RECENT CASES

Turner "superstation" in Atlanta allowed to broadcast NCAA football games this year, but not in the future

WTBS, the Turner Broadcasting System "superstation" in Atlanta, has been allowed to kick off a season of Saturday night broadcasts of NCAA football games by a Georgia state court judge. ABC and its Atlanta affiliate had attempted to enjoin the broadcasts, and though they did not succeed in doing so insofar as 1982 is concerned, they have prevailed with respect to next year.

The dispute over WTBS's right to broadcast the games arose shortly after the NCAA decided to alter its long-standing affiliation with ABC. Rather than continue with what had been an exclusive affiliation with ABC, the

NCAA decided to offer two networks the right to broadcast 14 games each per season from 1982 through 1985, and to offer cable or pay over-the-air television an NCAA "supplemental series" of 19 games per season for 1982 and 1983 on a trial basis.

In January of 1982, the NCAA signed a $17.5 million, 2-year agreement with Turner Broadcasting for the "supplemental series." Turner does not operate either a cable system or a pay over-the-air station, however. And that is why the dispute arose. Turner owns and operates WTBS which is a conventional, free, over-the-air television station in Atlanta. The reason the NCAA granted it the right to carry the "supplemental series" - which was intended for cable or payTV - was that WTBS is a "superstation." Its signal is picked up by Southern Satellite Systems which retransmits it by satellite to approximately 3,000 cable systems around the country having a total subscribing audience of 22.5 million households.

Thus WTBS is the originator of cable programming. However, because it is also a conventional television station, its signal is received, free, by all households in the Atlanta market. That was, as some say, the "rub," because ABC's affiliate in Atlanta, WSB-TV (owned by Cox Broadcasting), did not relish the prospect of competing on Saturday nights with NCAA football broadcasts - broadcasts which may give Turner's WTBS a 40 or even 50 share in Atlanta.

The basis for ABC's suit was that it had a contract of its own with the NCAA which was predicated on ABC's understanding that the "supplemental series" would be carried on cable or pay-TV only, not on conventional television. This contract was the product of "hard and bitter" negotiations, and ABC was not inclined to overlook the fact that WTBS is a free, overthe-air station. Furthermore, CBS's contract with the NCAA does include a provision by which CBS agreed that the

NCAA's "supplemental series" could be carried by a free, over-the-air station in one market - a provision which the NCAA insisted upon after it gave the "supplemental series" rights to Turner Broadcasting. ABC's contract with the NCAA had no such provision, however, because the NCAA did not want to risk aborting its $131,750,000, 4-year deal with ABC by inserting such a provision in ABC's contract. On the other hand, ABC had tried, unsuccessfully, to insert language in the contract which would have expressly prohibited superstations from carrying the ,.supplemental series." Apparently neither the NCAA nor ABC wished to have an open confrontation over the NCAA's deal with Turner Broadcasting. And both, knowing the position of the other, agreed after what were later characterized by the court as "sharp practices in contract negotiations" - to contract language that said nothing whatsoever about superstations in general or WTBS in particular.

In their action, ABC and WSB-TV alleged that WTBS's broadcasts of NCAA games in Atlanta would reduce WSB-TV's ratings and would harm its "image, standing, reputation and revenues." Judge Frank M. Eldridge of the Fulton County Superior Court agreed that WBS-TV and ABC would suffer irreparable harm if WTBS were allowed to broadcast the "supplemental series." Judge Eldridge also found that the overall purpose and intent of the agreement between the NCAA and ABC, as well as the NCAA's Football Television Plans which were incorporated by reference into that contract, were to exclude free, over-the-air broadcasts of the "supplemental series." Thus, he found that by entering into an agreement with Turner Broadcasting for the series, the NCAA had breached its contract with ABC.

