SYMPOSIUM:
FOREIGN OWNERSHIP IN THE COMMUNICATIONS INDUSTRIES - AN ANALYSIS OF SECTION 310.

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The Congress is currently considering amending the Communications Act of 1934. We will look at the changes that are being considered for Section 310, which places limits on the amount of equity a foreign company may have in a company that holds an FCC license to operate common carriers using the frequency system.

The foreign ownership issue is becoming more and more relevant today in the telecom and masscom segments of the communications industry. The recent acquisition by British Telecom of 20 percent of MCI and efforts to permit French and German investment in Sprint are obvious examples of the issue's relevancy. Other questions that the issue has raised involve Rupert Murdoch and his investing practices. Undoubtedly, the issue will remain with us as we enter the next century.

Today, we will examine how to do business under the current restrictions that Section 310 places on foreign ownership in case the law is not changed. We will also look at how the law should be changed in order to make it a fair guideline for American and foreign companies' interests.

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This is a praiseworthy time for a conference. If this conference was scheduled to take place last year, there would not be very much to talk about. We would have a law, the Communications Act of 1934, to which Congress has made only minor changes and about which there was some debate in the 1970s about whether cable television should be covered by the law. Generally, very little has happened since 1934, while the FCC has continued to make Solomon-like interpretations in the Congress of Section 310.

Today, by contrast, there is intense interest in foreign ownership issues. There is a good possibility that a bill will emerge from conference committee and contain an alien ownership provision. Also, the FCC is currently wrestling with the alien ownership issues involving Fox television and Rupert Murdoch. As a result, the FCC has initiated its own proceedings.

The Clinton Administration, with Al Gore as the spokesman, has urged liberalization of these restrictions in order to promote American interests abroad. So, with the confluence of such interest and activity, it seems almost inevitable that after the differences in H.R. 1555 and S. 652 are resolved at conference committee there will be some dramatic changes in a law that has not changed for 61 years.

To appreciate possible changes in the Act, it is helpful to parse the current language of Section 310. Part A of the section is the basic flat prohibition against foreign governments holding any licenses issued by the FCC. Part B limits the restrictions in Part A to common carriers, broadcasting stations, and aeronautical radio stations licenses. It does not include film companies, which today are primarily owned by foreign companies. Section 310 also does not apply to cable television, private radio services, and non-common carrier satellite services.

Under Section 310 (B)(4), a foreign owned corporation may hold more than a 25 percent interest in a broadcasting common carrier or aeronautical licensee as long as the Commission does not find that the ownership agreement is violative of the public interest. As a result, foreign entities must petition the FCC for a waiver. Although the FCC has allowed a foreign company to hold as much as a 60 percent interest or even total equity in a common carrier license, it has never applied this provision to broadcast licenses in such a liberal manner. In support of this position, the FCC has stated that a common carrier may not alter the content of transmissions. As a common carrier, a foreign company, as does its American counterparts, has a duty to provide service on a non-discriminatory basis and is subject to tariffs. Accordingly, the importance of limiting alien ownership is less pressing than it would be for broadcast stations.

This leads us to the issue that is before Congress and the FCC. While there seems to be a clear consensus that there should be a liberalization of the foreign ownership restrictions for common carriers, opinions about whether the limitations on foreign ownership of broadcast licenses should be repealed remain divided. There is even a split within the ranks of the Clinton Administration.

In testimony before Congress, the National Telecommunications and Information Administration (NTIA) said that it does not think the law as it applies to broadcast stations should be repealed. The NTIA described broadcasters as public trustees and pointed out that they have an important editorial role. In contrast, FCC Chairman Reed Hundt has remarked that there are possible situations in which foreign ownership of broadcast licenses would be permissible.

