

INTERNET-ENABLED TELEVISION

Davis Wright Tremaine LLP 

Legal Issues for Cable Programming and Affiliation Agreements

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Davis Wright Tremaine LLP

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Chair DWT Communications, Media, Technology Department

Areas of Practice

Media, intellectual property/entertainment, communications and related technology law

Representative Experience

Involvement in many of the major communications and media issues in the country for 20 years

Representation of new and traditional media programmers and content providers

Negotiation of technology contracts and analysis of regulatory issues for wireless, VoIP and other providers

Litigation and related matters under the Communications Act and First Amendment

Representative Clients

Belo Corp, Clearwire, Microsoft, T-Mobile, Time Warner-AOL companies, including New Line Cinema, HBO and Turner

Memberships and Activities

Named as one of the “Best Lawyers in America” in First Amendment Law by *Woodward/White*, 1991-1992; 1993-94; 1995-96; 1997-98; 1999-2000; 2001-02; 2003-04; 2005-06; 2006; 2007

Listed as a “Super Lawyer,” *Washington Law & Politics*, 1999-2006

Co-chair, National Association of Broadcasters, American Newspaper Publishers Association and LDRC seminar on defamation and privacy defense

Past chair, American Bar Association's Forum on Communications Law

Past Co-chair, Pacific Northwest Chapter of the Federal Communications Bar Ass'n

Washington State and District of Columbia Bar Associations

Education

J.D., Yale University School of Law

B.A., *summa cum laude*, Tufts University



KEY INTEREST GROUPS

- **Operators/Distributors [varying size]**
- **Other Distribution Entrants**
- **Major Programmers**
- **Studios/Labels**
- **New or Emerging Programmers**
- **Cities/LFAs**

[Note Bargaining Disparities]



Some Key Issues in Programming Contracts

- **Rate Issues**
- **MFN**
 - Pure/Cherry Pick**
 - Conditional – Subscriber Volume, Territory, Specific markets**
 - How Enforce – Audit, Third Party, Confidentiality Issues**
- **Rate Card vs. Negotiated Rates**
- **Volume/Take or Pay Issues (Special Issues for New Programmers)**



Other Financial Terms

- **Marketing Support – Tied to What?**
 - Measurable results or just dollars handed over
 - Less significant recently, except with new entrants
 - May be tied to cross promotions
- **Launch Support/Fee Waiver for Initial Launch Period**



Defining What is Carried

- TNT/Spike Issue – how define programming and keep from morphing
- Signal Embedding Prohibition or Restriction (also what is required, i.e., closed captioning)
- Infomercial issue – timing, amount, revenue sharing
- Must Launch or Carry vs. Migration/Deletion Rights (secondary network inclusion also often negotiated)
- Satellite Transponder may be relevant if costly to add



Grant of Right

- Traditional IP Licensing Issues of Media, Geography, etc.

Wireless

“Now known or hereinafter developed or existing”

- Broadband/VOD as integrated or separable
- Covenant of programmer as to other distribution media, i.e., free



Tiering, Placement and Related Issues

- **Total Distribution Discretion vs. Promised Tier**
- **By Through Issue**
- **Initial Placement vs. More Discretion**



Other Issues

- **Term, Termination, Renewal [recent tendency towards shorter term, especially broadband/VOD]**
- **Signal, Security Growing in Importance**
- **Relatively Standard Indemnification, Disclaimers; Damage Caps Rare to Date**
- **Confidentiality Typically Very Strict**
- **Dispute Resolution, NB MFN Issues**



➤ **NCTC**

- **Buying Cooperative Since 1984**
- **Membership (14 million subs top 3 distributor) (Compares to DirectTV)**
- **Conditions of Membership**
- **DOJ Letter**



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Contractual Disputes

Must Carry

Tiers

MFN/Pricing