However, Judge Eldridge also found that ABC had been dilatory in seeking relief, and that in the meantime, Turner Broadcasting had substantially changed its position in reliance on its own agreement with the NCAA. Moreover, the judge found that if the series were not carried by WTBS, great harm would be suffered by those NCAA schools that are to play in the "supplemental series." Therefore, Judge Eldridge refused to enjoin WTBS's broadcasts of the series during 1982. On the other hand, he did enjoin Turner Broadcasting from broadcasting any games by free, over-the-air television in 1983, 1984 or 1985. In order to alleviate the damage to be suffered by WSB-TV this year, the judge ordered the NCAA to permit WSB-TV to broadcast, during the 1982 season, two University of Georgia and two Georgia Tech games in addition to, or in place of, any of the regular 1982 NCAA games it may broadcast as an affiliate of the ABC network.

Cox Broadcasting v. NCAA, No. C-89120 (Fulton County, Georgia, Superior Court, August 20, 1982) [ELR 4:10:1]

"Monopoly" has become a generic term and has lost trademark protection, Federal Court of Appeals rules in case filed by maker of "Anti-Monopoly" game

Parker Brothers has had an unrewarding trip around the board in its action against Anti-Monopoly, Inc. In an earlier proceeding, a Federal District Court had held that the word "Monopoly" was not a generic term when it was registered as a trademark by Parker Brothers in 1935, and that the primary significance of the mark was to identify Parker Brothers as the source of the game (ELR 3:12:4). In reversing this decision, a Federal Court of Appeals recently has held that the District Court's finding that the trademark "Monopoly" serves to identify its producer was clearly erroneous.

The Court of Appeals did agree that the name "Monopoly" had not become generic before it was registered as a trademark, even though a game known as "Monopoly" or "Finance" had been played in scattered East Coast locations from 1904 to 1934. But the court went on to restate the essential principle that a word may be used as a trademark only if "the primary significance of the term in the minds of the consuming public is not the product but the producer. When a trademark primarily denotes a product, not the product's producer, the trademark is lost."

The District Court had questioned the appropriateness of this standard, since its application might foreclose trademark protection for any producer of a unique game, such as "Scrabble," whose corporate title does not appear in the title of the game. Over 55% of the participants in a survey conducted by Parker Brothers did correctly identify the company as the manufacturer of "Monopoly." But this fact did not show that the name "Monopoly" was primarily source-indicating, the Court of Appeals ruled. The survey also showed that two-thirds of the members of the public who purchased the game wanted "Monopoly" and did not care who made it. And, in contrast to the District Court's findings, the Court of Appeals raised no objection to a survey conducted by AntiMonopoly which was offered to support the conclusion that the primary significance of "Monopoly" is its reference to a product.

The court therefore ruled that the trademark registration of the name "Monopoly" is no longer valid. It will remain for the District Court to determine whether "Anti-Monopoly" is taking reasonable care to inform the public of the source of its product.

Anti-Monopoly, Inc. v. General Mills Fun Group, Inc., Case No. 81-4281 (9th Cir., Aug. 26, 1982) [ELR 4:10:3]

Injunction won by Warner Bros. barring distribution of unauthorized toy car resembling the "General Lee" of the "Dukes of Hazzard" is affirmed on appeal; unlicensed manufacturer is held in contempt

The honor of the General Lee has been upheld again. As television viewers well know, the General Lee is the orange-colored Dodge Charger that is a prime attraction of the "Dukes of Hazzard." The car prominently displays a confederate flag painted on its hood and the numbers "01" painted on its two side doors. Warner Bros. has granted licenses to several toy manufacturers to produce replicas of the General Lee. In 1981, the estimated retail sales of licensed products based on the General Lee was over $ 100 million.

In 1981, Processed Plastic Company (PPC) began manufacturing a toy car in a bright orange color. Its car had a confederate flag affixed to the roof and the numbers "07" painted on the two side doors. PPC raced to bring an action for declaratory relief in which it claimed that Warner Communications was violating sections 1 and 2 of the Sherman Act by acting with Warner Bros. to harass companies involved in the production and sale of toys in competition with the General Lee. PPC cited the action of Warner Bros., Inc. v. Gay Toys, Inc. (ELR 3:16:5) as an example of Warner's alleged "predatory conduct."

