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Cable and Television

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III. CABLE AND TELEVISION

A. *Copyright*

1. Videotaping Of Copyrighted Works For Temporary Classroom Use

After a two-year effort, the House Subcommittee on Courts, Civil Liberties and Administration of Justice, proudly published guidelines for off-the-air videotaping of copyrighted works for educational use.[1] The stated goal of the guidelines was to "reach an appropriate balance between the proprietary rights of copyright owners and the instructional needs of educational institutions."[2] In general, these guidelines provided that non-profit educational institutions may, without prior permission, videotape educational programs for classroom teaching and evaluation purposes, but must destroy the tapes within 45 days.[3]

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1. *Guidelines for Off-Air Taping and Copyrighted Works for Educational Use*, 127 CONG. REC. E4750, E4751 (Oct. 14, 1981) [hereinafter cited as *Guidelines*].

2. *Id.*

3. *Id.* In full, the *Guidelines* are as follows:

1. The guidelines were developed to apply only to off-air recording by non-profit educational institutions.
2. A broadcast program may be recorded off-air simultaneously with broadcast transmission (including simultaneous cable retransmissions) and retained by a non-profit educational institution for a period not to exceed the first forty-five (45) consecutive calendar days after date of recording. Upon conclusion of such retention period, all off-air recordings must be erased or destroyed immediately. "Broadcast programs" are television programs transmitted by television stations for reception by the general public without charge.
3. Off-air recordings may be used once by individual teachers in the course of relevant teaching activities, and repeated once only when instructional reinforcement is necessary, in classrooms and similar places devoted to instruction within a single building, cluster, or campus, as well as in the homes of students receiving formalized home instruction, during the first ten (10) consecutive school days in the forty-five (45) day calendar day retention period.
4. Off-air recordings may be made only at the request of and used by individual teachers, and may not be regularly recorded in anticipation of requests. No broadcast program may be recorded off-air more than once at the request of the same teacher, regardless of the number of times the program may be broadcast.
5. A limited number of copies may be reproduced from each off-air recording to meet the legitimate needs of teachers under these guidelines. Each such additional copy shall be subject to all provisions governing the original recording.
6. After the first ten (10) consecutive school days, off-air recordings may be used up to the end of the firty-five (45) calendar day retention period only for teacher evaluation purposes, i.e., to determine whether or not to include the broadcast program in the teaching curriculum, and may not be used in the recording institution for student exhibition or any other nonevaluation purpose without authorization.
7. Off-air recordings need not be used in their entirety, but the recorded programs may not be altered from their original content. Off-air recordings may not be physically or electronically combined or merged to constitute teaching anthologies or compilation.

Encyclopaedia Britannica Educational Corp. v. Crooks[4] is the first, and so far the only, decision interpreting the application of the guidelines to a non-profit organization's off-air copying of educational programs for the use by and at the request of non-profit educational institutions. The court held that where the owners of the copyrighted educational materials make their works readily available to educational institutions, a non-profit organization's videotaping, duplicating, and distribution of these works at the request of teachers does not constitute "fair use" even if the tapes are to be used only for temporary teaching and evaluation purposes.

Plaintiffs were profit-oriented corporations primarily engaged in the production and distribution of educational programs designed for the educational and related markets.[5] The Board of Cooperative Educational Services ("BOCES") was a non-profit organization with extensive facilities for off-the-air videotaping and duplication of programs, as well as a videotape library.[6] BOCES' stated purpose was to provide a variety of educational services in a more economical manner than was possible by an individual school or school district.[7] In the 1982 decision, the court granted a permanent injunction against BOCES' systematic videotaping, duplicating, and distribution of plaintiffs' copyrighted materials,[8] but left open the possibility that temporary or limited use of plaintiffs' works might be legal under the new Copyright Act.[9] Encouraged by this sug-

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8. All copies of off-air recordings must include the copyright notice on the broadcast programs as recorded.

9. Educational institutions are expected to establish appropriate control procedures to maintain the integrity of these guidelines.

See also COPYRIGHT L. REP. (CCH) ¶ 20 at 157 (1982).

4. 558 F. Supp. 1247 (W.D.N.Y. 1983). This opinion was one in a series concerning a quarrel between Encyclopaedia Britannica Educational Corporation, Learning Corporation of America, and Time-Life Films, Inc., plaintiffs, and the Board of Cooperative Educational Services (BOCES), of which C.N. Crooks was a member, defendants. In the prior decision, the court granted a permanent injunction against BOCES' systematic large-scale off-air videotaping and derivative copies of plaintiffs' works on the basis of copyright laws. Encyclopaedia Britannica Educational Corp. v. Crooks, 542 F. Supp. 1156, 1188 (W.D.N.Y. 1982); *see also* Note, *Nonprofit Organization's Use of Videotapes*, 4 LOY. ENT. L.J. 41 (1984).

5. 542 F. Supp. at 1158.

6. *Id.* at 1159.

7. *Id.* At the commencement of the 1982 lawsuit for a permanent injunction, 15 of the 21 school districts subscribed to the BOCES Videotape Service, and 20 of those 21 districts participated in the Film Service.

8. *Id.* at 1156.

9. *Id.* at 1188. The permanent injunction action was initiated before January 1, 1978, and the court's 1982 decision was made under the old Act of 1909, 17 U.S.C. §§ 1-810 (1976). However, any of the activities including the temporary use activities, are governed by the Copyright Act of 1976 (the new Act), 17 U.S.C. §§ 101-810 (1982).

gestion, BOCES attempted to have the court declare the legality of such use, and lost.

The new Copyright Act codified the long-recognized doctrine of "fair use."[10] In the 1982 decision, the court defined fair use as a "means of balancing the exclusive rights of a copyright holder with the public interest in dissemination of information affecting [areas of] universal concerns."[11] Given the Subcommittee's stated goal,[12] it seems that any use of copyrighted materials that fulfilled the requirements of the *Guidelines* would have the privilege of the "fair use defense."[13] The court acknowledged the existence of the *Guidelines*,[14] but promptly, and without further reference to them, examined the facts in light of the traditional four-prong test for "fair use":

> 1) The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
> 2) The nature of the copyrighted work;
> 3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> 4) The effect of the use upon the potential market for or value of the copyrighted work.[15]

The failure to consider the case under the *Guidelines* could have been due to the court's familiarity with the well established "fair use" criteria. Further, the court may have failed to see the distinguishing characteristics of this case and those intended to fall within the protection of the *Guidelines*, and did not reconcile the two tests for fear of undermining the legislative effort. However, BOCES' practices fail under either the four-prong test, or the *Guidelines*.

The *Crooks* court began by considering the effect that temporary use

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10. 17 U.S.C. § 107 (1982). Lawrence v. Dana, 15 F. Cas 26 (C.C.D. Mass. 1841), was the first decision to use the term "fair use," and to apply the doctrine as a defense to an otherwise infringing action. *See generally* 3 M. NIMMER, NIMMER ON COPYRIGHT § 13.05 (1982); note 15 *infra*.

11. 542 F. Supp. at 1178. *Accord* Meeropol v. Nizer, 560 F.2d 1061, 1068 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978).

12. *Guidelines, supra* notes 1 & 3; *See supra* text accompanying note 2.

13. The *Guidelines* supposedly reflected the "Negotiating Committee's consensus as to the application of 'fair use' to the recording, retention and use of television broadcast programs for educational purposes." *Id.* at E4751.

14. 558 F. Supp. at 1250.

15. 17 U.S.C. § 107 (1976 & Supp. V 1981) (codifying Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd* 420 U.S. 376 (1975). The factors are mandatory criteria to be satisfied rather than just guidelines to be followed. However, "fair use" still escapes definition and remains an "equitable rule of reason" that must be decided on the facts of each case. *See* Karll v. Curtis Pub. Co., 39 F. Supp. 836, 837 (E.D. Wis. 1941).

would have on plaintiffs' potential market for or value of the copyrighted work, the fourth prong of the "fair use" test.[16] The court found that, in spite of the purported value of free access to educational materials for temporary classroom use, nothing besides rental fees was preventing interested parties from obtaining the product from the copyright owners.[17] All of plaintiffs' works could be rented or leased for short or long periods of time; some works could be rented for as short a period as one to three days.[18] Thus, the court reasoned, any temporary use by BOCES would interfere with the marketability of plaintiffs' copyrighted works, and diminish the demand for their rentals and leasing.[19] The availability factor also outweighed the public interest that would be served by BOCES' distribution of plaintiffs' works.[20] The court held that since the "nature of the copyrighted work," the second prong of the "fair use" test, generally referred to the type of material used and whether public interest would be served by its distribution, the ready availability of the works weighed heavily in plaintiffs' favor.[21] The court quickly dismissed the "substantiality" factor, the third prong of the "fair use" test, declaring that BOCES was only interested in obtaining complete copies of plaintiffs' works.[22]

Considering the first factor last, the court declared that while the

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16. This factor, also known as the "harm" factor, is generally considered the most important and central consideration. *See* NIMMER § 13.05 [A][4] (1982). This factor poses the issue of whether the "unrestricted and widespread conduct of the sort engaged in by the defendant (whether in fact engaged in by the defendant or by others) would result in a substantially adverse impact on the potential market for or value of the plaintiff's work."

Nimmer suggests that the "harm factor" must be considered in conjunction with the function test, comparing not only the media in which the two works appear, but also the function that each serves regardless of the media. If it is found that defendant's work performs a different function than that of plaintiff's, then the "fair use" defense may be invoked. It would stretch the imagination to say that BOCES' copy of the copyrighted work performed a different function than intended by the plaintiffs; both are used for the same educational purposes. Therefore, BOCES' practices not only failed the "harm" prong, as the court indicated, but also the function test.

17. *See Crooks*, 558 F. Supp. at 1250.

18. *Id.* Many types of licensing agreements existed which permitted educational institutions to duplicate plaintiff's works. *See Crooks*, 542 F. Supp. at 1164-66.

19. *Crooks*, 558 F. Supp. at 1250-51. It is, perhaps, vital to the decision that plaintiff organizations aimed their products at and geared their marketing for educational institutions. The court's decision may be called a "bread and butter" rationale that would not likely apply to such television programs as "Roots," which have educational value, but whose copyright owners are not geared or equipped for the school market.

20. *Id.* at 1251.

21. *Id.* The court referred to the Senate Report on the 1976 Copyright Act, which suggested that unavailability of the work through "normal channels" may be "more justification for reproducing it than in the ordinary case." S. REP. NO. 94-473, 94th Cong., 1st Sess. 64 (1975). *See Crooks*, 542 F. Supp. at 1177.

22. *Crooks*, 558 F. Supp. at 1251. Generally, the copying of an entire work does not constitute fair use. NIMMER § 13.05 [A][3].

"purpose and character" of BOCES' use of plaintiffs' works was "to achieve laudable educational objectives," the specific purpose of the temporary use would be "time shifting."[23] Time shifting refers to the ability of teachers and students to watch television programs irrespective of the time that program was broadcast on the air.[24] The court reasoned that since "time shifting" was a matter of convenience, and since the "fair use" doctrine is based instead on reasonableness, BOCES' use of plaintiffs' works was unfair.[25]

The court concluded its determination of the unfairness of BOCES' practices by stating that, where the copyrighted works are readily available from their owners for a limited period of time, defendants' copying and use of those works for a limited period of time does not constitute fair use.[26]

The court's determination was based on the four-prong "fair use" test, and not on the *Guidelines* for temporary use. However, the *Guidelines*' purported intent indicates that BOCES' practices were impermissible under them as well.

