadcast.com would have a viable argument in court against any attempt to impose franchise obligations on its OVS offering.

#### *Other Regulatory Issues*

Broadcast.com may find that it would be worth accepting the regulatory burdens associated with becoming a national OVS operator if only it could have greater certainty that broadcast stations would actually give transmission consent. One solution would be to encourage and ultimately petition the FCC to change its rules to place some responsibility on broadcast stations to negotiate consent agreements in good faith. The argument might be framed by the concept that when a broadcast station elects retransmission consent, multichannel video service providers should be able to minimally expect that, when the terms are just and reasonable, the broadcaster will in fact grant such consent. Under this scenario, terms would be considered just and reasonable when they are comparable to what the broadcaster has granted to another MVPD. Second, such a rule would further Congress' goal of promoting competition in the multichannel video industry by encouraging new entrants to provide such services. Finally, it might be argued that because broadcasters make use of free spectrum to deliver their services, it is not unreasonable to require them to allow consumers to have access to programming through alternative media including the internet, especially when copyright law otherwise protects the broadcaster's interest.

A more aggressive position would be to ask the FCC to mandate that once a broadcaster grants retransmission consent to any MVPD in its market, it must grant consent to all such MVPDs on similar terms. This argument could be based on the rules that prevent broadcasters from entering into exclusive contracts.

Broadcast.com should also consider asking the FCC to clarify whether an entity that does not own or control any transmission facilities used to deliver service to subscribers qualifies as an OVS operator. Such a ruling would allow broadcast.com to know with certainty whether it could become an OVS operator without owning transmission facilities. Broadcast.com would have the option of filing such a request in its own name or could ask McDermott, Will & Emery to file an interpretive ruling request without mention of the Internet or broadcast.com.

Finally broadcast.com should take advantage of the FCC's liberal visitation policies as a way of creating support and sponsorship for its proposed service offerings. Before making any formal filings, broadcast.com could schedule meetings with key Bureau and Commissioner staff members in order to explore how the FCC might respond if broadcast.com were to seek OVS certification. Broadcast.com could protect its business strategies by formally requesting that the meetings be given confidential treatment.

### **Option 3: Form Business Alliances with a Satellite Television Service Provider**

#### **Summary of Recommendation**

Broadcast.com should assess whether it can become distributor of broadcast signals delivered via a satellite carrier by:

Identifying possible alliance partners.



Participating in the FCC's impending rulemaking establishing the rules governing satellite carrier retransmission consent obligations.

## Discussion

President Clinton recently signed into law the *Satellite Home Viewer Improvement Act of 1999*. The new law allows satellite television providers to deliver local broadcast programming under a statutory license. This gives satellite companies the ability to offer their subscribers the same local broadcast programming historically available through cable television systems. As is the case with cable system and OVS operators, the satellite providers will ultimately become responsible for complying with the must-carry and retransmission consent provisions of the Communications Act. However, the FCC has yet to implement regulations covering these statutory requirements, so an opportunity exists to influence the process through future rulemaking proceedings.

The statutory license allows satellite carriers to deliver local television signals to subscribers in the television station's market when the transmission is made by a satellite carrier to its subscribers or a distributor that has contracted with the satellite carrier to deliver the transmission to the public. The statute defines a "distributor" as an one that contracts with a satellite carrier to distribute the retransmitted broadcast signal, as a single channel or part of a package, either directly to individual subscribers or through other program distribution entities.

This definition of a distributor is so broad that it could easily apply to an arrangement between broadcast.com and a satellite carrier. Moreover, the option is attractive because broadcast.com could rely on the rights of the satellite carrier instead of having to negotiate rights directly with a broadcaster. Finally, broadcast.com could avoid directly assuming regulatory burdens due to the satellite carrier's compliance with such obligations. For instance, the satellite provider would have the legal responsibility for ensuring that a broadcaster's non-duplication request was fulfilled before sending the broadcast feed to broadcast.com. Therefore, broadcast.com would not have to take steps to effect the blackout.

The primary drawback to this arrangement is that we do not know how the FCC will implement the new statute. The law requires the FCC to initiate a series of rulemakings to adopt regulations that will govern the relationship between satellite carriers and broadcasters. The first proceeding, which must be initiated by January 13, 2000, will address retransmission consent between broadcasters and satellite carriers. It is likely that the distributor role will be raised in this proceeding and parties will be given a chance to define what a distributor is allowed to do and under what terms. In order for the distributor option to be attractive to broadcast.com, it is important that the FCC be persuaded to adopt a broad definition of a distributor.