During a hearing on Warner Bros.' motion for a preliminary injunction, a PPC officer testified that the company's "Rebel" car was designed with reference to the General Lee and in response to the demand for that car.

On the basis of this and other evidence, the District Court granted Warner a preliminary injunction on its claim of trademark infringement. The court found that PPC had deliberately attempted to represent its cars as replicas of Warner Bros.' General Lee car and thereby benefit from the consumer demand created for the authentic replicas. PPC's actions were likely to cause confusion among potential customers, concluded the District Court.

On appeal, PPC argued that no evidence had been presented that consumers identified the General Lee car with Warner Bros. Chief Judge Cummings of the Court of Appeals noted that secondary meaning may be established if the public assumes that a product comes from a single, although anonymous source. Thus the association by a consumer of the Rebel car or the General Lee with the "Dukes of Hazzard" television show would establish the existence of secondary meaning, because the cars were associated with a single source. As in Gay Toys, the court noted that this association sufficed to show secondary meaning even though Warner Bros. is the producer of a television show and not a manufacturer of toy cars.

The fact that PPC intentionally copied the General Lee car created an inference, unrebutted by the company, of consumer confusion. This likelihood of confusion might "vitiate" Warner Bros.' entire licensing program and damage the goodwill associated with the "Dukes of Hazzard" series. The District Court's order granting a preliminary injunction therefore was upheld.

About three months after the Court of Appeals decision, the Federal District Court which had issued the preliminary injunction found that PPC was in contempt of the injunction because the company bad continued to manufacture and distribute toy cars bearing the same "symbols of origin" which are associated with Warner

Bros.' General Lee car. The same automobile model was being used in the same bright orange color. The confederate flag sticker had been moved from the top to the side doors of the car and a notice had been pasted on the bottom of the toy disassociating the car with "any current television program or producer thereof." But the general appearance of the new toy remained quite similar to the original toy. In particular, the continuing use of the name "Rebel" along with the confederate flags created more rather than less confusion between the General Lee and PPC's car, stated the court. PPC was not merely using a Southern race car theme; the company was well aware of the significance of the confederate flag in the car's design and purportedly purchased the rights to the symbol from a Wisconsin stock car racer after the entry of the preliminary injunction. The obscure disclaimer did not obviate the likelihood of consumer confusion. PPC also apparently failed to notify its retailers of the issuance of the preliminary injunction. All of these factors demonstrated to the court that PPC was not staying a "safe distance" from the mandate of the preliminary injunction. PPC was ordered to pay all costs of the contempt proceeding including reasonable attorneys' fees.

Processed Plastic Company v. Warner Communications, Inc. 675 F.2d 852 (7th Cir. 1982); Processed Plastic Company v. Warner Bros., Inc., Case No. 81 C 3028 (N.D.Ill., July 14, 1982) [ELR 4:10:4]

Court of Appeals affirms dismissal of Teddy Brenner's antitrust suit against World Boxing Council

"When you are attempting to promote a professional championship boxing match, you had better keep your guard up." That at least is the lesson to be learned from Teddy Brenner's recent antitrust suit against the World Boxing Council, according to a Federal Court of Appeals in New York. Brenner is best remembered as the president of boxing for Madison Square Garden. In September of 1978, however, he left the Garden to become an independent promoter. As an independent, Brenner found himself in competition with promoter Don King - and it was that competition that eventually resulted in Brenner's lawsuit.

The facts leading up to Brenner's suit are complicated, and any summary of them will no doubt result in the loss of the detail and bitterness of the dispute. In a nutshell, however, the facts are these. In January of 1978, Alexis Arguello defeated Alfredo Escalera for the World Boxing Council (WBC) super featherweight championship. Shortly after Brenner became an independent promoter, he signed a contract with Arguello giving Brenner the right to promote Arguello's fights for three years. Brenner then arranged with CBS Sports for the broadcast of an Arguello-Escalera rematch, and got Escalera to sign a contract for the rematch. Thereafter, Don King also got Escalera to sign an undated contract for a rematch with Arguello-a contract which King then backdated more than a month to a date prior to Brennees contract.