Given the conflicting viewpoints on the issue, why were the alien ownership restrictions adopted by Congress in the first place? The answer dates back to 1912. Before 1912, there were no laws or regulations dealing with the ownership of radio stations. In this unregulated environment, anybody could put up a transmitter and broadcast over the airwaves. Someone else could then erect a bigger, more powerful transmitter and cause interference to the other transmissions. Also, there was a fear at the time that a foreign controlled radio station could destroy the coverage of stations on American soil, given there was no radio licensing. The United States Navy was deeply concerned about this prospect, especially because of the role the potential of interference with radio stations posed to national security along the coastlines.
In response, Congress passed the 1912 Radio Act, which included a provision that permitted only U.S. citizens to hold radio licenses. One problem with the measure was that it did not take into account the situations where a radio license would be given to an entity in which there was a substantial foreign ownership interest or where a foreign entity had de facto control.

Another Radio Act was passed by Congress in 1927. Again, a provision prohibiting alien ownership was adopted. This time, the rationale behind the new law was to prevent aliens from engaging in espionage. Apparently, this concern was not a matter to be taken lightly, for in the opening days of World War I, two German controlled wireless telegraph/radio stations communicated with German Naval vessels traveling off of the United States’ eastern shore and warned them to seek cover.

For years, however, there has been very little interest in changing Section 310. Now, the Clinton Administration has come out strongly in favor of removing the barriers against foreign investment. Also, Representative Mike Oxley, the Chairman of the House Telecommunications Committee, introduced a bill that would repeal Section 310 (B) in its entirety. He contends that repealing the law will create jobs in American telephone companies and equipment manufacturers. On the other hand, a large group apparently favors the concept of reciprocity as the best way to open up markets.

The Senate Commerce Committee approved a telecom reform bill on March 23, 1995 that would allow foreign companies to receive a license despite the existence of Section 310 (B), if the FCC finds that there are equal market opportunities for U.S. companies in the country of the license seeker. The bill also contains a snap-back provision, which directs the FCC to withdraw a foreign company’s license if its government imposes restrictive measures that affect American providers. If that happens, that particular foreign company will again be subjected to the Section 310 (B) restrictions.

Given the flurry of activity and debates surrounding prohibitions against alien ownership, it appears inevitable that Congress will pass some legislation about the issue this year. However, it is difficult to predict whether the lifting of restrictions on foreign ownership of broadcast stations will be included in any telecom reform bill passed by Congress.

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In addition to Section 310 of the Communications Act, there are other important FCC regulations. Among them is Section 214 of the Act, which is nothing more than a licensing scheme. Although the FCC continually declares itself the most open regulator in the world, the Commission has an amazingly restrictive licensing policy. Many foreign regulators find the FCC’s licensing rules to be truly inedible.

A carrier in the United States, a foreign carrier in particular, has to be licensed by service by service and route by route, whether or not the carrier provides the service by resale or ownership. Licenses can be obtained through a matrix of those types of arrangements. As a result, a carrier may hold a license to operate data services to a certain country by a resale, which provides absolutely no right to provide the same service by the same arrangement to another country.

The licensing plan in the United States is literally a three-fold, three dimensional matrix: service, route by route specificity, which means that the carrier must obtain a license for the path that the data is transmitted over, and the means of transmission, whether analog or digital must all be licensed, and whether you can own it or have to use another carrier’s like MCI, Sprint, or AT&T must be specified. No other country has such a detailed licensing scheme.

The scheme is very important because it constantly has a carrier filing one type of application or another with the FCC as its business grows. The filing of applications is routine because the FCC declared years ago that it will not grant blanket licenses to foreign carriers. In fact, the FCC necessitates a carrier to abide by the matrix whenever a carrier’s marketing team decides to implement a new sales plan.

Additionally, foreign carriers in particular but not exclusively, are regulated under what is called the dominance regime. Dominance indicates market power in one of the specific routes or in one of the specific services under the licensing regime. Cable & Wireless runs telecom operations in 40 to 50 countries. Many of the operations are monopolies. The Commission routinely addresses the ability of monopolies to discriminate, and the dominance rules seek to keep carriers under a microscope so that the FCC can watch the transactions between a U.S. affiliate and/or foreign monopolies. A carrier must prove to the FCC that it is not a dominant firm on a route by route, service by service basis. Dominant firms are subject to the more stringent tariff regulations that the FCC imposes. The tests are also more stringent for a carrier to obtain or expand a license on a route that is classified as dominant.