Even though the FCC has not yet implemented any rules, satellite carriers have already begun negotiating carriage agreements with broadcasters. It is possible that the terms of such agreements could limit the satellite carrier's ability to deliver signals through a distributor, including to Internet entities. Thus, broadcast.com may need to start exploring the feasibility of this option immediately so that satellite carriers do not agree to terms now that could foreclose a relationship with broadcast.com.

-oOo-

We hope that this memorandum provides you with some initial ideas on how broadcast.com could expand its service offerings. As always, we will continue to explore additional options. In the meantime, if you have any questions about the content of this letter, please feel free to call me.

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And about 6 weeks later after the first memo in this post, this is the review of a hearing related to the same topic

## **McDermott, Will & Emery**

Washington, D.C.

### **memorandum**

On February 16, 2000, the House Subcommittee on Telecommunications Trade & Consumer Protection held a hearing on compulsory copyright licenses for webcasters. Two DiMA members, Alex Alben of Real Networks and Bob Roback of Launch Media, testified on behalf of the Internet media industry. Ian McCallum testified on behalf of iCraveTV – another member of the industry. In addition, Jack Valenti testified on behalf of the Motion Picture Association of America and the newly founded "Copyright Assembly," Paul Kapowicz of LIN TV and Stuart Beck of Granite Broadcasting testified on behalf of local television stations, and University of Oklahoma President David Boren testified on behalf of the NCAA. Finally, Peter Jaszi, a professor at American University, testified on copyright licensing in general.

This hearing was a continuation of a debate from last year's Satellite Home Viewer Act reauthorization proceedings regarding whether webcasters should be able to retransmit television broadcast signals under a statutory copyright license akin to those available for cable and satellite retransmission. While this question has been pondered for the last few years, recent actions by iCraveTV appear to have caused Congress to wonder whether it should or must resolve this issue in the near term.

The general opinion expressed by copyright industries and broadcasters at the hearing was that Congress should not act hastily in enacting webcasting legislation that creates a new compulsory license for Internet-based broadcast video services. The Internet media companies also emphasized that similar restraint should be used with regard to any proposed legislation that would explicitly exclude Internet-based services from the existing cable or satellite licensing schemes. However, the underlying basis for these general recommendations highlights the differing positions among the various industry segments.

Local broadcasters testified that they are not against having broadcast signals delivered over the Internet – many are actually putting their content on their own web pages. They do, however, contend that they own their content and should decide who gets to retransmit it and under what terms. More specifically, the broadcasters argued that there are five primary issues that support their conclusion that a webcasting compulsory license is not needed:

**Content Control:** The broadcasters want to ensure that signal content is not altered and signal quality is not diminished. For instance, broadcasters believe that the small screen and slow delivery speeds associated with the Internet reduce the quality of their product. This, in turn, could diminish the value viewers place on

the broadcaster's service.

**Advertising:** The broadcasters claim that ISPs might interfere with a broadcaster's advertising relationships by altering or substituting ads in the broadcast stream or by running banner ads that compete with the ads in the broadcast stream. These actions allegedly might change the value of broadcast advertising opportunities and could harm a station by reducing its revenues.

**Localism:** Local broadcast stations claim that they provide an important public service by offering programming tailored to local interests (e.g., local news). They are able to do this because advertisers are willing to pay for air time in order to reach consumers in a particular market. If advertisers stop valuing this marketing approach, as might happen if their ads faced competition from web ads or if the ads were not reaching the right consumers (e.g., viewers outside a market), then broadcasters could see reduced ad revenues and may not be able to afford to provide local content. The fact that, according to the witnesses, technology does not appear to exist that can limit television broadcast retransmission via the Internet to a given geographic area allegedly creates a real threat to a broadcaster's ability to maintain its local focus.

**Network Programming:** Television stations generally do not have a right to allow others to retransmit network signals over the Internet. Consequently, any Internet compulsory license would have to include an exception for programming the station does not own.

**Theft:** Like the content providers represented by Mr. Valenti and Mr. Boren, broadcasters are concerned about unauthorized signal redistribution. They argue that the Internet is a global digital medium that allows high quality copies to be easily made and distributed. They allege that this same problem does not exist with satellite or cable television. Consequently, it is reasonable to draw distinctions between cable and satellite television compulsory licensing versus Internet licensing and to thoroughly consider these differences before adopting any legislation governing webcasting.

Mr. Valenti, representing the interests of several content providers, said he is not asking Congress to do anything other than be "cautious and wary about giving a license to anyone." Mr. Valenti also noted that the existing compulsory licenses have come with a cost to the satellite and cable companies – namely they have to comply with strict copyright and FCC rules that help to maintain the integrity of the content owner's property (e.g., sports blackout, syndication exclusivity, network nonduplication). Until ISPs can demonstrate that they can control service delivery in a manner that ensures that content is delivered only to certain geographic areas, can protect content from theft or alteration, and can account for distribution in a way that allows content owners to be compensated, Congress should not expand the existing licensing scheme to include Internet services. This sentiment was echoed by the broadcasters and by Mr. Boren.