King submitted his contract for the Arguello-Escalera rematch to the WBC at its annual convention, seeking certification of the fight. The WBC refused to do so however, saying that WBC rules required Arguello to defend his title against the WBC's number one rated contender, Rafael "Bazooka" Limon. Apparently, the WBC did not then know that Brenner also held a contract for an Arguello-Escalera rematch. Shortly afterwards Brenner sought certification of his Arguello-Escalera rematch. At Brenner's request, the WBC convention reconsidered Arguello's next title defense and voted to certify Brenner's rematch if "Bazooka" Limon agreed to step aside and if any dispute between Brenner and King were settled or resolved in court.

Escalera's manager confirmed that Brenner, not King, had the right to promote the Arguello-Escalera rematch. But the WBC would not waive the condition that Brenner's rematch would be sanctioned only if the dispute with King were cleared up one way or the other. When King notified CBS that he claimed the rights to the fight, CBS cancelled its contract with Brenner, though Brenner was able to enter into a new contract with ABC Sports to cover the fight. Brenner attempted to enjoin any further interference by King, but his application for a preliminary injunction was denied. Thereafter, Brenner "settled" with King by agreeing to pay him $25,000, but further disputes between them erupted and the settlement was never consumated. The rematch was held and televised nonetheless. And thereafter, the WBC suspended Brenner because of his failure to resolve his dispute with King as required as a condition of WBC certification. Brenner's suit followed.

In his suit, Brenner alleged that the WBC had conspired with King to restrain trade in professional boxing and that his suspension amounted to a group boycott, both of which are illegal under the antitrust laws. After a jury trial, both claims were dismissed, however. And the judgement against Brenner has been affirmed by the Court of Appeals.

According to the trial court, the evidence showed that "King isn't a nice guy, (and) the people he deals with don't think he's a nice guy, but that doesn't prove that he entered into a conspiracy with (the WBC) to have Brenner suspended." The Court of Appeals agreed. Its own review of the evidence led it to conclude that the WBC actually aided Brenner by agreeing to certify the

Arguello-Escalera rematch despite WBC rules requiring Arguello to fight Limon. Furthermore, the appellate court said that it could find no conspiracy in the WBC's decision to remain neutral in the dispute between Brenner and King over the validity of King's rematch contract. It noted that neither the trial court that had denied Brenner's request for a preliminary injunction nor CBS Sports had found King's contract to be invalid. And thus the WBC's decision to require Brenner to resolve the dispute in court or by settlement was not a requirement that favored King or amounted to a conspiracy with him.

The appellate court also rejected Brenner's group boycott claim. It determined that Brenner's suspension was not per se illegal. Rather, it ruled that the suspension had to be tested under the rule of reason, because the WBC was a self-regulating sports organization whose actions should be evaluated under the test announced in Denver Rockets v. All-Pro Management, 325 F. Supp.

1049 (C.D.Cal. 1971). Judged by this standard, Brenner's suspension was not an unreasonable restraint of trade, said the court, because its purpose was not to prevent competition or to favor any member of the WBC executive committee.

Brenner v. World Boxing Council, 675 F.2d 445, 1982-1 CCH Trade Cases, para. 64,638 (2d Cir. 1982) [ELR 4:10:5]

Baltimore Orioles are not liable for attorneys' fees awarded to group seeking greater access for disabled persons to stadium leased by team

The Baltimore Orioles baseball team will not be liable for the payment of attorneys' fees awarded by a Federal District Court to Disabled in Action, an organization of disabled persons. The organization brought a lawsuit, under section 504 of the Rehabilitation Act of 1973, seeking to require the club and Baltimore city officials to provide facilities for disabled spectators at Memorial Stadium equal to and integrated with facilities for the non-disabled. After the District Court denied a temporary restraining order, the matter was beard by the Maryland Commission on Human Relations. An eventual settlement of the dispute resulted in the addition of such stadium improvements as increased seating, additional turn-around space for wheelchairs, nonskid surfaces on access ramps, and special parking facilities.