The oldest foreign carrier in the United States, Cable & Wireless is probably the longest suffering veteran of the foreign carrier wars in this country. AT&T is its principal opponent and objects to any application that Cable & Wireless submits to the FCC. Most of AT&T’s arguments revolve around a reciprocity standard. Currently, the NTIA, the Commission, and the Senate are addressing this issue. In all likelihood, the House of Representatives will also take up the issue. At this time, however, the restrictions on foreign ownership probably will not be repealed given their political nature.

AT&T has crafted a very interesting argument that revolves around a concept called “mirror reciprocity.” The concept utilizes the proposition that unless there is an identical market place in the country from which the foreign carrier comes, there can be no opening of the American market to that carrier. This is an extremely galling scheme for a British company, for example. The market in the United Kingdom tends to be more open than the U.S. market because there are no restrictions that are similar to Section 310. In fact, foreign ownership is not a criterion of licensing in Britain. Many U.S. firms operate easily in Britain; however, many of the Americans’ British counterparts are excluded from holding licenses based on a supposed lack of reciprocity.

The difficulties that we face, however, are not denial of authorizations. In contrast to foreign countries that close their markets to American companies due to closure of the American market to foreign carriers, the FCC takes a more subtle approach. I do not think it is deliberate, however, its procedures are so arcane and subject to manipulation that we wind up with a result...
that is probably unintended.

I have never had an authorization application denied by the FCC. On the other hand, we have had numerous applications delayed for years at the FCC until the business considerations that were driving the applications collapsed during the wait for authorization. Certainly, this subtle form of denial can be frustrating and costly. Because it is difficult to conduct business in this kind of environment, we have supported changes in the legislation as well as in the general structure of the FCC’s notice of rulemaking procedures.

While we hope for changes in the law, the reciprocity standard that is being considered is troublesome, especially Senator Hollings’s snap-back provision. Under this plan, if a foreign country closes its market to American companies, the U.S. may close its market to that country’s communications companies. In certain situations, the snap-back provision may come into play years after a foreign carrier has made a substantial investment in a license in the United States. One example might be the occasion when the Labor Party controls a majority in the British Parliament and takes action that the FCC considers to be a closing of the British market to American companies. As a result, a British company like Wireless & Cable, would be left on the sidelines watching its investment relegated into uselessness.

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There are a number of different factors that are driving people all over the world, especially those in the U.S., to consider the whole question of foreign ownership. First, in the United States in the 1970s and the United Kingdom and Japan in the early 1980s, policy makers realized that competition and private ownership of telecommunications services would be more efficient avenues of providing consumers with communications systems. Because communication technology was and still is of vital importance to national economics, communications markets needed to be reorganized in order to provide for competition and privatization. After the American, British, and Japanese communications markets were opened up for competition, foreign companies became interested in investing in those markets.

A second factor driving investment is the response of former monopolists to the idea of competition. Inevitably, competition causes reductions in the monopolists’ sizeable market shares even if their respective markets and revenues grow. Consequently, where competition increased, the existing dominant company looked elsewhere. In many instances, the former monopolists searched overseas for opportunities to expand their businesses. British Telecom’s venture into the U.S. market is just one of countless examples of foreign companies entering other countries’ markets.

A third factor is a perception held by the major companies in the field that large, corporate consumers are interested in receiving telecommunication services from a single source. Today, the global market is quite fractionalized. A single call may involve several different providers. There are no common standards in place. The payment methods for call transfers from one company’s circuits to those of another company are rather archaic and add to the expense of the call. Consequently, telephone companies perceive that consumers want the market to be reorganized on a world wide scale so that there are single providers across national boundaries.

These factors are driving foreign investment activity and subsequently causing governments’ policy makers to take notice, especially America’s leaders who have become quite concerned.