The first possible distinguishing characteristic is that the "guidelines were developed to apply only to off-air recording by non-profit educational institutions."[27] Although BOCES is a non-profit organization, it is not an educational institution *per se*, but a service organization for educators. Thus, the court could have limited the application of the *Guidelines* to the educators themselves.[28]

Also, the *Guidelines* provide that off-air recordings may be made

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23. *Id.* This was later contradicted as the court stated that BOCES' "primary purpose in its off-the-air videotaping . . . was to provide videotapes to school teachers." *Id.* at 1253.

24. *Id.* Time shifting may be achieved by programming a videotape machine in advance to record a television program, and then by playing back the videotape at the convenience of the viewer. *See Crooks*, 542 F. Supp. at 1163.

25. *Crooks*, 558 F. Supp. at 1251. The court quoted the Senate Report on the 1976 Copyright Act: "The Committee does not intend to suggest . . . that off-the-air recording for convenience would under any circumstances, be considered 'fair use.'" S. REP. No. 473, 94th Cong., 1st Sess. 66 (1975). However, the court's use of Meeropol v. Nizer, 560 F.2d 1061, 1070 (2d Cir.), *cert. denied*, 434 U.S. 1013 (1977), for this proposition is unclear. The *Meeropol* court used the reasonableness concept with regard to the substantiality of copying. More important, however, is the holding of Sony Corp. of Am. v. Universal City Studios, Inc., — U.S.— 104 S. Ct. 774, 792-93 (1984), that "time shifting" was reasonable. Therefore, this part of the opinion is probably no longer valid. However, this would probably not alter the outcome of *Crooks*, given the great weight that the "harm factor" carries.

26. *Crooks*, 558 F. Supp. at 1251. The court stressed that this decision applied only to the facts of this case.

27. *Guidelines*, No. 1, *supra* notes 1 & 3.

28. In his October 14, 1981, presentation to the House of Representatives, Congressman Kastenmeier, Chairman of the Subcommittee, used the terms "educators" and "educational institutions" interchangeably, which suggests that the *Guidelines* were intended only for the

only at the request of teachers and may not be regularly recorded in anticipation of requests.[29] BOCES' practices would have to undergo major changes in order to fulfill this guideline, including the destruction of its videotape library and catalog service.[30] Neither did BOCES provide any controls for the erasures of the tapes as required by the guidelines.[31]

Perhaps the most important reason for BOCES' failure to meet the *Guidelines* is the caveat in the letter accompanying them. "Within the guidelines, the Negotiating Committee does not intend that off-air recordings by teachers under fair use be permitted to be intentionally substituted in the school curriculum for a standard practice of purchase or license of the same educational material by the institution concerned."[32] BOCES' furnishing teachers with copies of plaintiffs' copyrighted works for temporary use would do exactly what the *Guidelines* warn against: infringe on the rights of copyright owners of the educational programs, the rental and leasing of which is part of the "standard practice" of educational institutions. Therefore, BOCES' suggested temporary use practices, failing both the four-prong "fair use" test and the intent of the *Guidelines*, do not constitute "fair use."

The current code gives the court discretion in awarding costs and attorneys' fees to the prevailing party.[33] The former Copyright Act, however, rendered the award of costs mandatory.[34] As the suit was initiated under the former Act, the court did not have any discretion and awarded plaintiffs the costs of this action.[35]

On the issue of attorneys' fees, plaintiffs were not so fortunate. Both the current and former Copyright Acts provide for a discretionary award

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protection of teachers and schools. However, it could also be argued that BOCES simply steps into the shoes of those teachers and that the limitation is not justified.

29. *Guidelines*, No. 4, *supra* notes 1 & 3.

30. The holdings of BOCES' library were made known to teachers through a catalog. The 1975-1976 edition of the catalog listed close to 5,000 "master" videotapes, copies of which were available at teachers' requests. *Crooks*, 542 F. Supp. at 1162-63. This type of operation seems to be precisely what the guidelines intended to prevent.

31. *Guidelines*, No. 9, *supra* notes 1 & 3.

32. *Guidelines* at E4751, *supra* note 1. This August 31, 1981 letter was addressed to Congressman Kastenmeier from Elleen D. Cooke and Leonard Wasser, Co-chairs of the Negotiating Committee.

33. 17 U.S.C. § 505 (1982). *See generally* NIMMER § 14.09.

34. 17 U.S.C. § 116 (1976); *see also* Marks v. Leo Feist, Inc., 8 F.2d 460, 461 (2d Cir. 1925); H.M. Kolbe Co. v. Armgus Textile Co., 315 F.2d 70, 75 (2d Cir. 1963). *But see* Harrington v. Mure, 186 F. Supp. 655, 659 (S.D.N.Y. 1960), where the court ignored this provision and refused to allow costs to either side. *See generally* NIMMER § 14.09.

35. *Crooks*, 558 F. Supp. 1251-52 (citing Boz Scaggs Music v. KND Corp., 491 F. Supp. 908, 912 n.4 (D. Conn. 1980)).

of reasonable attorneys' fees to the prevailing party.[36] Since the award of attorneys' fees is generally characterized as a penalty to the losing party as well as compensation for the prevailing party, courts examine the intentions of the losing party in pursuing the suit.[37] Generally, attorneys' fees may be awarded if the losing party intentionally infringes, acts in bad faith, or brings and conducts the litigation in an unreasonable fashion.[38] Plaintiffs' motion for award of attorneys' fees was based on defendants' alleged bad faith and disregard of prominently displayed copyright notices.[39] The court cited *Roy Export v. Columbia Broadcasting System*[40] for the proposition that a determination of bad faith depends largely on whether defendants genuinely believed that, despite the copyright they had the legal right to use the materials.[41] Although BOCES' defenses were ultimately declared meritless, the novelty and complexity of the off-the-air videotaping issues justified the denial of plaintiffs' motion for attorneys' fees.[42]

The court next considered the types of infringements committed by BOCES and regarded the old Copyright Act as binding.[43] Plaintiffs claimed that defendants had committed both vending and performance infringements under the old Copyright Act.[44]

Plaintiffs insisted that each time BOCES videotaped their work at a teacher's request or, broadcast one of the copyrighted works at a teacher's request or via its closed circuit transmission system, it "sold" the copy, thus committing "vending" infringements under former Section 1(a).[45] The court, however, agreed with BOCES' characterization of its services as a "sale agreement," rather than a "buy-sell" contract, reasoning that the service aspect of the services predominated over the sales

36. 17 U.S.C. § 505 (1982).

37. *See generally*, NIMMER § 14.10[D].

38. *Id.*

39. *Crooks*, 558 F. Supp. 1252. The court denied this motion in the 1982 decision. The court reasoned that, if the area of the law in question is "novel, unsettled, or complex," the award of attorneys' fees should be denied. 542 F. Supp. at 1186-87.

40. 503 F. Supp. 1137 (S.D.N.Y. 1980).

41. *Crooks*, 558 F. Supp. at 1252.

42. *Id.*

43. *Id.* at 1254.

44. *Id.* at 1253. 17 U.S.C. § 1(a) (1976) of the old Copyright Act entitles a copyright owner to five exclusive rights: to print, reprint, publish, copy, and vend the copyrighted work. 17 U.S.C. § 1(d) gives the copyright owner the right to perform or represent the copyrighted work publicly. *See* 17 U.S.C. § 106 (1982) for the corresponding provisions of the new Copyright Act.

45. *Crooks*, 558 F. Supp. at 1253. Although the statute did not define "vending," it implied a prohibition of unauthorized sales. *Id.* (citing Platt & Munk Co. v. Playmore, Inc., 218 F. Supp. 267, 268 (S.D.N.Y. 1962), *modified & aff'd*, 315 F.2d 847 (2d Cir. 1963)).

aspect.[46] However, in light of the new Copyright Act's protection of the copyright holder's right to "distribute" their works,[47] the owner may have greater rights.[48]

Plaintiffs, however, persuaded the court that BOCES did commit performance infringements in violation of Section 1(d).[49] Plaintiffs insisted that each time a copy of one of their 19 copyrighted works was shown in a classroom, a public performance violation occurred.[50] Defendants attempted several arguments to counter the performance infringement contention. The court rejected the argument that plaintiffs had failed to demonstrate by a preponderance of the evidence that each tape was shown at least once in a classroom upon referring to teachers' testimony given at trial.[51] BOCES' also argued that, since New York state statutes place restrictions on who may attend classes and enter classrooms, the performances of their works were "private" rather than "public."[52] The court disagreed, holding that considering the nature of the audience, "public school students with a common purpose and interest in education," the performances were public.[53]

BOCES further claimed that their cable television transmissions were not "performances" within the meaning of the statute and the decisions in *Twentieth Century Music Corp. v. Aiken*,[54] *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*,[55] and *Fortnightly Corp. v. United*

46. *Crooks*, 558 F. Supp. at 1253 (quoting Wm. H. Wise & Co. v. Rand McNally & Co., 195 F. Supp. 621, 625 (S.D.N.Y. 1961): ("Where service predominates . . . it is a contract for work, labor and materials and not a sale.")).

47. 17 U.S.C. § 106(3) (1982) gives copyright owners the exclusive right "to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending."

48. *Crooks*, 558 F. Supp. at 1254.

49. *See supra* note 44.

50. *Crooks*, 558 F. Supp. at 1254.

51. *Id.*

52. *Id.* Only public performances of copyrighted works are infringements. The new Act defines "publicly" as "at a place open to the public or at any place where substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered . . . ." 17 U.S.C. § 101 (1982). Under the old Act, however, there were two competing lines of cases, one holding that as long as the audience was limited to a particular group and not open to the general public, the performance was private. The second line of cases, which this court joined, held that as long as a substantial segment of the public could attend, the performance was "public". *See generally* NIMMER § 8.14[C].

53. *Crooks*, 558 F. Supp. at 1254-55.

54. 442 U.S. 151, 162-63 (1975) (radio reception of broadcast of copyrighted musical compositions did not constitute a "performance").

55. 415 U.S. 394, 408 (1974) ("importation of 'distant' signals from one community into another does not constitute 'performance' under the Copyright Act").

Artists Television, Inc.[56] The court distinguished *Twentieth Century* on factual grounds, and used *Fortnightly* and *Teleprompter* for the proposition that where a broadcaster has the ability to "select, procure, and propagate programs to the public," that broadcaster "performs" within the meaning of the Act.[57] Denying defense's argument, the court reasoned that BOCES conducted these very activities as part of their service, and, therefore, "performed."[58]

Having struck down all of defendants' contentions regarding "public performance," and having decided that BOCES was guilty of performance infringements, the court proceeded to examine the number of such infringements, using two standard tests for this determination: the "time test" and the "heterogenity test."[59] The "time test" is concerned with the proximity in time that the infringements are repeated, and is used to determine whether the violations are multiple infringements or one continuous infringement. The "heterogenity test" refers to the nature of infringements in examining whether successive infringements should be considered as one.[60] Taking into account defendants' failure to provide evidence of the continuous or repetitious nature of the infringements, the court found that separate copying infringements occurred under Section 1(a) when BOCES made five original master tapes of the copyrighted works, and when it duplicated plaintiffs' works from each of the 19 master tapes.[61] The court further decided that a separate public performance infringement occurred each time a videotape copy was delivered to schools and shown in a classroom. Also, an infringement occurred each time BOCES broadcast one of the copyrighted works via its closed circuit television system.[62]

Notwithstanding the finding of infringements, BOCES pleaded ignorance and innocence. It contended that the individual defendants could not be held directly or contributorily liable for copyright violations where the infringers had no knowledge that their activities were, indeed, violative of the copyright laws.[63] BOCES also claimed that, because it did not have a direct financial stake, it could not be held vicariously lia-

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56. 392 U.S. 390, 398-99 (1968) (one who manually or by human agency merely actuates electrical instrumentalities does not "perform" within the meaning of the Copyright Act).