The District Court then awarded Disabled in Action $6,000 in attorneys' fees, though the group had requested fees of about $24,000. The District Court held the Orioles responsible for the payment of the fees on the theory that it was an indirect beneficiary of federal financial assistance, because the city had received a grant of $300,000 in 1977 from the Federal Economic Development Administration for improvement of the stadium's elevators. As the major, although nonexclusive, lessee of the stadium, the Club was "the greatest and most immediate" beneficiary of federal aid, the District Court declared.

However, a Federal Court of Appeals has reversed the District Court's ruling on the ground that the city and not the Club has paramount control over and responsibility for the stadium premises. The Club would be legally powerless to make the extensive physical alterations demanded by Disabled in Action if the city chose to resist the demands, noted Chief Judge Winter. This was not a case where a recipient of federal assistance would be escaping its obligations under the Rehabilitation Act by funneling such assistance through an intermediary, because the city was not a "mere conduit" of federal assistance to the Club.

Since the Club was not a "recipient" of federal funds, it could not be held liable under the Rehabilitation Act, for the payment of attorneys' fees. The Court of Appeals also remanded the matter for the recalculation of the amount of fees to be awarded to Disabled in Action.

Disabled in Action v. Mayor and City Council of Baltimore, Case No. 81-1896 (4th Cir., Aug. 9, 1982) [ELR 4:10:5]

Conditions imposed on operations of general bookstores are ruled invalid

A California Court of Appeals has ordered the Santa Cruz County Board of Supervisors to issue a permit for the operating of a general bookstore to Earl Kuhns, the owner of "Frenchy's" bookstore. The Board based its denial of a permit, in part, on Kuhns' prior convictions for distributing obscene material in the county and his ownership of two local adult bookstores which were also named "Frenchy's." The court noted that "the denial of a permit to engage in a constitutionally protected activity is a total prior restraint." And a prior criminal conviction does not present the type of clear and present danger of "serious substantive evil" which is required to sustain this type of restraint on the First Amendment activity of operating a bookstore.

It also was found that the Superior Court had erred when, in ordering the Board to issue a permit, the court sustained conditions imposed by the zoning administrator on the store's operation. One of the conditions stated that the bookstore could not include "as a substantial or significant portion of its stock in trade" materials characterized by their emphasis on matters relating to specified sexual activities or specified anatomical areas.

The superior court had determined that "substantial or significant portion..." amounted to more than 20% of the store's stock in trade for sale to the public. The Court of Appeals, however, found that the 20% figure was "admittedly arbitrary" and was an invalid invasion of legislative authority. If over half of a bookstore's stock is "adult," observed the court, the adult portion would be both substantial and significant. But any lesser portion would require quantification by the Board on the basis of findings setting forth the governmental interest being protected.

Kuhns was entitled to use the name " Frenchy's" on the sign for his store, despite the zoning administrator's ruling to the contrary. An on-premises business sign is protected both as a property right and as a limited First Amendment free speech right, noted the court. Public safety and aesthetic considerations may necessitate regulation of the size, location and other physical attributes of a sign. But a nonoffensive name may not be prohibited "simply because the name may attract undesirable clientele."

The zoning administrator's condition barring all motion picture machines from the bookstore's premises also was ruled unconstitutionally overbroad. The total prohibition of motion picture machines went beyond the accepted police power purpose of protecting the character of a neighborhood since the presentation of nonadult motion pictures also was barred. An acceptable condition, suggested the court, might bar the presentation of adult motion pictures in accordance with an applicable zoning ordinance provision. Kuhns also could not be required to submit bimonthly sales records in the two categories of regular and adult sales, because this requirement was unreasonable and unnecessary to further any police power purposes.