The United States has responded to the growing interest in foreign ownership with market closing initiatives. Although the laws are stacked against providers from foreign countries, they really are not written that way. Contrary to the understanding of most people, Section 310, which has three basic provisions, is not a complete bar to foreign ownership in the United States. First, according to Section 310(a), governments cannot own licenses. Therefore, a government owned company may not hold a license. This is a restriction because most foreign telephone companies are currently government owned or controlled. For example, Section 310(a) could be interpreted to prevent NTT of Japan, which is 60 percent government owned, from holding a radio license in the United States. Because most communications operations in the United States involve the use of radio licenses, that could serve as a bar. On the other hand, Section 310A would not restrict a government owned company from having less than control of a common carrier that holds a radio license.

The second provision of Section 310 states that a common carrier radio license cannot be held by a foreign entity. This, however, applies only to the entity which is the licensee itself. Most companies today are organized in such a way that the licensee is a subsidiary of a parent company. The parent company of a licensee, therefore, is not subject to the 20 percent foreign ownership restriction. In other words, a radio licensee could have no more than 20 percent foreign ownership; however, the parent company of a licensee is not subjected to the restriction. Instead, the law places a 25 percent threshold on foreign ownership in a parent company. The law does not actually have a flat prohibition of foreign ownership above 25 percent. Rather, foreign ownership above 25 percent is prohibited if the Commission finds that the public interest would not be well served by foreign ownership.

Both of these provisions arose from concerns for national security. As far as the law is concerned, foreign ownership in a parent company of licensee in excess of 25 percent should be permitted, should not require prior approval of the FCC, and should only be scrutinized by the FCC if there is a national security problem. This is a fairly flexible reading of the law. If the letter of the law were followed, there would probably be fair opportunities for foreign companies to do business in the United States. Unfortunately, that is not reality.

The reality is that it is difficult for a foreign provider to enter the U.S. market and do business here. What makes it difficult is that Section 310(B)(4) is interpreted by the FCC to mean that a foreign company must receive prior approval before it may buy a controlling interest in a company that has a common carrier radio license. Even though the law does not require it, a lawyer should never advise a client, who is seeking to invest in the parent company of a radio licensee, to proceed without first filing an application with the FCC for permission.

Moreover, Section 310 is problematic for foreign companies because it goes beyond its original intent, for the law was enacted due to national security concerns. Its legislative history makes this clear. Today, however, the FCC applies Section 310 in a way
that takes economics and market access in other countries into consideration before a foreign company’s application will be approved. Apparently, access to markets in other countries, not America’s security, drive the FCC’s policies on foreign ownership.

J. Gregory Sidak
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...I want to talk about how Section 310(f) , as it is now denominated in the press, might work in practice and how it reflects the predominance of what is known as strategic trade theories in economics over the classical theory of free trade.

Section 310(f) would replace Section 310(b) if there are equivalent market opportunities for American companies abroad. As a practical matter, the new section will be of interest only if a foreign company makes an investment in an American company that exceeds 25 percent.

One aspect that is missing from Section 310(f) is a determination that a foreign company’s investment will benefit the public interest. Apparently, a foreign company can invest in an American company as long as the foreign country can establish that American companies have access to the market in the foreign country’s country. Arguably, this is the “in the public interest” determination that must be made. However, when Section 310(f) is litigated for the first time, I would not be surprised if the opponent to a foreign company’s investment in the United States argues that a public interest determination must be made.

Despite the intent behind Section 310(f), if a foreign country does not present American companies with market opportunities that are comparable to those provided to foreign companies in the United States, Section 310(b) governs the situation.

Richard Cotton
Executive Vice President & General Counsel, NBC

...I am going to talk today as a practitioner, which means that I am going to make a series of observations rather than try to get too deeply into analysis of the specifics of the law or attempt to lay out an extended thesis as to exactly what U.S. policy ought to be in the communications arena.

The current debate on foreign ownership regulation, particularly as it applies to mass media, to former President Ronald Reagan. Officials from the Justice Department were briefing Mr. Reagan on plans to change various processes by which regulations were issued. The briefing had gone on for some time. It had become quite detailed. Finally, at its conclusion, the Justice Department official, who was a little concerned about whether the President had followed all of the briefing, asked what Mr. Reagan thought about the proposal that had just been outlined to him. Mr. Reagan is said to have replied that he thought it was a little like the hunter and the lion.