57. *Crooks*, 558 F. Supp. at 1255.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 1255-56. This defense of innocent intent does not serve as a defense to liability, but it may affect the remedies available against the defendant. *See generally* NIMMER § 13.08.

ble for the infringing activities.[64] The court disagreed, holding that the individual defendants, as BOCES' employees and members of the Board, caused and materially contributed to the public performance of the subject copyrighted works in the classrooms. They were, therefore, all jointly and severally liable.[65]

The court further ordered that plaintiffs were entitled to statutory damages of $250.00 for each infringement committed by BOCES.[66] In the 1982 decision, the court conceded that there was no clear consensus with regard to the applicable rule in awarding statutory damages rather than actual damages and defendants' profits.[67] The determination resulted in a difference between $93,000 claimed by the plaintiffs in statutory damages[68] and $265.00 admitted by the defendants as actual damages.[69] In 1982, the court had refused to make the determination in light of the inadequate analysis of the number of infringements actually commited by BOCES.[70] In 1983, however, the court was satisfied with the discussion of the "time" and "heterogenity" tests, and awarded plaintiffs the $250.00 in damages for each copying and performance violation committed by BOCES.[71] The plaintiffs were directed to submit an affidavit of costs and the total number of copying and performance

64. *Crooks*, 558 F. Supp. at 1255-56. It is generally held that if one has knowledge that an infringement is taking place, and causes another to infringe, the person so causing the infringement will be held liable. Moreover, even in the absence of any financial stake or supervision of the infringing activity by one with such knowledge, one may still be held as a related defendant. *See* NIMMER § 12.04 [A]. It seems then that for this argument to have merit, BOCES must have been both ignorant of the infringements and disinterested in their subsequent use. *But cf. Sony Corp. of Am.*, 104 S. Ct. 774, 789 (1984), in which the court held that suppliers of videotape equipment were not contributorily liable even if they knew that their equipment might be used for infringing activities. However, this facet of the decision must be considered together with the Supreme Court's determination that time-shifting constituted fair use. Therefore, contributory liability could not exist where primary liability did not.

65. *Crooks*, 558 F. Supp. at 1256.

66. *Id.* 17 U.S.C. § 101(b) (1976) of the old Act provided for an award "in lieu of actual damages and profits, such damages as the court shall appear to be just. . . ." Since it is often difficult to prove actual damages and defendants' profits from the infringement, plaintiffs may choose to ask for $250.00 statutory damages per infringement. *See generally* NIMMER § 14.01 [B]; *see also Crooks*, 542 F. Supp. at 1185-86.

67. *Crooks*, 542 F. Supp. at 1185-86.

68. *Id.* at 1185. Plaintiffs claimed that BOCES infringed a total of 372 times at $250.00 per infringement. Although plaintiffs would have been entitled to defendants' profits, statutory damages against a non-profit corporation were much more lucrative for the plaintiffs.

69. *Id.* BOCES calculated actual damages to be the price of one additional print film which might have been purchased by the Film Service.

70. *Id.*

71. *Crooks*, 558 F. Supp. at 1256.

infringements.[72]

The importance of this decision lies primarily in its implied limitation of the application of the congressional *Guidelines*. At first glance, this decision would seem to contradict the intent of the legislature in providing the guidelines in order to encourage education. It would also seem that the court encouraged BOCES to bring a motion to allow temporary use, and then refused it. However, in order for educational institutions to enjoy the use (free or otherwise) of these educational programs, their makers must be encouraged to produce them. If such non-profit organizations as BOCES are allowed to provide educational institutions with free rentals of videotapes that would otherwise be a financial encouragement and compensation to the makers of the films, then, perhaps, BOCES will have nothing or little to copy after a certain period of time. BOCES' efforts were laudable, but such service organizations will probably be obliged to make licensing agreements with copyright holders for the use of copyrighted works before providing them to educational institutions.

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72. *Id.* It must be kept in mind that the total damages should be substantially lower than $93,000 as that figure included the alleged vending infringements which the court struck down.

2. Copyright Royalty Tribunal's Second Distribution Withstands Challenge

The royalties paid to copyright owners for the use of their works are usually established in the marketplace. The producers and creators of programs maintain exclusive control of their product and attempt to negotiate the best possible price for it in a competitive market. In the case of cable retransmission of television and radio programs, however, individual negotiations between copyright owners and users would entail inordinately high transaction costs.[1] For this reason, the 1976 Copyright Revision Act ("the Act") granted cable operators a compulsory license to offer the secondary transmission of copyrighted material carried by broadcast stations.[2] In exchange for this compulsory license, cable operators must pay royalty fees which the Copyright Royalty Tribunal ("the Tribunal")[3] distributes to the registered owners of the program's copyright.[4]

Although the compulsory license applies to all cable system programming authorized by the FCC,[5] the Act imposes royalties only for the carriage of non-network programming on television or radio stations carried beyond their local service areas.[6] The Tribunal initiated the first

1. The operation of cable systems typically involves the reception of broadcast beams by means of special antennae and the transmission of these signals by cable or other methods to the homes of subscribers.

2. 17 U.S.C. § 111(c) (1976). (All United States Code Sections hereinafter cited refer to 1976 version unless otherwise stated).

3. The Copyright Royalty Tribunal is a governmental agency authorized to make an annual distribution of royalty fees paid by cable operators for the retransmission of copyrighted programming. Congress intended that the Tribunal operate as a substitute for direct negotiations between the cable operators and copyright owners. The Copyright Act vests the Tribunal with broad discretion in apportioning these royalties. Specific awards are reversible only if the Tribunal's decision is not supported by substantial evidence or is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" as defined by the Administrative Procedure Act, 5 U.S.C. § 706(2)(a). *See* Copyright Act of 1976, 17 U.S.C. §§ 801-810 for function and organization of Tribunal [hereinafter cited as "the Act"].

4. 17 U.S.C. § 111(d)(2).

5. The Act's compulsory license enables cable systems to offer essentially three types of basic service to subscribers: (1) the signals of local stations that are otherwise poorly received; (2) national programming from affiliates of the three commercial networks, regardless of the location of the broadcast station; and (3) non-network or syndicated programming originating in a community distant from the cable system. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 89 (1976), *cited in* National Cable Television Ass'n v. Copyright Royalty Tribunal, 724 F.2d 176, 179 (D.C. Cir. 1983).

6. 17 U.S.C. § 111(d)(4)(A). The rationale underlying the non-network distinction is that copyright owners of non-network programming are already compensated by the networks because their works reach the entire nation; therefore cable systems should not be required to

royalty distribution under this scheme in 1979 for cable royalties paid for the 1978 calendar year.[7] In *Christian Broadcasting Network v. Copyright Royalty Tribunal*, ("*CBN*"),[8] the District of Columbia Circuit analyzed the Tribunal's treatment of conflicting claims for cable royalties following distribution for the 1979 calendar year.[9] Approving in large part the Tribunal's allocation of royalties for both the 1978 and 1979 distributions, the court stressed that the Tribunal's percentage allocation was not reviewable as long as it was within a "zone of reasonableness."[10]

In 1976 the House Judiciary Committee adopted a fee schedule in which the Tribunal was authorized to adjust the royalty rates to account only for inflation and FCC deregulation. However, the Committee did provide the Tribunal with some limited guidance on the factors that should be taken into account, emphasizing the economic impact on the copyright owners and on the broadcasters.[11] Compulsory license fees are based upon a percentage of the gross receipts of the cable system for a semi-annual accounting period.[12] The fees are paid into the Register of Copyrights[13] for later distribution by the Tribunal.[14] All claimants must file with the Tribunal in order to be eligible to receive royalty fees.[15]

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provide double compensation to these owners. *See* H.R. REP. NO. 1476, 94th Cong., 2d Sess. 90 (1976).

Advertisers who support network programming reach a larger audience through cable retransmission. This permits the originating station to raise its advertising rates in order to compensate the producers for the increased airing of their shows. However, the market does not compensate the owners of non-network programming which is initially broadcast in communities remote from the cable system. Such programming is generally sponsored by local advertisers with little or no interest in a distant cable system.

7. *See* Sunshine Act Meeting Notice, 44 Fed. Reg. 47,440 (1979) (requesting views on whether the Tribunal should declare the existence of a controversy). The Tribunal's first distribution was affirmed in almost all respects by the same court that heard the later case that is the topic of this note. National Ass'n of Broadcasters v. Copyright Royalty Tribunal, 675 F.2d 367 (D.C. Cir. 1982).

8. 720 F.2d 1295 (D.C. Cir. 1983). CBN is only one of twelve parties appealing and/or intervening in the Tribunal's decision.

9. Although various challenges were brought regarding the 1980 annual distribution, the cases were subsequently vacated and remanded to the Tribunal in light of the court's decision of *CBN*. *See* 1980 Cable Royalty Distribution Determination, 48 Fed. Reg. 9,552 (1983).

10. *CBN*, 720 F.2d at 1304.

11. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 89, 176 (1976).

12. *See* 17 U.S.C. § 111(d)(2)(B),(C) and (D). If the semi-annual gross receipts of a cable system are over $214,000, the compulsory license fee is assessed on the basis of "Distant Signal Equivalents." These are defined under Section 111(f) as the value assigned to the secondary transmissions of non-network programming carried in whole or in part beyond the local service area of the transmitter.

13. *Id.* at § 111(d)(3).

14. *Id.* at § 111(d)(4).

15. *Id.* at § 111(d)(5)(A).

Each year after receiving the claims, the Tribunal determines whether a controversy exists concerning the royalty distribution.

In *CBN*, twelve parties disputed the Tribunal's allocation of the $20 million in royalties which were paid into the fund.[16] Although in one sense the host of conflicting claims reflects a "boundless litigiousness [on the part of] disappointed claimants,"[17] in another sense, this is a natural reaction in an industry that is expected to grow enormously in future years.[18] Congress provided the Tribunal with very few guidelines, stating that, "It would not be appropriate to specify particular, limiting standards for distribution [of the cable royalties]," and left it to the Tribunal to develop criteria on the basis of all "pertinent data and relevant considerations presented by the claimants."[19]

By the time of the 1979 distribution, the Tribunal had attempted to develop a marketplace system of valuation for allocating the royalties. The *CBN* court reviewed the Tribunal's decision under two main criteria: (1) the Tribunal had a duty to consider all evidence of economic harm to the claimants; and (2) the court's deference to the distribution decisions where the Tribunal's intent could be discerned.

The Tribunal relied on five distribution criteria that it employed in its 1978 proceedings. The primary factors considered were: the harm suffered by copyright owners whose works were retransmitted; the benefit derived by cable systems; and the marketplace value of the works transmitted. A second tier of considerations were: the quality of the copyrighted material and time-related considerations (*i.e.*, how long certain programming was played on the air).[20] In applying these criteria to the 1979 proceeding however, the Tribunal noted that the "harm" test was of limited utility because there was little concrete evidence to prove that cable retransmissions had harmed one group more than any other.[21]

16. The Act specifically provides that these claimants, notwithstanding any provisions of the Antitrust laws, "may agree among themselves as to the proportionate division of [the fund] . . . [and] may lump their claims together and file them jointly . . . or may designate a common agent to receive payment on their behalf." 17 U.S.C. § 111(d)(5)(A).