Kuhns v. Santa Cruz County Board of Supervisors, Case 4 Civ. No. 26397 (Cal.Ct.App., Feb. 1, 1982) [ELR 4:10:6]

Briefly Noted:

Copyright.

A Federal District Court in California has dismissed an action brought by the writer of a script entitled "The Assemblage ... The Ghost of West Point" against, among others, Walt Disney Productions, the producer of the film "The Ghosts of Buxley Hall." In brief Findings of Fact and Conclusions of Law, Judge Manuel Real determined that there was no substantial similarity of ideas or protectible expression between the film and the script, and that Disney is not liable for copyright infringement.

Singer v. National Broadcasting Corporation, Case No. 81-5232 (C.D.Cal., July 6, 1982) [ELR 4:10:6]

Copyright.

A company which imported and distributed copies of records produced abroad pursuant to licenses granted by CBS Records has been found liable for copyright infringement. CBS claimed that the record albums were intended for sale only outside the United States and that the importation, by Important Record Distributors, of albums by Blue Oyster Cult, Journey and Santana violated CBS' exclusive right to distribute the albums within this country. A Federal District Court in New York ordered Important to cease importing or distributing any records which would violate copyrights held by CBS.

CBS Inc. v. Important Record Distributors, Inc., Case No. CV82-0992 (E.D.N.Y., July 14, 1982) [ELR 4:10:7]

Historic Preservation.

Creatively, but unsuccessfully, a group of artists occupying the Goodman Building, a well-known site in San Francisco, argued that a proposal to displace them from the building as part of a renewal project necessitated the preparation of an Environmental Impact Statement (EIS) by the Department of Housing and Urban Development. The artists contended that their departure would irreparably damage the cultural environment of the area. A Federal Court of Appeals has concluded that this "Cultural threat" did not require the filing of an EIS. When a project has a primary impact on the physical environment, an agency also might be required to consider the cultural, economic or social effects of the project. But the focus of an EIS must remain the physical resources of an area. The court also noted that even if an EIS were found necessary, there had been no showing of a deleterious impact on the neighborhood due to the departure of the artist-residents, or that "the identities and interests of the residents of the Goodman Building manifest any significant influence on the exterior environment."

The Goodman Group, Inc. v. Dishroom, Case No. 80-4370 (9th Cir., June 8, 1982) [ELR 4:10:7]

Jurisdiction.

A Federal District Court in New York has held that defendants may not attribute their own activities under contract to the plaintiff for the purpose of showing that the plaintiff is "doing business" in New York without authority. (If the plaintiff were, it could not maintain an action in New York.) Oliver Promotions had granted Tams-Witmark Music Library the right to license amateur performances of the play "Oliver!" in the United States and elsewhere. The agreement was negotiated in London. Oliver Promotions, a corporation organized and doing business in London, subsequently brought suit against Tams, a corporation organized and doing business in New York. Oliver alleged that Tams and another defendant "were charging unreasonably high rentals and arbitrarily low royalties, were improperly allocating between royalties and rentals on their books, and were thereby retaining as 'rentals' amounts that should be paid to Oliver as 'royalties.'" Tams moved to dismiss the action on grounds that Oliver was doing business in New York without authority, and is thus barred from maintaining a suit there by N.Y.Bus.Corp.Law section 1312(a), which states that "a foreign corporation doing business in the state without authority shall not maintain any action ... in this state." Tams contended that by receiving a substantial portion of its income from royalties generated by Tams licensings, and by soliciting a first-class production of the play in New York, Oliver has been "doing business" in New York. The court disagreed with Tams, holding that Oliver was not "doing business" in New York within the purview of the statute because Tams cannot attribute its own acts to Oliver in order to show that Oliver has been "doing business" in New York. The court further noted that "mere solicitation of in-state sales and delivery pursuant thereto do not constitute doing business within the meaning of section 1312."

