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Not Fit to be Tied: Viacom Demands Dismissal of Cablevision's Antitrust Suit

Viacom asked a federal court Wed to dismiss **Cablevision**'s antitrust lawsuit, which claims the programmer illegally tied lesser-watched nets to "must-have" channels such as **Nick** and **MTV**. In its court filing, Viacom said the lawsuit came just months "after being successful in having had dismissed a lawsuit challenging that same conduct by it and others brought by consumers of cable and satellite distributors." It's referring to the 9th Circuit Court of Appeals affirming the '09 *Brantley* decision that bundling channels in video packages does not hamper competition and unduly harm consumers. Viacom and Cablevision were listed as co-defendants along with several other MVPDs and programmers. That suit was brought by a group of cable and satellite customers trying to stop the industry from bundling expanded basic channels. In its lawsuit filed in Feb, Cablevision claimed Viacom tried to strong arm it into carrying a suite of nets by imposing a financial penalty if the MSO licensed only the core nets of Nick, MTV, **BET** and **Comedy Central**. Cablevision said Wed that Viacom's interpretation of the bundling case is misleading and inappropriate, and it will respond to the court. "Viacom's assertions are predictable and do not change the fact that its all-or-nothing approach to selling programming is illegal and anti-consumer," Cablevision said in a statement Wed. "By forcing Cablevision's customers to pay for more than a dozen unpopular channels—or pay a penalty of more than $1bln—in order to receive the channels they actually want, Viacom is abusing its market power. Viacom is using our customers as pawns in its game to limit choice and competition and, ultimately, it is the consumer who suffers the consequences of Viacom's illegal actions." The MSO went on to say it was "notable" that Viacom didn't contest Cablevision's claim that it was forced into negotiations for the less popular nets. "So, all of the claims Viacom made when we first filed suit about merely offering us a 'standard volume discount' if we took all their channels were not truthful," the MSO countered. Viacom's dispute of Cablevision claims includes using the MSO's own words. Viacom's motion to dismiss cited numerous statements from CVC over the years to the **FCC**, **SEC** and courts, including this comment in '11 in an FCC docket on the RSN marketplace: "In a mature competitive marketplace, no single programming service—including an RSN—can make or break the competitive viability (or lack thereof) of an MVPD in any particular local market." The MSO has made similar statements over the years in arguing that the FCC should not restrict the ability of cable ops to enter into exclusive distribution agreements with programmers. Viacom also

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focused on the assertion in Cablevision's lawsuit that it would be more likely to launch (or sooner launch) indie nets, such as **Ovation** and **Outside TV**, if other Viacom nets weren't tied to the core channels. In arguing that Cablevision failed to allege the essential elements of a tying claim, Viacom said the MSO just paid "lip service" to the foreclosure requirement by "merely identif[ying] a handful of independent programmers whose services Cablevision—a single customer in the tied product market—might consider purchasing." To show that a tying arrangement causes anticompetitive effects in the tied product market, a plaintiff must show market-wide foreclosure, not merely that a competitor is deprived of a single distribution outlet. Viacom also alleged that the MSO waited too long to mount a challenge, as it has operated under the conditions as far back as 2008 and then entered into a similar agreement in the disputed Dec '12 contract "without even a hint that less than 2 months after signing it" Cablevision would seek to challenge the conduct.

Earnings: After the bell Wed, **News Corp** reported FY3Q results that beat analyst expectations. Revenue was up 14% YOY to $9.5bln, while net income soared to $2.85bln from $937mln a year ago (thanks partly to gains related to the acquisition of additional ownership in **Sky Deutschland** and the sale of its stake in **Sky Network** in New Zealand). Cable network programming posted operating income of $147mln, up 17%, driven by a 17% increase in rev. Affil rev grew 11% at the domestic nets, led by growth at the RSNs, **Fox News** and **FX Networks**. Ad rev grew at 2% during the Q, with double-digit growth at FX Nets and **Nat Geo Channels** partially offset by lower ad rev at Fox News with the presidential election over. -- Operating income at **Disney**'s cable nets increased $224mln to $1.7bln during 1Q, due to growth at **ESPN**. Higher operating income at ESPN was helped by increased affil revenues and higher ad revenue, partially offset by increased programming and product costs. Growth in ESPN ad revenue primarily stemmed from an increase in units sold and higher rates while higher college sports rights fees drove the increase in programming costs. Overall, Disney's 1Q income rose 32% YOY to $1.5bln. CFO *Jay Rasulo* attributed the growth in the cable business to benefits of new affil agreements. -- **Liberty Media,** which spun off **Starz** in Jan, reported net income of $8.1bln in 1Q, up from $151mln in the year-ago period. The jump in profits stemmed largely from Liberty's new controlling interest in **Sirius XM**. The company also took a minority stake in **Charter** in March. Though Charter is well positioned to be a stand-alone entity, "we will see" if the op can be a purchaser or acquisition target, CEO *Greg Maffei* said during Wed's earnings call. When asked if Liberty will exercise its option to raise its stake to 40% over time, Maffei again took a wait-and-see approach.