The hunter in this particular circumstance had never hunted big game before, according to the President, and was understandably nervous. When he came upon his first lion, he took careful aim but, being nervous, he shot and only grazed the lion. The lion turned on the hunter, who, in his haste, jammed his gun. At that point, he turned and ran as fast as he could with the lion hard on his heels. But suddenly, as he plunged through the jungle, he came to the edge of a very, very steep and very, very high cliff.

Realizing he had no place to go, the hunter fell on his knees, clapped his hands together in prayer and said, “Dear Lord, if you ever answer a prayer, answer me now. Please strike this lion with a Christian heart.” With that, there was a peal of thunder, a lightening bolt came down from the sky, struck the lion, and the lion, lo and behold, fell to his knees. The hunter was about to offer thanks when he heard the lion intone, “Bless, oh Lord, the meal that I am about to eat.”

The point of the story, obviously, is that the process may change, but that does not guarantee that the result will be any different. Keeping that story in mind when we turn to the issue of foreign ownership, my observations will flow from my recent experience at NBC. Let me stress two aspects of my experience just to be certain that you understand the context.

First, the petitions that NBC filed at the FCC challenged Fox on three grounds. For starters, Fox violated the foreign ownership rule. Second, the stations that Fox attempted to acquire should properly be attributable to them. Lastly, the number of stations it would own would exceed the 12 station limit on ownership by any one corporate entity. The focus, therefore, was not particularly on foreign ownership from NBC’s perspective. Rather, it was a desire to see clear interpretation of the rules that applied to all competitors.

NBC came to the decision to file the petitions challenging Fox’s actions on the basis that when one looked at the regulations and compared how NBC and Fox operated under them, it was difficult to overlook the evidence that two competitors were conducted business under two radically different interpretations of the rules. It should be noted that seeking equal enforcement of the rules does not necessarily imply support for the rules. In fact, our position before the FCC was that we took no position on precisely how the FCC should apply the foreign ownership restrictions. Rather, we asked the FCC if it was going to allow Fox, in effect, to have ownership that exceeded the 25 percent limitation in Section 310 and if all competitors would be permitted to hold that type of interest. Simply put, we questioned whether the FCC deemed an investment which exceeded 25 percent in an American television station was acceptable.

These questions were posed not because there was a pending NBC transaction at stake, but because we want a level playing field. The question of whether we could enter into joint ventures to finance and purchase stations with Sony, Matsushita, and other international firms was thrown around. Indeed, over the last two or three years, there were several conversations that had occurred between NBC and foreign competitors. However, all sides concluded that the law disallowed any the type of venture in which a foreign company would own more than 25 percent of an American station.

When NBC filed the petitions against Fox’s applications, NBC took the position that it was unacceptable for the FCC to make an ad hoc decision to permit Fox to exceed the 25 percent limit when the FCC did not allow any other foreign company to exceed that limit during the previous 60 years. Furthermore, our position was that the FCC did have authority and discretion to structure the power it has to grant a waiver if it set forth the criteria upon which permission to exceed the limit would be granted.
From our perspective, the FCC did exactly what we suggested it should do. The FCC started a rulemaking proceeding in reviewing foreign ownership of both common carriers and broadcast stations. Within 10 days of the issuance of that rulemaking, NBC withdrew its challenge to the FCC’s procedures. The point I want to leave here is that what we were concerned about was the FCC’s exercise of discretion under Section 310.

The second observation I wish to make is that NBC has an extremely strong appetite to be a major international distributor of home video programming. Our particular focus is in the area of news and information, especially business news and information. In the late 1980s, NBC made several investments in broadcast properties in foreign countries, but was forced to conform them with the very stringent limitations that existed under foreign laws. As a result, most of the investments ranged from 15 to 20 percent. Virtually all of them proved to be unsuccessful because the foreign partner did not possess the skills necessary to successfully manage the broadcast station. In the 1990s, NBC has followed an entirely different route. Namely, NBC bought a majority interest in satellite services, which are not regulated as strictly as broadcast stations in other countries. Beginning this summer, there will be an NBC Superchannel in Asia and a CNNAsia in Asia. It is our goal to broadcast to every country in Asia with the aid of cable systems that receive signals from satellites or through direct home satellites.