Oliver promotions Ltd. v. Tams-Witmark Musk Library, Inc., 535 F.Supp. 1224 (S.D.N.Y. 1982) [ELR 4:10:7]

Previously Reported:

Without a further opinion, and only one day after oral argument, a Federal Court of Appeals has affirmed the District Court judgment in Broadcast Music Inc. v. Moor-Law "essentially for the reasons set forth in its opinion reported at 527 F.Supp. 758 (D.Del. 1981)." Case No. 82-1077 (3d Cir., July 8, 1982). The District Court opinion was reported at ELR 3:18:1.

The United States Supreme Court has agreed to hear an appeal by football coach Frank Kush in the case of Rutledge v. Arizona Board of Regents previously reported at ELR 3:16:5.

The United States Supreme Court has declined to hear the following cases: RKO General v. FCC (3:16:2); Olivia N. v. NBC (3:16:2); U.S. v. CBS (3:19:4); Federated Publications v. Swedberg (3:21:6); Sailor Music v. Gap Stores (3:22:4); Bellanca v. New York State Liquor Authority (4:3:4); Atari, Inc. v. North American Philips (4:5:3); Roy Export v. CBS (4:1:1).

The following cases, reported in previous issues of the Entertainment Law Reporter: have been published: American Vitagraph v. Levy, 213 USPQ 31 (3:13:3); Village of Grafton v. ABC, 435 N.E.2d 1131 (3:15:3); RKO General v. FCC, 670 F.2d 215 (3:16:2); Home Box Office v. Wilkinson. 531 F.Supp. 987 (3:16:7); Warner Bros. v. Wilkinson, 533 F.Supp. 105 (3:17:2); Home Box Office v. Directors Guild of America, 531 F.Supp. 578 (3:19:1); U.S. v. CBS, 1982-1 CCH Trade Cases, para. 64,492 (3:19:4); Cher v. Forum International, 213 USPQ 96 (3:20:1); North American Soccer

League v. National Football League, 670 F.2d 1249 (3:20:3); General Cinema v. Buena Vista Distribution, 532 F.Supp. 1244 (3:21:1); U.S. v. National Association of Broadcasters, 536 F.Supp. 149 (3:22:1); Kamakazi Music v. Robbins Music, 534 F.Supp. 57 (3:22:3); Sailor Music v. Gap Stores, 668 F.2d 84 (3:22:4); Stern Electronics v. Kaufman, 669 F.2d 852 (3:22:5); Eastern Microwave v. Doubleday Sports, 534 F.Supp. 533 (3:23:1); MCA v. Wilson 677 F.2d 180 (3:23:2); National Association of Broadcasters v. Copyright Royalty Tribunal, 675 F.2d 367 (3:24:1); Filmvideo Releasing v. Hastings, 668 F.2d 91 (3:24:8); Roy Export v. CBS, 672 F.2d 1095 (4:1:1); Turf Paradise v. Arizona Downs, 670 F.2d 813 (4:1:6); Allied Artists v. Rhodes, 679 F.2d 656 (4:4:3); Broadcast Music Inc. v. United States Shoe Corp., 678 F.2d 816 (4:4:4); Twin City Sportservice v. Finley, 676 F.2d 1291 (4:6:5); Rooney v. Columbia Pictures, 538 F.Supp. 211 (4:7:5).

[ELR 4:10:7]

NEW LEGISLATION AND REGULATIONS

FCC abandons proposal to limit multiple ownership of cable TV systems, and initiates new proposal to permit ownership of cable systems by major TV networks

The Federal Communications Commission has taken two significant steps towards eliminating restrictions on the ownership of cable television systems. On the one hand, it appears that the FCC's recent actions will foster the continued growth of existing multiple system operators (MSO's). On the other hand, it also appears that these actions may lead to new competition for existing MSO'S, because the FCC is considering a proposal that would permit the ownership of cable systems by ABC, CBS and NBC.

At the present time, FCC rules prohibit broadcasters from owning more than 7 AM radio stations, 7 FM radio stations, and 7 television stations, at one time. There has never been a comparable limit on the ownership of cable TV systems, however. In 1970, the FCC initiated a proceeding in which it proposed to adopt a rule which would have limited the number of cable systems that could be owned, or the number of cable subscribers that could be controlled, by any single cable TV operator. The reason for the proposed rule was to promote diversification of control of the media.

