

MEMORANDUM

September 29, 1998

From: Cheryl A. Leanza
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Re: Liability for Programming Transmitted on the DBS Noncommercial Educational and Informational Set-aside

DBS providers are not liable for the content of programming transmitted on the capacity set-aside for noncommercial educational and informational programming created in Section 25(b) of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"). 47 USC § 335(b).

I. Introduction

Some parties argue that DBS providers may incur liability for the content of programming transmitted on the noncommercial educational and informational set-aside, and thus argue that they should be granted control over such programming. These parties base their argument on a comparison between the Communications Act's ("the Act's") DBS provisions and the Act's cable television leased access and public, educational, and governmental ("PEG") provisions. The DBS provisions and the cable access provisions use identical language to deny the exercise of editorial control to DBS providers and cable operators. *Compare* 47 USC §§ 531(e), 532(c)(2) *with* 47 USC § 335(b)(3). The cable provisions, however, explicitly exempt cable operators from liability for any programming transmitted on PEG and leased access channels. 47 USC § 558. Parties favoring additional control for DBS providers argue that the absence of an immunity provision in the DBS portion of the Act supports an inference that DBS providers should be allowed to exert control over the programming on the noncommercial set-aside.

Reliance on the differences between these two portions of the Communications Act is misplaced for the two reasons described in detail below. First, Supreme Court precedent holds that, when the Communications Act deprives an entity from exercising editorial control over certain programming, the Act contains an implied grant of immunity from liability for the substance of such programming. Second, the Commission has held that a statutory prohibition on the exercise of editorial control must be enforced regardless of whether the broadcaster or cable operator could be held liable for the transmission of defamatory or libelous material.

II. Entities that Do Not Exercise Editorial Control Over Programming are not Liable for the Content of Such Programming.

Under Supreme Court precedent, Section 25(b) contains an implied grant of immunity for DBS providers. In 1959, the Supreme Court considered Section 315 of the Communications Act,

which contains provisions very similar to those contained in Section 25(b).¹ *Farmers Educational & Cooperative Union of America v. WDAY, Inc.*, 360 U.S. 525 (1959) (“*Farmers Union*”). The Supreme Court held that, because section 315(a) deprives broadcasters of editorial control over political broadcasts carried pursuant to that section, broadcasters could not be held liable for defamatory statements contained in those broadcasts. *Farmers Union*, 360 U.S. at 531; *see also Lamb v. Sutton*, 274 F.2d 706 (6th Cir. 1960) (applying *Farmers Union*). The Court concluded that, to impose liability for programming broadcast under Section 315(a), “would sanction the unconscionable result of permitting civil and perhaps criminal liability to be imposed for the very conduct the statute demands of the licensee.” *Id.* Section 25(b) compels the same conclusion.

The exemption from liability is not limited to federal case law interpreting the Communications Act. The dissenting justices in *Farmers Union* dissented from the case, in part, because under libel law in most states, a broadcaster could not be held liable for the content of material over which it could exercise no control because “it lacked intent to communicate the defamation.” 360 U.S. at 542 (Frankfurter, J., dissenting). Current law continues to hold that, if the distributor of defamatory matter can show that it did not know and reasonably could not have known the matter was defamatory, the distributor is not liable. 50 Am.Jur.2d *Libel and Slander* § 369 (1995).

The absence of an explicit statutory exemption from liability for DBS providers does not alter this analysis. In *Farmers Union*, the Court held that the failure of Congress to adopt an exemption from liability for programming broadcast pursuant to Section 315(a) was of no consequence. The Court concluded “whatever adverse inference may be drawn from the failure of Congress to legislate an express immunity is offset by its refusal to permit stations to avoid liability by censoring broadcasts.” 360 U.S. at 532. It also concluded that “more than balancing any adverse inferences drawn from congressional failure to legislate an express immunity is the fact that the Federal Communications Commission--the body entrusted with administering the provisions of the Act--has long interpreted § 315 as granting stations an immunity.” *Id.* at 532-33. This analysis is directly applicable to Section 25(b). Congress chose to follow the same format in Section 25(b) that it followed when adopting Section 315(a). The same result should follow. Any doubt as to DBS providers' liability for programming transmitted on the set-aside capacity can be eliminated by a Commission decision concluding that, under current law, DBS providers are immune.