Thus, the underlying argument from a content provider and broadcast perspective was that Congress should not act because it may upset the current regime.

The Internet industry took a different approach: Congress should not act now because the marketplace is still working itself out, but it is inevitable in the long term that video-based programming, including television, will be made available over the Internet because consumers are demanding this service. So Congress may ultimately be required to act if the content providers, broadcasters and ISPs cannot come to a solution on their own.

Representing the Internet industry perspective, Alex Alben and Bob Roback emphasized that Congress should not adopt policies based on the actions of one Internet company – iCraveTV. They reminded Congress that DiMA's members have demonstrated their respect for the rights of copyright holders by negotiating transmission rights and by cooperating in past efforts to shape copyright legislation. Furthermore, the Internet industry is not asking for government intervention at this point, but might seek a compulsory license sometime in the future. In the meantime, Congress should not adopt laws that prohibit Internet companies from relying on existing compulsory licenses. In response to a question from Congressman Markey on whether existing licenses actually apply to Internet companies, Alex Alben stated that it is not clear because no ISP has attempted to use them, but if the ISP can demonstrate that it can comply with all the terms and conditions of such licenses then they should be able to benefit from them. Alex Alben and Bob Roback also said it would be unfair to give certain companies access to compulsory licenses and not others merely because the delivery medium (e.g., cable, satellite, wireless or Internet) or subscriber equipment (e.g., TV or computer) differs. Thus, while Internet companies would rather work with broadcasters to reach negotiated agreements, it would be technically and competitively more fair and much more convenient if ISPs had the option of using a compulsory license just as cable and satellite carriers can. Professor Jaszi agreed, pointing out that the best approach is a hybrid model where ISPs can rely on both negotiated and compulsory license agreements.

iCraveTV, the other Internet representative, was more focused on defending the legality of its own business decisions. Relying on the argument that Canadian copyright law does not base the compulsory license right on the technology used and does not require ISPs to receive a broadcaster's permission before retransmitting signals over the Internet, Mr. McCallum said that iCraveTV did not break the law and is not a pirate. When asked if he broke U.S. copyright laws, Mr. McCallum said that that question is before the courts but it was not iCraveTV's intention to retransmit signals without proper authorization. Rather, he argued, responsibility for transmissions outside Canada rests with the non-Canadian users, who fraudulently claimed a Canadian area code to access the iCraveTV site. He also said his company will soon have tariff arrangements with Canadian rightsholders that will govern retransmission compensation and is implementing technical solutions that will keep non-Canadian users from accessing U.S. material. He declined to speculate on what Congress should do with regards to copyright compulsory licensing for U.S. webcasting, saying that iCraveTV's focus is solely on Canada.

The response from the committee members was varied. Several members expressed their support for local broadcasters saying that just as Congress is interested in encouraging the continued development of the Internet, it is also interested in ensuring that any proposed webcasting legislation reflects the important role these broadcasters play in promoting the public interest.

Other committee members said that the current debate raises issues that are similar to those raised by broadcasters when Congress considered making UHF channels available, when Congress created the cable compulsory license and most recently when Congress gave a compulsory license to satellite carriers. In all three instances there were concerns about the demise of free broadcast television. However, broadcast television has survived these changes in the past despite more competition and Congress should be careful not to adopt policies that protect entrenched service providers interested in preserving the status quo at the expense of creating more competition and consumer choice or thwarting Internet growth.

Finally, several members shared their appreciation for the role the Internet currently plays in keeping them apprised of what is going on outside of Washington. Congresswoman Wilson noted that she uses the Internet everyday to get news on what is happening in her district from a local broadcast station in New Mexico. Congressman Markey said he uses the Internet in a similar way and would be happy to be able to watch Boston Red Sox games via the web. Comments such as these suggest that the members recognize the desirability of long-distance availability of local information.

It appeared from comments made by many committee members, as well as the witnesses, that there is an appreciation for the fact that people like being able to receive television programming over the web and that the industry is moving forward at a rapid pace to bring these services to subscribers. While at this point there appears to be a consensus that legislation is not necessary, it also appears inevitable that the boundaries of the existing copyright licenses will be challenged and that Congress could be forced to intervene if the marketplace cannot resolve this debate on its own.

On a related note, Chairman Tauzin said he is also interested in holding hearings on the need for legislation to protect Internet privacy, particularly as it relates to the gathering and exchange of user-specific data without user knowledge or consent.