ORIGINAL

EX PARTE OR LATE FILED

COVINGTON & BURLING

1201 PENNSYLVANIA AVENUE NW
WASHINGTON, DC 20004-2401
TEL 202.662.6000
FAX 202.662.6291
WWW.COV.COM

WASHINGTON
NEW YORK
SAN FRANCISCO
LONDON
BRUSSELS

RECEIVED

SEP - 5 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

September 5, 2002

BY HAND DELIVERY

Ms. Susan M. Eid
Office of Chairman Powell
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Ex Parte* Communication in CS Docket Nos. 98-120, 00-96 & 00-2

Dear Susan:

Gemstar-TV Guide International, Inc. ("Gemstar") regrets that its representatives were unable to meet with you this week on the issue of what constitutes "program-related material" in the digital context – an issue that will determine whether any independent EPG provider can survive and whether homes served by over-the-air television will have access to any EPG service.

Our understanding is that there is wide appreciation at the Commission of the benefits that independent EPGs make available to the public and of the contributions they make to a competitive marketplace. There is also recognition that the appropriate test for determining program-relatedness ought to be flexible and not frozen in a specific past technology. But there may remain questions about whether EPGs may be considered program-related under the 1992 Cable Act.

Attachment I spells out why the 2001 *Report and Order* in this proceeding unduly constrains the meaning of program-relatedness. When Congress used the term "program-related" in the 1992 Cable Act, there was an existing judicial definition of that term that had been laid out in the 1982 *WGN* case. That definition included within its scope information about future programming and not merely about the very program in which the material was displayed. In implementing the 1992 Cable Act, the Commission decided to rely on the *WGN* case for "guidance" in determining program-relatedness. It said it would apply the *WGN* factors flexibly to accommodate technological innovations and otherwise. On reconsideration, the Commission reaffirmed that it would follow a flexible approach and, for example, specifically determined that Nielsen Source Identification Codes are clearly program-related despite failing to satisfy the

No. of Copies rec'd 0
List ABCDE

WGN factors, in part because they provide important information useful to broadcasters. The same decision on reconsideration adopting the flexible *WGN* test explicitly pointed out that in the *WGN* case material relating to future programming was held to be program-related. Thus, the definition of program-relatedness as spelled out by the *WGN* court and adopted as guidance by the Commission in implementing Congress's mandate is not a barrier to, but rather supports, a holding that EPGs are program-related.

Attachment II – a screen shot from a demo of Gemstar's *Guide Plus+* service – illustrates that this is the case. It shows details about the program being viewed; a description of the program; and, like the program-related material in *WGN*, information about future programming. This screen shot closely resembles the material that the *WGN* decision held was program-related.

In the digital world, this information is assembled from data transmitted to the television receiver along with a digital broadcast signal, at times when bandwidth use is low, to be called up later by the viewer and reassembled by the *Guide Plus+* service. Transmitting information about a program at the same time the program is being viewed is just not possible using digital technology because use of digital channels is fluid, and channel 4.2 showing a movie that begins at 3:00 p.m. may not be in use or may not even exist at 2:59 p.m. Digital technology also facilitates the transmission of aggregated information about various TV-station and cable-channel program offerings. A narrow interpretation of the *WGN* test cannot accommodate the efficient, bursty transmission of bits that is the hallmark of digital technology and is not consistent with how this test was previously interpreted. The application of an unduly limited interpretation of "program-related" to digital content will stymie the potential of innovative program-related services that are spectrum efficient and enhance consumer welfare. It will leave over-the-air viewers without any EPG at all and cable subscribers without an alternative to the cable operator's EPG.

The Commission has full authority, and a great opportunity, to interpret program-relatedness in a way that makes sense for, and facilitates the development of, digital technologies. It can accomplish this objective by remaining true to the original meaning of "program-related" adopted in the early 1990s and not tying its interpretation to an outmoded analog technology.

Sincerely,

Michael D. Berg /add

Michael D. Berg
Shook, Hardy & Bacon L.L.P.

Jonathan D. Blake /add

Jonathan D. Blake
Covington & Burling

Counsel to Gemstar-TV Guide International, Inc.

Attachments

cc: Chairman Michael C. Powell
Commissioner Kathleen Q. Abernathy
Commissioner Michael J. Copps
Commissioner Kevin J. Martin
Mr. Bryan Tramont
Ms. Stacy Robinson
Ms. Alexis Johns
Ms. Catherine C. Bohigian
Mr. W. Kenneth Ferree
Mr. Rick Chessen
Ms. Marlene M. Dortch

ATTACHMENT I

September 4, 2002

DEFINITION OF PROGRAM-RELATED MATERIAL

When the Commission adopted rules in 1993 implementing the 1992 Cable Act requirement that cable operators carry "program-related material," it turned to a ten-year-old copyright case examining program-relatedness in a different context for guidance. That court's definition of what material is "program-related" and the FCC's adoption of that definition as guidance supports a broader reading of the term than what cable now argues for in the digital carriage proceeding.

The *WGN* Case (1982):

> ***The service that WGN held to be program-related contained information about programming not then being viewed*:** "The teletext channel is to contain an announcement of future programming on WGN. The viewer of the nine o'clock news, a compendium not all parts of which may interest every viewer, is thus invited to switch to the teletext channel when his attention to the news flags, to see what is forthcoming on WGN." (p. 627)

FCC's Analog Carriage Order Defining "Program-Related" (1993):

> ***The WGN factors are not limiting but are intended to provide guidance*:** "[W]e believe the best guidance for what constitutes program-related material is to be found in the factors enumerated in *WGN Continental Broadcasting*." (¶ 81)
>
> ***The WGN factors are not an ironclad definition of "program-related"; the FCC adopted instead a flexible definition to accommodate innovation*:** "Carriage of information on a stations's [sic] VBI is rapidly evolving: thus, we believe no hard and fast definition can now be developed." (¶ 81)

FCC's Analog Carriage Recon Order (1994):

> ***The WGN factors are not exclusive*:** "[O]n reconsideration, we clarify that the factors set forth in *WGN* do not necessarily form the exclusive basis for determining program-relatedness. We believe there will be instances where material which does not fit squarely within the factors listed in *WGN* will be program-related under the statute." (¶ 50)
>
> ***Nielsen Source Identification Codes ("SID codes") are clearly program-related despite failing to satisfy the WGN factors*:** "[O]n reconsideration, although SID codes may not precisely meet each factor in *WGN*, we find that they are program-related under the statute." (¶ 50)
>
> ***Future programming schedules and other information not directly linked to the program then being broadcast are program-related*:** "The court accepted [information about] WGN's future programming schedules as an 'integral part of the program.' . . . [T]he WGN VBI information not only included local news, but also contained future programming schedules for WGN, and the court upheld the VBI as one copyrightable expression with the video signal." (¶ 44)

ATTACHMENT II

10:55pm

1 Watch 2 Go To 3 Record Guide plus+

Gone With the Wind, PG, Based on Margaret Mitchell's

Olivia de Havilland and Leslie Howard

8:00 pm

Plus Code 00441A

Jordan's back!

6:30/5:30pm

THE DISTRICT

Tonight

10/9pm

CBS