On the Hill: As expected, next week's **Sen Communications** subcmte hearing on the state of video will feature testimony from **NCTA**'s *Michael Powell* and **NAB**'s *Gordon Smith (**Cfax**, 5/3)*. Also on the witness list are **DISH** gen counsel *Stanton Dodge* and **Public Knowledge** sr staff attorney *John Bergmayer*.

Verizon JV: New products are coming from **Verizon Wireless** and its cable partners, potentially in "very important" 4Q, Verizon Wireless head *Dan Mead* said during the **Jefferies** Global Telecom and Media Conference Wed. He noted a "very active pipeline" of products that will be available nationwide as part of the Verizon/cable joint marketing/sales/development agreement. The telco acquired AWS spectrum from MSOs including **Time Warner Cable, Comcast, Cox** and **Bright House** in a $3.9bln deal last year. Verizon made a product for downloading video content available with Comcast last year. "If you are traveling across country and want to download movies, you can do it over the LTE network," he said. "You can download them and take them with you."

Google Fiber: Grandview, MO, will be the newest **Google** fiberhood. The city's board of aldermen on Tues approved Google's plan to bring fiber to the community. Even Google acknowledged it will take a while before it can start the deployment, saying in a blog post that it needs to plan and engineer the network first.

A&E Reshuffling: **A&E** ramped up its ad sales team, upping 4 industry vets to evp: *Jim Agius* of A&E/**Bio;** *Amy Baker* of **Lifetime/LMN**, *Peter Olsen* of **History/H2** and *Michael Peretz* of ad sales revenue management & operations, A&E Networks, respectively. The company also hired 2 new vp of business development, a newly formed business development group. The new VPs include *Louis Jerome* (for A+E/Bio) and *Susan Webber Gatto* (for Lifetime). The move re-positions *Chris Lenge*, vp of business affairs, who will now focus on History/H2.

Sports Emmys: **NBC** had the most Sports Emmy wins Tues, picking up 10 statuettes. **HBO Sports** had 6 wins, followed by **NBC Sports Net**'s (4). Four nets had 3 wins each: **ESPN, MLB, TBS** and **TNT**. Oddly enough, **Bravo** actually picked up 2 wins. Nope, "Real Housewives" cat-fighting and table flipping haven't become sports. The wins were collective wins

BUSINESS & FINANCE

for NBCU's Olympic coverage.

TVE: **Starz** added new devices to support TVE, including Android devices and other operating platforms like Nook HD, Nook HD+ and some Google Nexus devices including the Nexus 4, Nexus 7, and Nexus 10. The net also launched its free PLAY platform app in the Google Play and Nook Apps storefronts.

Programming: **Disney** doesn't have all the *Star Wars* programming. Lego Star Wars returns to **Cartoon** with the "The Yoda Chronicles," a 3-part animated special that debuts May 29, 8pm. -- **CNN** announced original series "Chicagoland" for next year. Exec produced by *Robert Redford* and *Laura Michalchyshyn* of **Sundance Prod**, it's a non-scripted series about the city and its challenges. -- **TNT** greenlit spy drama "Legends," starring *Sean Bean*, for 10 eps to premiere next year.

People: **News Corp** vet *Tom Mockridge* becomes CEO of **Virgin Media** at the close of **Liberty Global**'s proposed purchase. The transaction is set to close early next month. -- **ESPN** named *Aaron Taylor* svp, marketing.

Business & Finance: **Charter** announced that funds affiliated with stockholder **Crestview Partners** have agreed to sell approx 1mln shares of Charter common stock. Charter won't sell any shares in the offering and won't receive any proceeds from the offering. **Goldman Sachs** will act as underwriter for the offering.

CableFAX Daily Stockwatch

Company	05/08 Close	1-Day Ch
BROADCASTERS/DBS/MMDS		
DIRECTV:	61.90	(0.05)
DISH:	39.61	(1.17)
DISNEY:	65.99	(0.08)
GE:	23.01	0.33
NEWS CORP:	31.98	(0.31)
MSOS		
CABLEVISION:	15.47	0.24
CHARTER:	110.04	0.35
COMCAST:	43.27	0.23
COMCAST SPCL:	41.40	0.28
GCI:	9.50	(0.22)
LIBERTY GLOBAL:	79.05	1.04
LIBERTY INT:	22.80	1.03
SHAW COMM:	23.05	(0.03)
TIME WARNER CABLE:	98.32	0.75
VIRGIN MEDIA:	51.86	0.48
WASH POST:	449.50	(0.94)
PROGRAMMING		
AMC NETWORKS:	64.65	(0.45)
CBS:	46.95	(0.7)
CROWN:	2.04	UNCH
DISCOVERY:	76.94	(0.93)
GRUPO TELEVISA:	26.57	0.76
HSN:	55.42	0.36
INTERACTIVE CORP:	49.20	UNCH
LIONSGATE:	26.26	0.23
OUTDOOR:	10.14	0.04
SCRIPPS INT:	69.10	0.19
STARZ:	24.24	0.28
TIME WARNER:	61.13	(0.39)
VALUEVISION:	4.04	0.11
VIACOM:	69.19	0.77
WWE:	9.30	0.07
TECHNOLOGY		
ADDVANTAGE:	2.31	(0.05)
ALCATEL LUCENT:	1.48	0.04
AMDOCS:	36.42	0.36
AMPHENOL:	77.98	0.09
AOL:	37.74	(3.68)
APPLE:	463.84	5.18
ARRIS GROUP:	16.70	(0.02)
AVID TECH:	6.94	0.05
BLNDER TONGUE:	1.15	0.10
BROADCOM:	36.41	0.12
CISCO:	20.72	0.34
CLEARWIRE:	3.39	0.04
CONCURRENT:	7.65	(0.04)