With this in mind, I will make some observations about the foreign ownership debate. First, from the perspective of an American company like NBC, the restrictions have an enormous impact. For example, small minority interests are by large unattractive overseas investments for NBC. The only benefit behind a minority share investment is to enhance ties with another large company. Of course, the more appealing alternative is to be the operator of a service. Undoubtedly, joint ventures can be attractive, but most foreign restrictions on broadcast stations foreclose more than just a minority investment.

Second, in the Fox proceedings, there are a set of issues yet to be resolved regarding the interpretation of Section 310. Of particular interest is Fox’s contention that what is at stake in Section 310(b) is voting control and not equity. NBC’s view is that there is not much of a legal argument to be put forth on this matter. But again, the FCC’s decision on how Section 310(b) is to be interpreted and how much of a restriction it will continue to be in the broadcast arena remains to be seen.

Third, if I had to quickly and broadly describe the arguments for doing away with foreign ownership restrictions, I think they would fall into four categories. The first involves technology. The enormous developments in technology do not particularly respect political boundaries. The product of these developments can be called the “global information infrastructure.” Because it is here, it no longer makes sense to restrict broadcasting. The second category is the efficiency of the capital market, which is the free trade argument in favor of removing barriers. Next, there has been a drastic increase in the number of sources of programming. Therefore, there is no need to worry about foreign control. Finally, the internationalization of news, information, and entertainment through the use of a multitude of distribution mechanisms undercuts the rationale behind ownership restrictions. In short, the global village is here, or else it is right around the corner.

Despite these arguments, I think there is a whole set of other considerations that guide the foreign ownership debate. Most carry an enormous amount of weight with politicians. Out of curiosity, I reviewed the television ratings for a recent Sunday night. Between 8:00 p.m. and 11:00 p.m. Eastern Standard Time, depending upon the hour, 55 to 65 million households had their televisions on for every hour of that three hour period. A little more than two people were watching each of those television sets. Thus, between 110 and 130 million Americans were watching television. Seventy-five percent of those people were watching broadcast television. The numbers are slightly lower for other days of the week.

Turning to network news, about 25 million homes are tuned into either CBS, NBC, or ABC broadcasts. Given that about two people are watching each television set that is on, more than 50 million people are watching network television news.

The point of bringing up these figures is that when we speak of broadcast television, the cultural, political, ideological, and national security issues that surround the foreign ownership debate come to the foreground. The broadcast business in the US has grown up and developed with a unique blend of national and local programming. Many parties own local broadcast stations. As a result, tradition suggests that local stations address the issues in their respective market places. And, although criticism of the quality of local news is endemic in the business, the reality is that local news is the business that local stations are in.

The politicians who deal with foreign ownership issues pay close attention to and are dependent on the local news of broadcast stations and the national news of the networks. Certainly, they are aware of the notion that the image of an individual society is frequently heavily attached to broadcast television. The point here, however, is that while it is easy to argue in favor of repealing foreign ownership restrictions and that they are outdated as an intellectual policy matter, real world political considerations often win out on the other side of the coin.

Loose Ends from page 9

In the 1950s, competitors searched for forgotten corners in the shadow of P&P, where they might peddle such things as cardboard punch cards or plastic Hush-A-Phone cups. But that old world, Orwell’s world, the world of computer and communications monopolies, will not be seen again in our lifetimes. The loose ends and the forgotten corners have taken over. The battle of the cardboard card and the plastic cup have been won; computers, telephones, and television are now riddled with slots, ports, jacks, joysticks, mice, and SCSI interfaces, and surrounded by compact disks, video cameras, VCRs, scanners, screens, optical character readers, facsimile interfaces, sound synthesizers, projectors, and radio antennas. The plugs and jacks and sockets have taken over the telescreen world; the Ministry is dead. Every unlined plug, every unconnected jack, is a loose end, a new entry into the network or an exit from it, a new soap box in Hyde Park, a new podium, a new microphone for poetry or prose, a new screen or telescreen for displaying private sentiment or fomenting sedition, for preaching the gospel, or peddling fresh bread.