17. *CBN*, 720 F.2d at 1319.

18. The growth in the value of cable television stocks versus the performance of the stock market as a whole illustrates cable's phenomenal growth. The average price of a share in the cable index rose from approximately six dollars in 1976 to a record high of $111 in 1982. During this same period, the Dow Jones Industrial average rose only twenty-two percent. Hatfield & Garrett, *A Re-examination of Cable Television's Compulsory Licensing Royalty Rates: The Copyright Royalty Tribunal and the Marketplace*, 30 J. COPR. SOC'Y 433, 458 (1983).

19. H.R. REP. No. 1476, 94th Cong. 2d Sess. 89, 97 (1976).

20. 1978 Cable Royalty Distribution Determination, 45 Fed. Reg. 63,026, 63,035 (1980).

21. *See* 1979 Cable Royalty Distribution Determination, 47 Fed. Reg. 9,879, 9,899 (1982) (parties unable to provide more than "theories" or "anecdotal evidence" of harm).

Accordingly, the Tribunal focused on those factors that helped appraise the compensable marketplace value of the claimants' ability to exploit their works.

The 1979 proceeding was conducted in two separate phases. Phase I allocated the fund among various groups of claimants.[22] In Phase II, disputes, if any, among claimants within each group were resolved. In *CBN*, the Phase II proceeding involved almost entirely a dispute between the members of the program syndicator and movie producer groups which had been allocated 70% of the fund.[23]

Six parties appealed their royalty allocations. While affirming the Tribunal's decision in most respects, the court, however, dealt in depth with the cases of two claimants: a group of religious broadcasters known collectively as the Devotional Claimants and the National Association of Broadcasters ("NAB"). Their claims were remanded for further consideration and a clearer articulation of the reasoning used by the Tribunal.

The Christian Broadcasting Network, Old-Time Gospel Hour and PTL Television Network ("the Devotional Claimants") are the copyright owners of television programs with varying degrees of religious themes.[24] Despite the differences in their programs, they all share several common organizational and financial attributes. Each distributes its programs to

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22. *CBN*, 720 F.2d at 1301.

Program Syndicators and Movie Producers	70%
Joint Sports Claimants*	15%
Public Broadcasting Service	5.25%
U.S. T.V. Broadcasters	4.50%
Music Performing Rights Societies**	4.25%
Canadian T.V. Broadcasting	0.75%
National Public Radio	0.25%
Commercial Radio	0.00%

* The Joint Sports Claimants ("JSC") are comprised of major league baseball, basketball, hockey and soccer leagues.

** Consisting of ASCAP and BMI.

23. *Id.*

Motion Picture Association of America	96.8%
Multimedia Program Productions	1.6%
National Association of Broadcasters	0.8%
Spanish International Network	0.7%
Mutual of Omaha	0.1%
Christian Broadcasting Network	0.0%
PTL Network	0.0%
Old Time Gospel Hour	0.0%

24. CBN, for example, is the syndicator and producer of twenty-two programs. The most widely known is "The 700 Club", a daily program consisting of "55 ½ minutes of public affairs material, 8 minutes of entertainment and 7 ½ minutes of religion." Brief for CBN, *cited in CBN*, 720 F.2d at 1308. PTL Television Network produces and distributes two live programs daily. The Old Time Gospel Hour is a weekly one hour service conducted by Reverend Jerry Falwell.

broadcasting stations with the understanding that no commercial interruptions are to be allowed. For this reason, each pays broadcasters to air their shows, reversing the usual arrangement in which the broadcaster pays the producer for a program and then capitalizes on the program through the use of advertising.[25] The three organizations use their programs as vehicles for soliciting call-in donations.[26]

The Tribunal denied the Devotional Claimants any award on two grounds. First, it found that the Devotional programming was "fundamentally distinct" in that it had no marketplace value due to the distinct arrangement whereby the program's producers paid the broadcasters to air it. Second, the Tribunal could find no evidence of harm by cable retransmission of the Devotional programming. Rather, the Tribunal found that the Devotional Claimants derived a benefit because an expanded viewing audience could provide a source of additional donations. The court found these explanations to be perfectly reasonable at first blush. However, when measured against the Tribunal's dissimilar treatment of other similarly situated claimants, the decision took on an air of "unexplained arbitrariness."[27]

The court did not find the idea that there was a fundamental distinction in the non-commercial religious broadcasting necessarily irrational. But it did object to the Tribunal's complete failure to discuss the counterarguments offered. For example, the Devotional Claimants contended that their payments to the broadcasters could not be interpreted as an external indication of market worthlessness since they reflected the conscious, self-inflicted cost of commercial-free formatting.[28] The Tribunal also ignored the argument that the market value of the Devotional programming was reflected in the value which viewers place on it and are willing to pay to support it through donations. The court held that these failures to address the Devotionals' arguments did not in themselves vitiate the Tribunal's "fundamental distinction" theory. However, their conspicuous failure to discuss these relevant aspects of the Devotionals' case made it difficult for the court to appraise the reasonableness of the

25. *Id.*

26. *Id.* Indeed, each of these organizations finances its production and distribution costs entirely from viewer contributions.

27. *Id.* at 1309.

28. *See, e.g.*, Tribunal Summary of PTL's Evidentiary Position, 47 Fed. Reg. 9,890-9,891 (1982): "Religious programmers choose not to mix advertising with their programming in order to retain freedom of expression . . . ." CBN Exhibit 1, JA 450-51, *cited in CBN*, 720 F.2d at 1309: "Interspersing such programs with product commercials would be as offensive and out of place as billboards in a church or synagogue."

Tribunal's response to the evidence.[29] In the words of the court, "[m]easured in light of these awards, the Tribunal's 'fundamental distinction' begins to take on the texture of quicksilver."[30]

Two of the three primary criteria which the Tribunal examined were the benefit derived by cable systems and the harm suffered by the copyright owners. When discussing the Sports Claimants' presentation, the Tribunal found that the benefit of boosted subscription rates was "the marketplace consideration we have found most persuasive and useful."[31] The Devotional Claimants offered alot of testimony to show their programming had attracted a large, steady audience, and that a notable number of cable stations now carried their programs.[32] However, the Tribunal either disregarded or simply chose not to discuss the benefit derived by cable systems from the Devotional programming, concluding that the Devotional Claimants suffered no harm. The *CBN* court found this disregard of evidence a "tell-tale [indicator] of capriciousness."[33] The court indicated that, while it did not necessarily interpret this evidence to require an award to the Devotional Claimants, the evidence was too similar to evidence proffered by other parties (National Public Radio and Public Broadcasting System) awarded royalties to be discounted.

As owners of their own satellite networks, the Devotional Claimants alleged that the fact that their programs were available throughout most of the day on retranssmitted cable made it significantly more difficult for them to place their satellite networks with other cable systems that felt that their area already had enough of this programming. This "overairing" also made it less likely for the Devotional programming to be shown during prime-time when viewership and contributions would be at their maximum. The Tribunal refused to recognize this claim, stating that Section 111 was not designed to provide compensation to satellite networks.[34]

The court partially agreed with the Tribunal's limitation. The general revenue losses of the Devotional Claimants' satellite networks (due to their inability to sell their programs to cable stations who could already pick up the same programs) were not compensable. This situation

29. *CBN*, 720 F.2d at 1310.

30. *Id.*

31. *Id.*

32. *Id.* A letter from a cable station to CBN states: "Your program [The 700 Club] has attracted a very loyal and dedicated audience that appears to be gradually increasing all the time." The testimony of a former CBN executive indicated that a notable number of stations qualifying under the FCC carried CBN programming.

33. *Id.*

34. *Id.* at 1312.

merely illustrates the compulsory licensing system at work. Copyright royalties are not designed to compensate satellite networks for the general loss of business. However, if the Devotional Claimants as copyright owners could specifically prove that cable retransmission had measurably diminished their contribution potential, the court declared such loss should be covered by the scope of Section 111.[35] This analysis seems accurate in that it considers the essence of copyright protection. It is the nature and purpose of the work created (a program which seeks to move the viewer to support the religious view being preached) to solicit financial support.

The Devotional Claimants' final argument concentrated on cable's manipulation of audience demographics. They offered evidence of economic harm resulting from "fractionalization," or the splitting up of a program's local audience block because of the distant signal importation of their own or similar programs. The court found that the Tribunal was authorized to consider evidence of this type of economic harm. In its 1978 proceeding, the Tribunal had admitted that "there is a further adverse economic impact on a copyright owner from the importation of competing distant works into the aggrieved party's local community."[36] This is the Devotional Claimants' identical situation, although they had not argued it in the 1978 appeal.

The court concluded that there was a very real possibility that the benefit of cable to the Devotional Claimants in the form of increased contributions and support might outweigh its economic harms. But it saw no reason why this benefit factor should completely foreclose any award or prevent full consideration of the evidence presented.[37]

In its appeal of royalty allocations, the NAB revived two claims raised in the 1978 proceeding: one on behalf of sports events telecasters; the other for commercial radio broadcasters. Both groups requested a greater percentile allocation of the fund on the grounds that their broadcasts are creative compilations, increasing the intrinsic worth of the programming.

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35. *Id.* The court acknowledged that, "Although it appears to us that proving such an attenuated loss would be extremely difficult, competent evidence of such a harm would not be beyond the power of the Tribunal to evaluate." *Id.*

36. 1978 Cable Royalty Distribution Determination, 45 Fed. Reg. 63,026, 63,035 (1980).

37. *CBN*, 720 F.2d at 1313. The Tribunal recently announced the procedures it will follow to implement the court's remand decision: "The Tribunal will not receive further evidence on the matters of Devotional Claimants . . . will permit all interested parties to participate in the consideration of the Devotional Claimants' remand . . . [and] will permit parties to submit Supplemental Findings of Fact and Conclusions of Law." Copyright Law Reports, No. 75, Sept. 24, 1984, Copyright Royalty Tribunal Notices, 48 Fed. Reg. 55,498, 10,601-10,602 (1983).

The NAB claimed that some of the funds distributed to the Joint Sports Claimants ("JSC") should have been instead allocated to the television sports broadcasters for their creative contributions to the programming. They introduced evidence to demonstrate the manner in which broadcasters' efforts—such as instant replay, split screens and play-by-play commentaries—add to the over-all quality of a sports telecast.[38] In support of this "broadcast day as a compilation" theory, the NAB argued that cable operators do not retransmit individual programs selectively but merely pick up the broadcasts of particular stations in their entirety. The broadcast stations select the optimum mix and arrangements of their programming based on such factors as audience demographics, competing broadcasts, seasonal changes and audience flow from one program to the next.[39]

The Tribunal reiterated the view it had expressed in its 1978 determination that, in the absence of specific contractual provisions, Congress clearly intended to award cable royalties for sports programming to the sports leagues.[40] However, in *NAB v. CRT*, the circuit court squarely rejected the Tribunal's interpretation of the Act, finding instead that Congress did seem to contemplate Tribunal recognition of the copyrightable interests of broadcasters. This belief is illustrated by the House Report:

> When a football game is being covered by four television cameras, with a director guiding the activities of the four cameramen and choosing which of their electronic images are sent out to the public . . . there is little doubt that what the cameramen and what the director are doing is what constitutes "authorship."[41]

Although the Tribunal acknowledged telecasters' copyright potential in

38. The NAB argued that the broadcast stations expended considerable time and effort in compiling a broadcast day and suggested that this type of programming fell within the Act's definition of a copyrightable compilation work since it was "a work formed by the collection and assembling of pre-existing materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship." 17 U.S.C. § 101.

