

Title: ACTA Liability

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Distribution: ACTA-all (All interested parties)

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Abstract:

The ACTA is currently debating the issue of liability for its actions as defined by FCC 00-400, the report and order that, among other things, created ACTA. Several of the ACTA representatives have expressed concern that lawsuits against ACTA, even if unsuccessful, could be so costly to themselves and their companies that their participation in ACTA is threatened.

The following memo from Dale Mohlenhoff, legal counsel for Thomson multimedia, Inc., addresses these concerns and recommends that ACTA incorporate as a non-profit organization and purchase insurance to mitigate the liability from any potential lawsuit. Note that Thomson multimedia, Inc. is one of ATLINKS' parents and ATLINKS still contracts for its legal services from Thomson.

The memo was written prior to the contributions ACTA-0107-11-04 and 05, but is offered now because:

1. Its recommendation is based in part on liability resulting from ACTA "Hot Line" functions described in FCC 00-400 paragraph 53. These duties do not seem to be addressed in contributions 04 and 05.
2. Mr. Mohlenhoff's recommendation to incorporate is not mentioned in either contribution 04 or 05.

Unfortunately, Mr. Mohlenhoff is out of the office the week of (July 2 – 6) and is unable to comment specifically on contributions 04 and 05.

Memo

To: Clint Pinkham
From: Dale Mohlenhoff
CC: Susan Bates
Date: 6/15/01
Re: Potential ATCA Incorporation

The following memo is an internal Thomson memo representing Thomson's internal viewpoint with respect to the incorporation of ATCA. This memo is not meant to represent legal advice, but merely to generate discussion with respect to the subject matter.

(a) Recommendation

The Administrative Council for Terminal Attachment (ATCA) should incorporate as a non-profit corporation.

(b) Background Facts

The ATCA is an industry group composed of 3 elected representatives from each of 6 interest segments associated with the telecommunications industry. The ATCA is responsible for publishing the technical standards for equipment attached to the telephone network as defined by 47 CFR part 68. Once published, the technical standards have the force of law, i.e. equipment that does not meet the standards cannot be connected to the telephone system or be imported into the United States. In addition to preparing and publishing the technical standards, the ATCA also operates a telephone hotline to answer questions related to the technical standards and individual companies' responsibilities with respect to compliance with these standards.

(c) Discussion

This memo will briefly define the risks associated with the ATCA activities and discuss the advantages and disadvantages of the incorporation of ATCA.

If ATCA decides not to incorporate, the risk of liability to its members increases and Thomson would not be in a position to participate in the ATCA. Legal actions can result from actions ranging from incorrect advice given on the telephone hotline to actions resulting from a finding of non-compliance by a particular company. If a third party feels it has been wronged by the ATCA and initiates litigation or some other legal action, the members, both individually and as a representative of their corporation, can be named in

the action and can be found liable. The naming of individuals and the individual corporate entities for any legal action is necessitated by the fact that there is no ATCA legal entity to sue that provides a “corporate veil” which shields against such legal actions. While individuals can still be named if incorporated, there are certain protections such as insurance the corporation can secure which help to reduce the risk of liability. Members must consult their own companies as to whether the company would cover the legal expenses associated with the individual liability. While larger companies would likely cover this expense, many smaller companies may not be able to do so. However, even larger companies may not wish to accept the risk associated with the activities of ATCA. Furthermore, the risk of corporate liability to smaller companies may be significant enough to cause a significant financial burden and may in some cases result in the bankruptcy of smaller companies. As may be obvious to many, it also does not matter sometimes whether you win or lose, the cost of litigation is sometimes more than some companies can bear. Even though individual officers and board members can be held liable in legal actions involving ATCA activities, such officers and board members in a corporation can be protected by insurance, which is discussed briefly below.

Incorporating as a non-profit corporation provides the advantages of operating as a corporate entity in terms of the corporate liability discussed above. A non-profit corporation, along with appropriate insurance, could shield the individual companies and individuals from legal actions that could reasonably result from the activities conducted by the ATCA, their officers and board members. This is the primary advantage of incorporation.

The major disadvantages occur with respect to the administrative burden and the costs. Initially, articles of incorporation and by-laws will have to be developed, approved by the members and filed with the state in which the incorporation is to take place. The cost of filing the documents with the appropriate state is usually nominal, but do vary depending on the state. The cost of preparing the documents may require some outside legal counsel fees since these documents will govern how the corporation operates on a day-to-day basis and governs the election of officers and board members. Once the corporation is formed, ongoing activities such as tax returns and state filings, both for taxes and corporate governance, will need to be filed. This may require some additional legal and accounting fees. There is also the matter of director’s and officer’s liability insurance as well as other types of insurance, such as general liability, that may need to be considered. Insurance costs will likely be the major expense resulting from the formation of the corporation.