Comments on the proposed rule were filed by two dozen parties. Some supported the need for multiple ownership restrictions, though their reasons varied. Other comments opposed the rule, especially those filed by cable TV operators. As sometimes happens at the

FCC (and other federal agencies), the comments were studied and discussed, but no action was taken -then or ever. The proceeding was never formally closed either. Instead, in the years that have passed, the FCC has followed the growth of the cable industry. Indeed, in recent years the FCC has conducted two intensive studies of the cable industry. One was done by the FCC's Network Inquiry Special Staff, and the other by its Office of Plans and Policy.

Both studies concluded that although concentration in the cable industry is increasing, the industry is not a concentrated one, and there is no reason to suspect that competition between cable operators is decreasing or that the public's receipt of diverse viewpoints is or will become endangered. Indeed, the FCC has pointed out that the largest MSO only has 13% as many viewers as the largest multiple TV station owner. And if ranked by viewership, the largest MSO would be only 30th on a combined ranking of multiple TV station and cable system owners. Moreover, said the FCC, because cable systems only rarely produce programming themselves, even the largest MSO's would be further down any list of "opinion molders."

For these reasons, the FCC has terminated its now 12-year-old proceeding on cable-TV multiple ownership without adopting any rules limiting multiple ownership of cable systems.

Commissioner Abbott Washburn dissented, saying that he was "saddened and concerned by the placing of the organs of information, news and opinion in this country in fewer and fewer hands." Concentration of control of media outlets, Commissioner Washburn said, "is an unhealthy trend for democracy" and "is not in the public interest."

Although the FCC never adopted a rule limiting the number of cable systems that may be owned by a single operator, it did adopt a rule in 1970 prohibiting ownership of cable systems by the three major networks, ABC, CBS and NBC. (In 1981, the FCC granted CBS a waiver of that rule so as to permit CBS to own cable systems having as many as 90,000 subscribers in markets where CBS does not own television stations. ELR 3:9:3.) The FCC's "cross-ownership" rule was designed to foster diversification of control of the channels of mass communication and appears to have been prompted by three concerns. First, the FCC feared that if the networks were permitted to own cable systems, they would restrict the amount and diversity of programming supplied to those cable systems in order to minimize competition for their network television programming. Second, the FCC was concerned that network-owned cable systems would refuse to carry the programming of rival networks and would thus hinder the development of new cable networks altogether. Third, the FCC felt in

1970 that the networks dominated television, and that permitting them to own cable systems would increase their already dominant position.

The Network Inquiry Special Staff also studied the rule prohibiting network ownership of cable systems and concluded that the rule did not aid in accomplishing the FCC's goals. In fact, it determined that there are advantages to cross-ownership which the FCC had not considered when it adopted the rule. The Special Staff concluded that the rule actually restrains competition and diversity in the cable industry. A study conducted by the FCC's Office of Plans and Policy also recommended the rescission of the network-cable cross-ownership ban on the grounds that free entry into the cable industry is the best way to encourage its development, to meet consumer needs, and to maximize opportunities for free expression.

Naturally, the networks and the National Association of Broadcasters advocate eliminating the crossownership ban. Perhaps just as naturally, existing cable operators and the National Cable Television Association advocate retaining the ban. The Department of Justice has sided with the networks on this issue - a position the FCC found especially interesting, because the Justice Department has traditionally supported regulations in this area. (In fact, as recently as 1981, the Justice Department opposed CBS's application for a waiver of the cross-ownership ban.)

The FCC's preliminary view is that the crossownership ban no longer serves the public interest and should be eliminated. It has requested comments from interested parties which it will consider before making a final decision. Comments must be received by the FCC by November 29, 1982, and reply comments by January 14, 1983. For further information, contact Robert H.

Ratcliffe of the FCC's Cable Television Bureau at (202) 632-6468.

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