39. National Ass'n of Broadcasters v. Copyright Royalty Tribunal, 675 F.2d 367, 377 n. 13 (D.C. Cir. 1982).

40. 1978 Cable Royalty Distribution Determination, 45 Fed. Reg. 63,026, 63,035 (1980), *cited in CBN*, 720 F.2d at 1315. The Sports leagues originally sought federal copyright protection in order to control the unauthorized retransmissions of their broadcasts by cable systems. Once fixed, a live sports telecast qualifies for copyright protection as a "motion picture" and "audiovisual work." 17 U.S.C. § 102(a)(6).

41. *NAB*, 675 F.2d at 378 (quoting H.R. REP. NO. 1476, 94th Cong., 2d Sess. 52, *reprinted in* U.S. CODE CONG. & AD. NEWS 5659, 5665 (1976). The court refers to, among other things, the "banter" of Howard Cosell and Don Meredith, adding that, "Anyone who has ever

the 1978 proceedings, their interests were found to be quantitatively de minimis. The Tribunal observed that broadcast compilations had minimal market value because the public views sports broadcasts primarily to see the sports performance, and not the work of the director or cameramen.[42]

Perhaps learning from its mistakes, the NAB did attempt to introduce evidence of the value of their contributions in the 1979 proceedings. The NAB claimed that in thirty-six and one-half percent of the 1979 sports telecasts, U.S. television broadcasters created the programs and did not assign the copyrights to sports teams.[43] It argued that television broadcasters are either the sole or joint authors of these broadcasts. Regardless of the merits of the NAB's ownership claim, it had not been permitted to raise it before the Tribunal in 1979, and consequently, was not properly raised upon appeal. The court remanded, noting, "[w]e expect that NAB will be allowed to raise its authorship/joint authorship claim to the Tribunal on remand."[44] However, the Tribunal was not mandated to award the broadcasters any royalties for their contributions to sports telecasts.[45]

Prior to the court's ruling in *CBN*, the Tribunal was involved in its 1980 proceeding. It appeared to make the very evaluation which the *CBN* court suggested was possible, concluding that the broadcasters' contributions were de minimis and did not warrant any increase in their award.[46] The broadcasters and sports interests ultimately resolved their differences before the Tribunal in a settlement providing that the sports clubs would continue to receive all royalties unless broadcasters entered

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watched Monday night football . . . knows that such effects as instant plays in slow motion add immensely to the quality of sports telecasts." *NAB*, 675 F.2d at 378.

42. *Id.* at 379. The court also observed that, "[T]he record is void of any useful evidence that local broadcasters are harmed by cable carriage in distant markets of their locally produced programs, and it is quite possible that distant carriage of local broadcasts is considerably beneficial to television broadcasters because the enlarged audience increases the reach of commercial advertising." *See supra* note 6 and accompanying text for contra argument. The Act prohibits cable systems from altering commercials carried on retransmitted programs. 17 U.S.C. § 111(c)(3). CBN did not discuss the harm/benefit test in relation to the NAB's claims.

43. *CBN*, 720 F.2d at 1316.

44. *Id.*

45. *Id.* at 1315-16.

46. The 1980 Tribunal Decision stated: "[T]he contribution of the broadcasters as compared with that of the teams is minimal. . . . We find no evidence in our record, including that of the NAB sports witnesses, establishing that the contribution of the sports broadcasters in any significant respect contributes to a cable operator's interest in sports programming, or in the decision of an individual to subscribe to cable television. . . . We do not find it creditable that a cable subscriber would pass up viewing a game involving teams competing for the pennant to watch a Chicago Cubs game because of the quality of the Cubs telecast." 1980 Cable Royalty Distribution Determination, 48 Fed. Reg. 9,552, 9,565-66 (1983).

into separate contract negotiations with the clubs.[47]

Commercial radio broadcasters received no royalty allocations in either the 1978 or 1979 proceedings. In the 1978 determination, the radio claimants were unable to distinguish the extent of the distant carriage of their signals due to technical inadequacies in the information gathering procedures used by the Copyright Office. Lacking any demonstration of marketplace value, the record was inadequate to support a finding that the retransmission of radio signals caused the radio stations any harm.[48]

The Tribunal's 1979 decision to refrain from awarding any royalties to commercial radio broadcasters was based on its finding that radio's value in the commercial marketplace was de minimis. The court rejected the NAB's contention that the Tribunal's failure to award royalties to commercial radio was inconsistent with the 0.25% Phase I award to National Public Radio ("NPR").[49] NPR was awarded royalties due to its innovative and distinctive quality radio programming.[50]

However, no such consistency existed between the Tribunal's award to music claimants (part of which was necessarily allocated to music played on the radio), and failure to award any royalties to commercial radio. The music claimants introduced evidence that approximately seventy percent of the total commercial FM radio airtime is occupied by music. This reliance on on-the-air time, like quality, was one of the Tribunal's secondary criteria. Although the Tribunal found the record of the music claimants not entirely clear, the seventy percent total of the copyrighted music permitted the Tribunal to issue an award of four and one-quarter percent.[51] Yet the Tribunal was unable to discern any marketplace value whatsoever for all distant commercial radio carriage. Upon examination, the reasoning used to distinguish between the music and commercial radio claimants blurred. The Tribunal recognized the contribution of "formatting" (akin to the television broadcaster's compi-

47. This was the method originally advanced by the Tribunal as the only way the broadcasters could collect on their compilation theory. *CBN*, 720 F.2d at 1315.

48. *NAB*, 675 F.2d at 379.

49. Although the NAB introduced evidence which attempted to demonstrate the benefit of radio carriage to cable, the court found only a de minimis interest. Various testimony from people in the cable industries was offered, asserting that: cable stations do not even attempt to ascertain the number of FM radio connections; cable carriage of radio signals at this point is not a significant factor in the radio broadcasting industry. *CBN*, 720 F.2d at 1316.

50. *Id.* at 1317. The evidence offered to support the conclusion that NPR produced distinctive programming included the fact that NPR received 100 times as many awards as did commercial radio, as well as exhibits of letters of support from distant cable listeners. Given these documented differences in quality, the court found that the Tribunal's exceedingly small award of 0.25% was well within the "zone of reasonableness."

51. 47 Fed. Reg. 9,894 (1982).

lation theory) to radio's appeal when offered in testimonies for public radio. However, it relied upon the opinion of a witness for the music claimants who claimed that commercial radio has only a few interchangeable formats which are present in every commercial market, so that the appeal of an imported commercial signal is very limited.[52] Regardless of the programming's level of appeal, the court noted that this testimony provided a questionable basis on which to completely foreclose broadcasters from any award because of the "ubiquity" of their programming—while simultaneously granting an award to music claimants because their music was played a ubiquitous seventy percent of the time.[53] The court therefore set aside both the award to the music claimants and the non-award to the commercial radio claimants as arbitrary and remanded these aspects of the Tribunal's decision.

The decision-making latitude of the Tribunal remains wide and is bound only by the court's review for an even-handed application of awards within a zone of reasonableness. A clear presentation of evidence of either benefit or harm structured in the monetary terms of the marketplace is the paramount requirement. If the claimants follow this procedure and show something greater than a de minimis benefit or general revenue loss, they will not be precluded from recovering.

However, the royalty rates under compulsory licensing must be examined in a larger context. Congress established the compulsory licensing rates to help promote the availability of diverse programming.[54] With the recent development of other technologies and services for delivering video programming, cable television is no longer the only technology on the horizon that is capable of providing such diversity.[55] Because of its compulsory license, cable enjoys a significant advantage over these emerging technologies. It has also been suggested that in the long run, below-market royalty rates will induce copyright owners to restrict the amount of their programming on free television.[56] Nevertheless, the basic issue remains whether copyright owners are being adequately compensated under the system of compulsory licensing. As *CBN* illustrates, proving harm is problematic and often involves a protracted court battle.

52. *Id.*

53. *CBN*, 720 F.2d at 1318.

54. Hatfield & Garrett, *supra* note 11, at 468. At that time, most cable systems could carry programming on no more than twenty channels. Copyright owners received further protection through pervasive FCC regulations in force at that time which restricted the number of signals that a cable system could import. *Id.* at 468 n.124.

55. *Id.* at 471.

56. *Id.* at 474 n.138. This would eventually result in a loss to those who cannot afford or do not have access to cable.

As the Tribunal defines its methodology and criteria with greater precision, the court will apply a stricter standard of review. It is not unlikely that the expanding future of cable technology may render the compulsory license unnecessary as greater numbers of non-network cable stations enter into negotiations with copyright owners in the traditional marketplace manner.

Nora Dwyer

B. Constitutional Law

1. Access Of The Hearing-Impaired To Television Programming

According to the Federal Communications Commission, there may be as many as twenty million hearing impaired persons in this country, who therefore require specialized television broadcasting.[1] Both the United States Supreme Court and the Ninth Circuit have rendered decisions which will have a significant impact on the access these twenty million people have to television.[2] The ultimate consequence of these decisions is that the vast majority of television programs will continue to be broadcast without captions for the hearing impaired.

In *Community Television of Southern California v. Gottfried*,[3] the Supreme Court held that the Rehabilitation Act of 1973[4] did not require the FCC to renew a public television station's license application under any different standard than that applied to a commercial licensee. Concomitantly, the Court held that it was within the FCC's authority to decline to impose a greater obligation on a public licensee than on a commercial licensee to provide special programming for the hearing impaired.[5]

Eight months after the Supreme Court's decision in *Gottfried*, the Ninth Circuit in *Greater Los Angeles Council on Deafness, Inc. v. Community Television of Southern California*[6] held that the Rehabilitation act did not mandate federally funded programs to be produced or broadcast with open rather than closed captioning. Moreover, the court declared that federal agencies which supply television funding were under no constitutional duty to take affirmative action in order to make programming accessible to the hearing impaired.[7]

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1. The Use of Telecasts to Inform and Alert Viewers with Impaired Hearing, 26 F.C.C.2d 917 (1970).

2. Community Television of S. Cal. v. Gottfried, 459 U.S. 498 (1983); Greater L.A. Council on Deafness, Inc. v. Community Television of S. Cal., 719 F.2d 1017 (9th Cir. 1983), *cert. denied* — U.S. —, 104 S. Ct. 3535 (1984).

3. 459 U.S. 498 (1983).

4. Section 504 of the Rehabilitation Act of 1973, provides that: "No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Rehabilitation Act of 1973, § 504, as amended, 29 U.S.C. § 794 (1976 & Supp. V. 1982).

5. *Gottfried*, 459 U.S. at 512.

6. 719 F.2d 1017 (9th Cir. 1983), *cert. denied* — U.S. —, 104 S. Ct. 3535 (1984).

7. *Id.* at 1024.

Gottfried originated in 1977 when Sue Gottfried, individually and on behalf of the deaf and hearing impaired population, and the Greater Los Angeles Council on Deafness filed a formal petition with the FCC. Gottfried's petition requested that the FCC deny the renewal of the broadcast licenses belonging to seven commercial stations and one public station.[8]

Gottfried advanced two principal grounds for denial. First she claimed that the licensees failed to discharge their obligation to ascertain the problems, needs and interests of the deaf and hearing impaired population within their service area.[9] Second, she claimed that the licensees violated Section 504 of the Rehabilitation Act. Gottfried also charged that the public station KCET had failed to provide enough programming with special captioning.[10] She further alleged that KCET had shown indifference to the needs of the deaf. This indifference was manifest in KCET's failure to broadcast a captioned version of the ABC evening news through most of its licensed term, and in its subsequent failure to broadcast the captioned program during prime time.