Company	05/08 Close	1-Day Ch
CONVERGYS:	17.78	0.13
CSG SYSTEMS:	21.75	0.36
ECHOSTAR:	39.93	(0.07)
GOOGLE:	873.63	16.40
HARMONIC:	5.84	(0.05)
INTEL:	24.25	0.10
JDSU:	13.53	(0.22)
LEVEL 3:	23.99	0.78
MICROSOFT:	32.99	(0.32)
RENTRAK:	24.18	(0.22)
SEACHANGE:	11.15	0.05
SONY:	17.94	0.24
SPRINT NEXTEL:	7.32	0.10
TIVO:	11.94	(0.07)
UNIVERSAL ELEC:	23.74	(0.5)
VONAGE:	2.81	(0.01)
YAHOO:	26.41	0.34
TELCOS		
AT&T:	37.83	0.31
VERIZON:	53.11	0.19
MARKET INDICES		
DOW:	15105.12	48.92
NASDAQ:	3413.27	16.64
S&P 500:	1632.69	6.73

Think about that for a minute...

'A Funny Thing Happened...

Commentary by Steve Effros

….on the way to the forum." That play was hilarious, with lots of twists and turns. So now there's a sequel, with lawyers "forum shopping" the Aereo case. It's getting to be its own sort of comedy. Broadcasters don't think its so amusing. For the cable industry, however, we can sit back and watch the show. We'll be smiling at the end either way.

The latest twist; Aereo wants to expand into Boston while awaiting the trial in New York regarding the legality of its copyright ploy. It claims it doesn't have to pay broadcasters for delivering their signals to customers because the processing technically happens, Aereo claims, after the individual customer has "received" the broadcast on their own little "leased" antennas, thus there is no "performance" as defined by the copyright law. Of course cable operators, who provide essentially the same delivery, do have to pay broadcasters, either through a compulsory license or via retransmission consent rules established in law. As one judge has already said, what Aereo is doing is claiming an alleged technological loophole to avoid having to pay copyright. It's not clear at all what the ultimate decision in the first case will be. Despite all the blogs and consumer press reports to the contrary, Aereo has not "won" that case, they simply avoided being shut down before the case was heard!

But Aereo was very careful to pick New York for it's initial offering, since it relies on the "Cablevision" case, decided in the same (2nd) Circuit, which ruled that remote DVRs did not create a new copyright "performance." There are, however, major differences. First, the claim in the DVR case was that charging for the recording off-premises itself was a "performance," not the original distribution. And second, copyright fees for the original distribution to the customer from Cablevision were already paid. So while the 2nd Circuit Aereo theory rests, I think precariously, on the prior Cablevision case, that's not so anywhere else! The Cablevision remote DVR decision only technically applies, or constitutes binding "precedent," for judges in the 2nd Circuit. Boston is in the 1st Circuit, and that's where Aereo wants to go next. CBS has said they will sue in any legal forum where Aereo initiates service. Now Aereo has asked the 2nd Circuit Court to rule that no suits can be filed anywhere else, and that the Court should simply declare that, nationwide, what Aereo is doing is not a violation of the copyright law!

But that's what the original case is about that has yet to be tried! Aereo wants to freeze the case in just one Forum, the only one that has any precedent in their favor. The 9th Circuit, in California, has already heard a similar argument about "performances" and has ruled the other way. I don't see the 2nd Circuit trying to tell all other courts they shouldn't hear legal disputes in their own jurisdictions. I also can't imagine how long the list of potential claimants against Aereo might be. It's not just CBS. What about cable operators in every jurisdiction who are unfairly harmed by having to pay a fee that Aereo is refusing to pay and then "competing" with that operator for customers wanting video delivery?

But if they win? Then, as Glenn Britt noted, we could do it too! Not "Internet delivery" as some papers and blogs misreport, nope; just use little, addressable antennas and say goodbye to retrans fees. Think that's likely? Lots of laughs.

Steve

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