

VERNER · LIIPFERT  
BERNHARD · McPHERSON & HAND  
[CHARTERED]

901 - 15TH STREET, N.W.  
WASHINGTON, D.C. 20005-2301  
(202) 371-6000  
FAX: (202) 371-6279

RECEIVED

JUL 2 1996

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

DOCKET FILE COPY ORIGINAL

WRITER'S DIRECT DIAL  
(202) 371-6244

July 2, 1996

Mr. William Caton  
Secretary  
Federal Communications Commission  
1919 M St., NW #222  
Washington, D.C. 20554

BY HAND

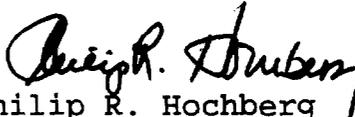
Re: Request for Clarification or, in the Alternative,  
Petition for Reconsideration  
Docket No. 96-46

Dear Mr. Caton:

Enclosed are an original and eleven copies of a Request for Clarification or, in the Alternative, Petition for Reconsideration filed by the Office of the Commissioner of Baseball, the National Basketball Association, the National Football League, and the National Hockey League in the above-referenced proceeding.

Should you have any questions, please communicate with the undersigned.

Sincerely,

  
Philip R. Hochberg

enc.

05965.0004; 05936.0004; 05681.0004

No. of Copies rec'd  
LIST ABOVE

*OH*

HOUSTON, TEXAS OFFICE  
2600 TEXAS COMMERCE TOWER  
600 TRAVIS  
HOUSTON, TEXAS 77002  
(713) 237-9034  
FAX: (713) 237-1216

AUSTIN, TEXAS OFFICE  
SAN JACINTO CENTER  
98 SAN JACINTO BLVD., SUITE 1440  
AUSTIN, TEXAS 78701  
(512) 703-6000  
FAX: (512) 703-6003

HONOLULU, HAWAII OFFICE  
HAWAII TIMES BUILDING  
928 NUUANU AVE., SUITE 400  
HONOLULU, HAWAII 96817  
(808) 566-0999  
FAX: (808) 566-0995

MCLEAN, VIRGINIA OFFICE  
8280 GREENSBORO DRIVE  
SUITE 601  
MCLEAN, VIRGINIA 22102  
(703) 749-6000  
FAX: (703) 749-6027

RECEIVED

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

JUL 2 1996

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )  
 )  
Implementation of Section 302 of ) CS Docket No. 96-46  
the Telecommunications Act of 1996 )  
 )  
Open Video Systems )

REQUEST FOR CLARIFICATION OR,  
IN THE ALTERNATIVE,  
PETITION FOR RECONSIDERATION OF  
OFFICE OF THE COMMISSIONER OF BASEBALL,  
NATIONAL BASKETBALL ASSOCIATION,  
NATIONAL FOOTBALL LEAGUE, AND  
NATIONAL HOCKEY LEAGUE

Pursuant to Section 1.429 of the Commission's Rules, the Office of the Commissioner of Baseball, the National Basketball Association, the National Football League, and the National Hockey League (collectively "the Leagues") file this Request for Clarification or, in the Alternative, Petition for Reconsideration of certain of the Commission's rules on Open Video Systems ("OVS"), as adopted in the Second Report and Order, FCC 96-249 (released June 3, 1996).

The rules adopted by the Commission fail to meet the statutory requirement of Section 302 of the Telecommunications

Act of 1996.<sup>1/</sup> In creating new Section 653 of the Communications Act of 1934, Section 302 of the Telecommunications Act required that the Commission prescribe regulations that

(D) extend to the distribution of video programming over open video systems the Commission's regulations concerning sports exclusivity (47 C.F.R. 76.67)....

In fact what the Commission has done in proposing the language of Section 76.1506(m) is to give sports less protection in dealing with the new medium than with cable, given the nature of the two media.

(a) Responsibility for Protection

The Commission on the one hand says that "we will hold open video system operators responsible for compliance with our sports exclusivity ... rules,"<sup>2/</sup>. The Commission then proceeds to effectively nullify that responsibility.

The Commission says

An open video system operator shall not be subject to sanctions for any violation of these rules by an unaffiliated program supplier if the operator provided notices to the program supplier and subsequently took prompt steps to stop the distribution of the

---

<sup>1/</sup> Pub. L. No. 104-104, 110 Stat. 56, approved February 8, 1996.

<sup>2/</sup> Para. 203.

infringing program once it was notified of a violation.<sup>3/</sup>

This kind of responsibility might be appropriate for the long-running protections of syndicated exclusivity (Section 76.1508(c)) or network non-duplication (Section 76.1509(c)), but it cannot work with the limited protection of the sports rule. Sports deletions, notwithstanding their importance, are few in number, can happen sporadically, any day of the week, and, most importantly, once missed, can never be re-couped.

If the OVS operator can be held to be required to take steps to stop the future distribution of an infringing program, then, in the limited number of sports deletions, the OVS operator should be held to a duty of making certain the distribution does not occur at all.<sup>4/</sup> The Leagues respectfully request that the Commission amend its rules to make clear that the OVS operator is required to ensure compliance with the sports rule and that responsibility is not satisfied simply by passing along sports rule notices to the packager and by taking steps after the violation occurs.

---

<sup>3/</sup> Section 76.1506(m)(2).

<sup>4/</sup> To the extent that an OVS operator might be monetarily sanctioned, certainly indemnification can be made a condition of use by the program provider.

(b) Timely Notice

Under Section 76.67(c), teams or leagues are required to provide notice for regular season games by the Monday preceding the week in which the game will take place; with respect to playoff (or rescheduled) games, the rights holder is required to notify the cable operator within 24 hours of scheduling the telecast, but in any case no less than 24 hours before the telecast takes place. Not infrequently, in the latter case, a one-day window is created for notifying operators.

The Commission should clarify that notice by the sports team or league to the OVS operator constitutes notice and compliance with Section 76.1506(2) and that there is no requirement on the part of the team or league to notify program providers as well.

In addition, the current language of Section 76.1506(m) provides that the OVS operator, once having received a notification from the team or league, is merely required to make those notifications "immediately available" to video program providers. To avoid future disputes over what constitutes "immediately available," the Commission should require OVS operators to transmit the notice on the same day it is received to the affected video program provider.

Respectfully submitted,

NATIONAL BASKETBALL ASSOCIATION

NATIONAL FOOTBALL LEAGUE

NATIONAL HOCKEY LEAGUE

By: *Philip R. Hochberg*  
Philip R. Hochberg, Esq.  
Verner, Liipfert, Bernhard,  
McPherson & Hand  
901 15th St., NW  
Suite 700  
Washington, D.C. 20005  
(202) 371-6000

OFFICE OF THE COMMISSIONER OF  
BASEBALL

By: *Robert Alan Garrett*  
Robert Alan Garrett, Esq.  
Arnold & Porter  
555 12th St., NW  
Washington, D.C.  
(202) 942-5444

Date: July 2, 1996

05965.0004; 05981.0004; 05936.0004