In its defense, KCET argued that it had responded to the needs of the deaf and hearing impaired by presenting more than 960 programs in the prior three years, which were either capitioned or signed, or included no spoken words whatsoever.[11] KCET maintained that all of these programs were understandable to the deaf and hearing impaired.

The FCC denied Gottfried's petition, concluding that the licensees' efforts to ascertain the special needs of the hearing impaired were adequate given that the FCC only required specialized programming techniques for the broadcasting of emergency information.[12] The FCC held

8. The licensees involved were KABC-TV, American Broadcasting Co.; KCOP-TV, KCOP Television, Inc.; KHO-TV, RKO General, Inc.; KNBC-TV, National Broadcasting Co.; KNXT-TV, Columbia Broadcasting System; KTLA-TV, Golden West Broadcasters; and KTTV-TV, Metromedia, Inc. The eighth station is a noncommercial public station, KCET-TV, licensed to Community Television of Southern California. Gottfried v. FCC, 655 F.2d 297, 300 n.1 (D.C. Cir. 1983).

9. Section 307(c) of the Communications Act of 1934, *as amended by* 47 U.S.C. § 307(c) (1983 Supp.) provides, in part, that: "the FCC is directed by statute to grant an application for renewal of a broadcast license if it finds that the 'public interest, convenience, and necessity would be served thereby.' "

10. Captioning refers to any of several technologies that project written text onto a television image so that deaf viewers receive information that is communicated to others by the soundtrack. *Gottfried*, 459 U.S. at 501 n.3. *See also*, Captioning for the Deaf, 63 F.C.C.2d 378 (1976).

11. *Gottfried*, 459 U.S. at 501, 502 n.4. These programs include: "Nova," "Once Upon a Classic," and "Masterpiece Theatre."

12. *Id.* at 504, 505. *See also* License Renewal Applications of Certain Television Stations Licensed for and Serving Los Angeles, Cal., 69 F.C.C.2d 451, 455 n.6 (1979) (wherein FCC found licensee not required to include demographic data regarding its hearing impaired popu-

that Section 504 of the Rehabilitation Act did not apply to the seven commercial stations because they were not alleged to have received any federal funding.[13]

Gottfried appealed the FCC ruling to the District of Columbia Circuit.[14] The court affirmed that portion of the FCC's order relating to the commercial stations, but vacated the renewal of KCET's license and remanded for further proceedings.[15] The court concluded that Section 504 of the Rehabilitation Act did impose a legal obligation on KCET as a federal funding recipient to comply with the Act's non-discrimination requirement. Furthermore, the court held that the FCC must consider a public station's adherence to the non-discrimination requirement in determining whether the station had met the public interest standard, pursuant to Section 307 of the Communications Act.[16] Consequently, both the FCC and KCET petitioned for certiorari.[17]

The Supreme Court affirmed the dismissal of Gottfried's objection to the renewal of the commercial licensees, but reversed the court of appeal holding insofar as it pertained to the FCC and to public broadcasters.[18] In reversing, the Court relied upon the legislative history of the Rehabilitation Act.

According to the Court, Congress, in amending the Act in 1978, made explicit the earlier presumption that the FCC had no enforcement obligation under Section 504.[19] As the Court observed, "[i]f such an en-

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lation on renewal application, but only required to maintain a public file listing demographic aspects of the community).

13. 459 U.S. at 505. In a second memorandum opinion and order, the FCC denied Gottfried's petition for reconsideration, stating that the allegations against KCET were premature unless an authorized agency had determined that the station had violated Section 504. Further, the FCC rejected Gottfried's additional argument that the FCC had a duty to adopt regulations to implement Section 504. Petition for Reconsideration of Comm. Action, 72 F.C.C.2d 273, 279 (1979).

14. Gottfried v. FCC, 655 F.2d 297 (D.C. Cir. 1981).

15. *Id.* at 316. As to commercial stations, the court stated that although a license to broadcast is a valuable commodity, it does not qualify as "financial assistance" within the meaning of Section 504. *Id.* at 312. Thus, one who is merely a licensee is not a federal fund recipient.

16. *Id.* at 307. Section 307 of the Communications Act of 1934 is codified as amended at 47 U.S.C. § 307 (West Supp. 1983). Note that this public interest standard has been construed so as to include a requirement that broadcasters endeavor to discover and meet the programming needs of all significant groups within their service areas. Stone v. F.C.C., 466 F.2d 316, 327-28 (D.C. Cir. 1972). *See generally* Ascertainment of Community Problems by Broadcast Applicants, 53 F.C.C.2d 3 (1975).

17. Gottfried v. United States, 454 U.S. 1141 (1984).

18. *Gottfried*, 459 U.S. at 512.

19. *Id.* at 509. *See* Pub. L. 95-602, § 119, 92 Stat. 2982 (codified as amended at 29 U.S.C. § 794 (Supp. V. 1982)).

forcement obligation existed, it would have to derive from the Rehabilitation Act itself, since the general words 'public interest' in the Communications Act are not sufficient to create it."[20] Thus, the responsibility for enforcing the Act, insofar as it regulates private recipients of federal funds, remains with those agencies administering the federal financial assistance programs and the FCC is obviously not such an agency.[21] The Court further stated that although

> the FCC has an administrative duty to consider the needs of handicapped citizens in determining whether a license renewal would effectuate the policies behind the Communications Act . . . but is by no means required to measure proposals for a public television license renewal by the standards of § 504 of the Rehabilitation Act.[22]

The Court then determined that, rather than the FCC, it was the Department of Justice which had the authority to coordinate and implement the enforcement of Section 504.[23]

Despite its finding that section 504 was not an absolute standard by which renewal applications would be evaluated, the Court did concede that if a licensee was found guilty of violating the Rehabilitation Act, the FCC would clearly be obligated to consider its possible relevance in ascertaining whether to renew the violator's license.[24] However, this concession resulted in a hollow victory for the hearing impaired in that the Court maintained that the FCC was not required to take original jurisdiction over such a controversy.[25]

Furthermore, while the Court recognized that a public station had a duty to comply with the Rehabilitation Act, the Court nonetheless held that the FCC was not required to evaluate a public station's service to the handicapped community by a more stringent standard than that applicable to a commercial station.[26] The Court reasoned that the interest in having both commercial and public stations serve the handicapped community is equally strong,[27] thus suggesting that public stations are justi-

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20. *Gottfried*, 459 U.S. at 509 n.14; *Cf.* NAACP v. FPC, 425 U.S. 662, 670 n.7 (1976). Under the Communications Act, the FCC is charged with ensuring that its licensees' programming fairly reflects the tastes and viewpoints of minority groups. *NAACP* at 670 n.7.

21. *Gottfried*, 459 U.S. at 509-10.

22. *Id.* at 509 n.14.

23. *Id.* at 509-10 n.15. In 1980, the coordination and enforcement of authority was transferred from HEW to the Department of Justice. Exec. Order No. 12,250, 3 C.F.R. 298 (1981).

24. *Gottfried*, 459 U.S. at 510. For an explanation of FCC policy regarding regulatee violation of a federal statute, see Revision FCC Form 303, 59 F.C.C.2d 750, 763 (1951).

25. *Gottfried*, 459 U.S. at 510.

26. *Id.* at 511.

27. *Id.*

fied in discriminating against the hearing impaired to an extent equal to that of their commercial counterparts.

In concluding, the Court noted that whether a standard is being set for the relicensing of a public or commercial station, rulemaking is generally a "better, fairer, and more effective" method of implementing an industry-wide policy, than is the uneven application of contract conditions.[28] In any case, a decision regarding the manner in which such standards are applied would remain within the province of the federal agency providing the funds. Thus, if a federal agency took it upon itself to impose more rigorous standards on a public station, agency discretion would determine whether conditions should be attached to the station's subsidy or, alternatively, whether the agency should develop its own standards under the Rehabilitation Act.[29]

Just eight months after *Gottfried* was decided, the Ninth Circuit in *Greater L.A. Council on Deafness, Inc. v. Community Television of S. Cal.*[30] was presented with several issues closely related to those decided by the Supreme Court in *Gottfried*. The position taken by the Ninth Circuit on these issues essentially mirrors that of the Supreme Court. This is illustrated by the Ninth Circuit's announcement that the government was under no constitutional obligation to take affirmative action to make television accessible for the hearing impaired.[31]

In addition to this holding, the court made a number of other pronouncements regarding the requirements of the Rehabilitation Act. In construing the Act, the court held that: (1) federally funded programs are not required to have open, rather than closed, captions; (2) the Department of Health, Education and Welfare is not required to terminate funding of programs, pending the promulgation of regulations under Section 504; (3) neither the FCC nor the Attorney General are required to promulgate regulations under Section 504; and (4) it is within the discretion of the Department of Education to determine whether to promulgate regulations under Section 504 or proceed through adjudication and the conditioning of grants in implementing its enforcement duties.[32]

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28. *Id.*

29. *Id.* at 511-12. The FCC argued that in the event such a "differential standard were appropriate, commercial stations would be better able to afford the costs associated with special programming than public television stations, which cannot sell advertising and which serve the public in large part by airing programs of specialized interest that lack the mass appeal required for broadcast on network affiliates." *Id.* at 512 n.19.

30. 719 F.2d 1017 (1983).

31. *Id.* at 1024.

32. *Id.* at 1021-23. The court also held that a private civil court action may be filed before the administrative remedies provided in the Rehabilitation Act are exhausted. *Id.* at 1021.

The action was initially brought in the United States District Court for the Southern District of California by the Greater Los Angeles Council on Deafness and two individual plaintiffs, Marcella Meyer and Sue Gottfried.[33] Alleging in their complaint that Section 504 mandates federally funded stations to provide open captioning[34] of television programs, Meyer and Gottfried named two sets of defendants. The first group, referred to as private defendants, included KCET, its officers, the Corporation for Public Broadcasting (CPB) and the Public Broadcasting System (PBS). The complaint sought to enjoin KCET's broadcasting of non-captioned programs and CPB's and PBS's distribution of funds and programs to all stations broadcasting non-captioned programs.[35]

The second group, designated as federal defendants, included the FCC, HEW, the Department of Education and the Attorney General.[36] Meyer and Gottfried sought the termination of federal funding to these grantees not in compliance with Section 504, as well as the recovery of funds previously distributed to non-complying stations and the promulgation of regulations requiring public broadcasters to comply with the Rehabilitation Act.[37]

The district court found that KCET, CPB, and PBS had not violated Section 504, concluding that it did not require them to take affirmative action to provide access to television programming. However, judgment was entered in favor of Meyer and Gottfried against the federal defendants.

The court explained that insofar as the federal defendants had failed to promulgate regulations implementing Section 504, it had effectively discriminated against hearing impaired viewers by denying them the benefit of federally funded programs.[38] The court concluded that closed

33. The suit was certified as a class action on behalf of all hearing impaired persons within Los Angeles, Orange, Ventura, and San Bernardino Counties. *Id.* at 1019. However, the Greater Los Angeles Council on Deafness was dismissed for lack of standing. The order has not been appealed. *Id.* at 1019 n.3.

34. Open captioning refers to subtitles appearing at the bottom of the television screen which translates the audio portion of the program. Closed captioning requires the use of a decoder which allows only those viewers with special equipment to view the audio translation. *Id.* at 1019. This decoding equipment must be purchased by the viewer at an approximate cost of $250. *Id.* at n.2. Although the cost of producing closed or open captioned programs is equal; however, broadcasters may incur additional equipment expenses with open captioned programs. *Id.* at 1019 n.2.

35. *Id.* at 1020.