The Commission has previously taken similar action on its own initiative. In adopting cable leased access rules in 1972, the Commission prohibited cable operators from exercising editorial control over such channels. *Cable Television Report and Order*, 36 FCC.2d 143, 195-96, 240-41

¹ Section 315 of the Communications Act requires broadcasters to grant all legally-qualified political candidates equal opportunities to broadcast messages subject to certain requirements. *See generally* 47 USC § 315. Section 315(a) prohibits broadcasters from exercising any “power of censorship” over such broadcasts. *Id.* at § 315(a).

(1972).² When it adopted those rules, the Commission explicitly dismissed industry arguments that a prohibition on editorial control should not be adopted because it might unjustly impose liability for statements over which cable operators were being deprived editorial control. First, the Commission relied upon common law to conclude that cable operators' fears were unfounded, stating "there is little likelihood of . . . a criminal suit in a situation where the system has no right of control and thus no specific intent to violate the law." *Id.* at 195 (citation omitted).³ Second, the Commission found that, "state law imposing liability on a system that has no control over these channels may unconstitutionally frustrate federal purposes." *Id.* at 196. Thus, when the Commission was free to impose or not impose a prohibition on editorial control, it nonetheless chose to impose such a prohibition in spite of industry concerns that it might incur liability under state libel law. The Commission would be acting arbitrarily to now conclude that a statutory prohibition on the exercise of editorial control should be weakened in light of Congress's decision to leave the issue of liability to common law.

III. The Commission has Previously Concluded that the Plain Language of a Statute Cannot be Defeated by a Lack of an Explicit Grant of Immunity.

The Commission's long and consistent administration of the editorial control provision of Section 315(a) is powerful authority for the wisdom, as well as the legality, of affording immunity. The Commission has previously determined that Section 315(a)'s statutory prohibition on the exercise of editorial control must be enforced regardless of whether the broadcaster could be held liable for the transmission of defamatory or libelous material. In *Port Huron*, the Commission held: "the prohibition on section 315 against any censorship by licensees of political speeches by candidates for office is absolute, and no exception exists in the case of material which is either libelous or might tend to involve the station in an action for damages." *Port Huron Broadcasting Co*, 12 FCC 1069, 1074 (1948). The Commission later reinforced the ban on censorship, stating: "Nor will we accept the argument that state statutes or common law on the subject of libel in some way

² Although the Commission's authority to promulgate such rules was ultimately struck down, *FCC v. Midwest Video*, 440 U.S. 689 (1979), the Commission's conclusions regarding the potential liability associated with a validly-adopted prohibition on the exercise of editorial control were not questioned.

³ An intent to violate the law has been consistently read into obscenity statutes to preserve their constitutionality. See *U.S. v. X-citement Video, Inc.*, 513 U.S. 64 (1994) (holding that, despite ambiguous statutory language, a defendant must know that an actor is a minor to be convicted under a child pornography distribution statute); *Smith v. California*, 361 U.S. 147 (1959) (finding unconstitutional a local ordinance making it illegal for a bookseller to sell an obscene book because it did not contain a requirement that the bookseller know the book is obscene); *Tallman v. U.S.*, 465 F.2d 282 (7th Cir. 1972) (holding that the federal prohibition on the broadcast of obscene material contained in 18 USC § 1464 includes an implied element of *scienter*). Statutes frequently include a requirement that obscene material be transmitted "knowingly." See, e.g., 18 USC § 1468 (prohibition on transmission of obscene material via cable or subscription television).

supplant or modify the unqualified pronouncement of Congress on the use of interstate facilities of radio by candidates in making political broadcasts.” *WDSU Broadcasting Corp.*, 7 R.R. 769, 773 (1951).

IV. Conclusion

Both Supreme Court precedent and the Commission’s own precedent compel the Commission to find that, because Section 25(b) deprives DBS providers of editorial control over programming broadcast on the channel capacity set-aside for noncommercial educational and informational programming, DBS providers are immune from liability for the content of programming transmitted pursuant to that section.