36. *Id.* Originally the federal defendants comprised the FCC and HEW, but when HEW was restructured in 1980, the Dept. of Education and the Attorney General were added as defendants.

37. *Id.*

38. *Id.* at 1021.

capitioning was not a reasonable means of assuring non-discriminatory access to television programs because only viewers with decoders would be able to view the audio translation at the bottom of their television screens.[39]

Accordingly, the district court enjoined the Department of Education from allocating any funds for programming until it promulgated regulations consistent with the court's holding.[40] The Department was also directed to continue with any of its attempted rule-making efforts in enforcing the Rehabilitation Act. Moreover, the FCC and the Attorney General were ordered to issue standards in conformance with Section 504.

All parties appealed the district court's ruling.[41] The Ninth Circuit affirmed the judgment as it affected KCET, CPB and PBS, but reversed the decision against the federal defendants.

In affirming the lower court's disposition of the claims against KCET, CPB and PBS, the Ninth Circuit relied on the decision in *Southeastern Community College v. Davis*,[42] the first case in which the Supreme Court was called upon to interpret Section 504. Citing the unanimous opinion in *Davis*, the Ninth Circuit stated that "[s]ection 504 by its own terms does not compel [federally funded programs] . . . to make substantial modifications in their programs to allow disabled persons to participate."[43] Instead, the Rehabilitation Act simply mandates the "evenhanded treatment of qualified handicapped persons," and not "affirmative efforts to overcome the disabilities caused by handicaps."[44]

In considering the significance of the term "evenhanded treatment," the *Community Television* court acknowledged that some sort of affirmative modification of normal television broadcasting was required in order to compensate the deaf and hearing impaired viewers' inability to receive the audio portion of a broadcast.[45] Nevertheless, in applying the *Davis* analysis, the Ninth Circuit agreed with the district court's conclusion that KCET, CPB and PBS did not have to take affirmative *action* on

39. *Id.* at 1019, 1021.

40. *Id.* at 1021. The disbursement of funds for projects developing or employing open captioning was exempted.

41. *Id.* The federal defendants appealed the order that they promulgate regulations and terminate funding. The plaintiff class cross-appealed the judgment dismissing the private defendants. Additionally, the private defendants filed a protective appeal to challenge their loss of funding. *Id.*

42. 442 U.S. 397 (1979).

43. 719 F.2d at 1023.

44. *Id.*

45. *Id.*

behalf of the hearing impaired, pursuant to Section 504, by captioning or signing all its broadcasts.[46] The Ninth Circuit panel explained that KCET's practice of broadcasting those programs already produced with closed captions was a sufficient form of "affirmative modification of normal television."[47]

Turning to the federal defendants, the court found no merit in Meyer's and Gottfried's constitutional claims. The court dispensed with their allegations by stating that there was no legal precedent to support their contention that the first and fifth amendments imposed a duty of affirmative action on the federal defendants to make television accessible to the hearing impaired.[48]

In reversing the district court order mandating the termination of funding pending the promulgation of Section 504 regulations by the Department of Education and HEW, the Ninth Circuit asserted that withholding of funds is a " 'severe' remedy that an agency can invoke 'to avoid the use of federal resources to support discriminatory practices.' "[49] This proposition follows from a statutory procedure which allows a federal agency to terminate funding only when an express finding has been made that the funding recipient has failed to comply with a funding requirement.[50] The court held that there was no evidence to support such a conclusion in this case, in light of a determination that the funding recipients (KCET, CPB and PBS) had not violated any subsidy requirements.[51]

Assessing the claims made against the Attorney General and the FCC, the court declared that neither defendant had a duty to develop regulations in accordinace with Section 504.[52] The court noted that despite the Attorney General's responsibility to coordinate the implementation and enforcement of the non-discrimination provision of Section

46. *Id.*

47. *Id.*

48. *Id.* at 1024.

49. *Id.* at 1021-22 (*quoting* Cannon v. Univ. of Chicago, 441 U.S. 677, 704-05 (1979)).

50. 42 U.S.C. § 2000d-1 (1982) provides, in pertinent part:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan or contract . . . [may effect compliance] with any requirement adopted pursuant to this section . . . by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement. . . .

51. 719 F.2d at 1022. The court also noted that there is nothing in the statute to indicate that a private plaintiff may avail itself of this remedy. *See* Cannon v. Univ. of Chicago, 441 U.S. at 704-06 (contrasting public and private remedies).

52. 719 F.2d at 1022.

504,[53] this responsibility did not entail the promulgation of regulations.[54] Concomitantly, the court proclaimed that the district court order, requiring the FCC to promulgate regulations, was inconsistent with the Supreme Court's decision in *Gottfried*.[55] The Ninth Circuit reiterated the Supreme Court's holding that since the FCC did not administer funds, it therefore had no duty to promulgate regulations.[56]

Finally, the Ninth Circuit determined that the Department of Education was entitled to implement its enforcement duties under Section 504 by methods other than rulemaking.[57] Thus, as the Supreme Court had also concluded, it was up to the Department's discretion whether to promulgate regulations or to proceed by adjudication and contract conditions.[58] As the court suggested, from a practical standpoint, the use of the latter methods might permit federal agencies to remain responsive to developing technology.[59]

The court's suggestion was based on the assumption that such methods would allow the government to work with producers and broadcasters in creating programs accessible to the hearing impaired. Such an assumption, however, overlooks the possibility of the selective application of contract conditions according to government caprice. This possibility would necessarily be precluded if regulations were used to enforce the Rehabilitation Act (especially since its application to broadcasting has been severely limited, thereby making its requirements easier to ignore) since a uniform, industry-wide standard would have to be instituted.

Both *Gottfried* and *Community Television* present difficult questions concerning the obligations of broadcasters and federal agencies in their attempts to accommodate the special needs of hearing impaired viewers. In their efforts to respond to the issues raised, both the Supreme Court and the Ninth Circuit have clearly enunicated at least two points.

First, despite judicial recognition that the non-discrimination re-

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53. Exec. Order No. 12,250, 3 C.F.R. 298 (1981), *reprinted in* 42 U.S.C. § 2000d-1 app. at 23 (1982).

54. 719 F.2d at 1022 (citing 28 C.F.R. § 41.4 (1983)).

55. *Id.*

56. *Id. See also Gottfried*, 459 U.S. at 509. This holding was also affirmed in Cal. Assoc. for Physically Handicapped, Inc. v. FCC, 721 667 (9th Cir. 1983).

57. 719 F.2d at 1023. During the early stages of this litigation, the newly organized Department of Education published a Notice of Intent to promulgate regulations. In 1981, however, it abandoned its rulemaking efforts and advised the court that it would proceed instead by adjudication and imposition of contract conditions. *Id.* at 1020.

58. *Id.* at 1022 (quoting NLRB v. Bell Aero-Space Co., 416 U.S. 267, 294 (1974)).

59. *Id.* at 1023. The court of appeal also emphasized the Supreme Court's decision in *Community Television* that "the Government must proceed by rulemaking." *Id.*

quirements of the Rehabilitation Act do apply to public television stations, public broadcasters effectively have no more of an affirmative duty to avoid programming discrimination than do their commercial counterparts. Although the language of the Act clearly states that no handicapped individual shall be denied the benefits of any program receiving federal financial assistance solely because of a handicap, under these two decisions, the deaf viewer is being denied the benefits of public television by virtue of his or her handicap. Furthermore, even though public broadcasters are directed to make some type of affirmative modifications in their normal broadcasts to accommodate their hearing impaired viewers, this minimum requirement may often remain unmet, since federal agencies are not *required* to promulgate and enforce non-discriminatory regulations.

Second, notwithstanding the Supreme Court's suggestion that the FCC should take into account a public broadcaster's violation of the Rehabilitation Act when considering its license renewal application, it is evident that such a violation can and will be ignored according to FCC discretion. This capacity for discretionary decision-making is eminently consistent with the FCC's traditional view that its statutory duty to serve the public interest is best fulfilled by "achieving diversity in entertainment programming through market forces."[60] It is not, however, consistent with the FCC's additional obligation to serve "public convenience and necessity," at least insofar as the hearing impaired public is concerned.

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60. FCC v. WNCN Listeners Guild, 450 U.S. 582, 599 (1981).

2. Miami Ordinance Regulating Cable Television Transmission Of "Indecent" Material: The First Amendment To The Rescue

Adult movie lovers everywhere can breathe a heavy sigh of relief, after a United States District Court decision found Miami City Ordinance No. 9583, an ordinance designed to regulate indecent material on cable television, unconstitutional. The court in *Cruz v. Ferre*[1] granted the plaintiffs' motion for summary judgment and permanently enjoined the City of Miami, Florida from enforcing the indecency ordinance.[2]

Ruben Cruz, a cable television subscriber, sued the City of Miami on the grounds that the indecency ordinance violated his first amendment right to free speech and his fourteenth amendment due process and equal protection rights.[3]

Subsequent to the filing of Cruz' lawsuit, Home Box Office, Inc. intervened as a plaintiff, also alleging that the indecency ordinance restricted free speech and infringed upon due process and equal protection.[4] HBO was a private cable television service offered to Miami citizens who subscribed to Cablevision, the sole Miami cable television licensee.[5] About 75% of all Miami cable television receivers subscribed to HBO.[6]

HBO's programming included feature films rated "G," "PG," or "R," by the Motion Picture Association of America, but it was HBO's policy not to show "X" rated films or their equivalent.[7] Still, due to the mature themes of many HBO presentations, the company provided safeguards for unwary viewers, including a monthly guide, extensively describing its program offerings, as well as "lockboxes" and "parental keys" provided free of charge by HBO.[8]

Despite these protective devices, the City of Miami chose further to protect its viewers from "indecent" programs by enacting an "indecency ordinance" banning the knowing distribution of indecent material over cable television.[9] The ordinance further provided that the City Manager

1. 571 F. Supp. 125 (S.D. Fla. 1983).
2. *Id.* at 127.
3. *Id.* at 126.
4. *Id.* at 128.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* "Lockboxes" are devices attached to the television set, preventing access to programming without unlocking the device with a "parental key."
9. *Id.* at 127. Miami City Ordinance No. 9583 states, "Section 1. No person shall by

resolve any disputes arising over "probable cause," preside over any hearing, and ultimately make any final judgment upon any complaint filed pursuant to this ordinance.[10]

The court addressed the procedural hurdles of "case or controversy"[11] and standing,[12] prior to addressing the merits of the case. First, the court found that the plaintiffs each had a ripe dispute against the City of Miami.[13] A dispute is ripe when there is a " 'substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.' "[14] While the challenged ordinance had not yet been enforced, this was not material as to the claim's "ripeness."[15]

Rather, the threat of enforcement of the ordinance and the likely inhibition of the exercise of free speech were the relevant factors.[16] The threat of sanctions can deter the exercise of free speech as strongly as the actual application of sanctions.[17]

The threat of enforcement of the indecency ordinance burdened the right of cable television viewers to receive, and the right of cable television operators to disseminate, diversified communications.[18] These threats, therefore, created a genuine "case or controversy" as to both plaintiffs.[19]

Once the controversy was established, plaintiffs had to show that they were personally injured by the existing indecency ordinance.[20] The court admitted that the plaintiffs' injuries were not readily apparent, but recognized that the chilling effect of the indecency ordinance on the exercise of their free speech rights was quite real.[21]

Such anticipatory challenges are permissible when " 'the allegedly

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means of a cable television system knowingly distribute by wire or cable any obscene or indecent material."

10. *Id.*

11. *Id.* at 128.

12. *Id.* at 129.

13. *Id.* at 128-29.

14. *Id.* at 128, *quoting* Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941).

15. *Cruz*, 571 F. Supp. at 128. *See* High Ol' Times, Inc. v. Busbee, 621 F.2d 135, 139 (5th Cir. 1980); American Booksellers Ass'n v. McAuliffe, 533 F. Supp. 50, 54-55 (N.D. Ga. 1981).

16. *Cruz*, 571 F. Supp. at 128.

17. *Id.* at 129, *citing* NAACP v. Button, 371 U.S. 415, 433 (1963).

18. *Id. See* Stanley v. Georgia, 394 U.S. 557, 564 (1969); *see also* Home Box Office v. FCC, 567 F.2d 9, 48-59 (D.C. Cir.), *cert. denied*, 434 U.S. 829, *reh'g denied*, 434 U.S. 988 (1977).

19. *Cruz*, 571 F. Supp. at 129.

20. *Id. See* Baker v. Carr, 396 U.S. 186, 204 (1962).

21. *Cruz*, 571 F. Supp. at 129.

unconstitutional statute interferes with the way the plaintiff would normally conduct his affairs.' "[22] Plaintiff-subscriber Cruz might have forsaken his right to receive, rather than wage a costly battle against the City.[23] Likewise, the ordinance might have discouraged plaintiff-distributor HBO from pursuing programs that might have been found "indecent" under the ordinance.[24] When restraints on free speech are at issue, the concept of standing is construed broadly by the courts in favor of litigants asserting their free speech rights.[25] The *Cruz* court found the discouraging effects of the indecency ordinance substantial enough to provide the plaintiffs with standing to bring suit against the City of Miami.[26]

The discussion of the merits began with the ordinance's effect on first amendment free speech.[27] The court reiterated that the freedom to speak has been among the most important and, therefore, most protected of all constitutional rights, but that "[o]bscenity is unprotected because of its minimal social value and offensiveness to contemporary moral standards."[28] While obscenity is unprotected speech, the Supreme Court has provided some first amendment protection for "indecent" speech.[29] The *Cruz* court found that the indecency ordinance regulated constitutionally protected speech and was, therefore, unconstitutionally overbroad and facially defective.[30]

The Supreme Court has held that indecent speech can be regulated on broadcast radio and television due to the nature of their ability to invade the privacy of the home.[31] Yet, the courts, as in *Cruz*, seem un-

22. *Id., quoting* International Soc'y for Krishna Consciousness v. Eaves, 601 F.2d 809 (5th Cir. 1979).

23. *Cruz*, 571 F. Supp. at 129.

24. *Id., citing* Erzoznik v. City of Jacksonville, 422 U.S. 205, 216 (1975).

25. *Cruz*, 571 F. Supp. at 129, *citing* Broadrick v. Oklahoma, 413 U.S. 601, 611-13 (1973).

26. 571 F. Supp. at 129.

27. *Id.* at 130.

28. *Id. See* Miller v. California, 413 U.S. 15, *reh'g denied*, 414 U.S. 881 (1973).

29. FCC v. Pacifica Foundation, 438 U.S. 726, *reh'g denied*, 439 U.S. 883 (1978).

30. *Cruz*, 571 F. Supp. at 130-31.

31. *Pacifica*, 438 U.S. 726. The City's reliance on *Pacifica* was rejected by the court in *Cruz*.

In *Pacifica*, a monologue by comedian George Carlin was aired on a radio station around 2 p.m. The monologue contained "offensive and vulgar language." The FCC found the monologue to be "patently offensive — indecent, but not obscene — yet subject to regulation." The Supreme Court agreed that this was a circumstance where indecent speech could be regulated. The Court recognized that the content and context of speech are critical factors in deciding whether the speech can be regulated. The Court noted that the pervasiveness of broadcast radio (its ability to invade the home and the scarcity of available frequencies) limited its constitutional protection. The Court also provided a host of variables which must be considered before regulation of speech is permitted. These variables are time of day, program context, and willing to allow any regulation of *indecent* material on cable television, due to cable's vast inherent differences from broadcast television.[32]

The dissimilarities between cable television and broadcast television were discussed in a case involving identical circumstances, *Community Television of Utah, Inc. v. Roy City*.[33] The *Roy City* court struck down an indecency ordinance because of cable television's adequate safeguards against undesired and surprise viewing.[34] Among the adequate safeguards perceived by the court was cable television's larger offering of stations and the fact that television owners are free to accept or reject the terms of cable programmers.[35] Also, detailed monthly guides, in addition to "lockboxes" and "parental keys," were found sufficient to prevent surprise viewing.[36] The *Cruz* court applied this same reasoning and found that the Miami indecency ordinance unconstitutionally abridged protected speech.[37]

The court also found that the indecency ordinance violated the due process clause of the fourteenth amendment.[38] The due process clause was designed to protect against "arbitrary and capricious governmental action."[39] Due process safeguards apply when a property interest, such as Cablevision's license, defined by a source such as state law, is subject to deprivation.[40] In *Cruz*, the indecency ordinance provided for the City Manager to be the primary decision maker through all stages of any dispute involving potential indecency ordinance violations.[41] Since due process requires fair hearings, the court found that the power given solely to the City Manager created an intolerably high risk of arbitrary or capricious governmental action.[42]

While not ruling on the plaintiffs' equal protection claim, the court, nevertheless, discussed it in some detail.[43] This claim involved the question of whether the regulation of indecent speech on cable television, but not of other communication forms, deprived cable programmers of equal

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the inherent differences between radio, television and circuit transmission. For a more detailed list of these differences, *see Cruz*, 571 F. Supp. at 132.

32. *Cruz*, 571 F. Supp. 132.
33. 555 F. Supp. 1164 (D. Utah 1982).
34. *Id.*
35. *Id.*
36. *Cruz*, 571 F. Supp. at 132.
37. *Id.*
38. *Id.* at 133.
39. *Id. See, e.g.*, Ohio Bell Tel. Co. v. Comm'n, 301 U.S. 292 (1937).
40. *Cruz*, 571 F. Supp. at 133. *See* Bd. of Regents v. Roth, 408 U.S. 564 (1971).
41. *Cruz*, 571 F. Supp. at 133.
42. *Id.*
43. *Id.* at 133-34.

protection under the law.[44]

The court was compelled to use a strict scrutiny standard of analysis since the ordinance regulated speech content.[45] Strict scrutiny required the showing of a compelling state interest justifying the government ordinance and the lack of a less restrictive alternative.[46] The court found that the City could not meet its burden of proving that indecent speech presented on cable television has a greater effect on public morality than indecent speech presented by other communication forms not regulated by Miami's indecency ordinance.[47] This disparity could not be justified under the exacting demands of strict scrutiny; thus the indecency ordinance denied plaintiffs equal protection under the law.[48]

Although not discussed in much detail, *Cruz* raises a controversial issue involving the extent to which first amendment rights are extended to persons being denied the right to receive information. The *Cruz* court concluded, without any analysis, that plaintiff-subscriber Cruz had his first amendment free speech violated by the indecency ordinance's chilling effect upon his "right to receive."[49] While the court's conclusion may be correct, the question certainly is important enough to warrant some discussion. An incorrect conclusion regarding a subscriber's first amendment right to receive indecent material could mean the difference between a plaintiff's summary judgment or a successful motion to dismiss for lack of standing.

It seems that the current Supreme Court's position regarding standing in the first amendment area would be to acknowledge its existence in the *Cruz* case. It has been established that "[f]reedom of speech presupposes a willing speaker", and where a speaker exists, "the protection is afforded to the communication, to its source and to its recipients both."[50] In short, the Supreme Court has acknowledged a first amendment right to "receive information and ideas."[51] Since the *Cruz* court concluded that indecent speech on cable television is constitutionally protected, the denial of Cruz' right to receive this indecent speech caused him sufficient injury to provide standing.[52]

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44. *Cruz*, 571 F. Supp. at 134.

45. *Id.* Strict scrutiny is the highest standard of scrutiny a court can apply.

46. *Id. See* Carey v. Brown, 447 U.S. 455 (1980).

47. *Cruz*, 571 F. Supp. at 134.

48. *Id.*

49. *Id.* at 128-29.

50. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756 (1976).

51. Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972).

52. *Cruz*, 571 F. Supp. at 128-29.

This liberal interpretation of the first amendment free speech doctrine gained its widespread acceptance in the 1960's and early 1970's.[53] Because the complexion of the Supreme Court may take a very conservative turn in the next four years, the implied first amendment "right to receive" could soon be narrowed. In a major case establishing this "right to receive," *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[54] a dissenting Justice Rehnquist believed the court should try to balance the interests "in individual free speech against the public welfare determinations embodied in a legislative enactment."[55] Justice Rehnquist further stated that "[l]egitimate attempts to protect the public, not from the remote possible effects of noxious ideologies, but from the present excesses of direct, active conduct, are not presumptively bad because they interfere with and, in some of its manifestations, restrain the exercise of first amendment rights."[56] Using this analysis, the potentially "conservative" new Supreme Court may not find standing in a case similar to *Cruz* after applying Rehnquist's balancing test and might conclude that an indecency ordinance is a legitimate attempt to protect the public from the direct acts of "indecent" film programmers. Thus, absent the "right to receive," a plaintiff-subscriber would not be injured, and, consequently, would have no standing to sue.

Dicta in *Cruz* and *Roy City* strengthen the bedrock of first amendment free speech. Both courts expressed a personal distaste for the indecent material being subjected to regulation.[57] However, in the area of free speech, public tolerance is required of the courts, not public approval.[58] Freedom of speech should be most vigorously protected when there exists, also, a freedom to choose.[59] A cable subscriber has the option of whether to subscribe and has a myriad of choices as to what he or she will watch. "If the first amendment means anything, it means that a State has no business telling a man, sitting alone in his own house what

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53. *See* Red Lion Brdcst'g Co. v. FCC, 395 U.S. 367, 390 (1969); Griswold v. Connecticut, 381 U.S. 479, 482 (1965).

54. 425 U.S. 748 (1976).

55. *Id.* at 789. *Va. Board* involved plaintiff consumers' wanting to strike down a statute prohibiting pharmacists from advertising drugs. The Court concluded the right to receive drug information was constitutionally protected under the first amendment.

56. *Id.*

57. *Cruz*, 571 F. Supp. at 134-35. In *Cruz*, Judge Hoeveler states, "The butchers of our times press forward, their appetites for profit obscured by the banners of the First Amendment which they thrust forward with each new attempt to enlarge the ambit and prurience of their offerings." 371 F. Supp. at 134.

58. *Roy City*, 555 F. Supp. at 1172.

59. Home Box Office v. Wilkinson, 531 F. Supp. 991, 1001 (D. Utah 1982).

books he may read or what films he may watch."[60] The indecency ordinance in *Cruz* clearly infringed this highly protected freedom of choice and was correctly struck down on first amendment grounds.

Cruz should prove a significant financial victory for all cable programmers. Adult programming on cable television can prove to be a very lucrative endeavor. Cable television advertising reveals that "adult" programming is a selling point of many cable packagers. Cable companies often charge extra money to subscribers for the right to view adult movies. This extra charge can provide considerable revenue for cable companies. Naturally, legitimizing indecency ordinances would jeopardize this adult market, resulting in substantial financial loss for cable companies charging extra for access to adult entertainment programs.

It appears that *Cruz* and *Roy City* are founded on sound legal grounds, and "indecency" ordinances such as these should become extinct. In *Cruz*, the court suggests that correction of the indecency ordinance might be accomplished if the procedural language, regarding the extreme power given to the City Manager, was eliminated. However, it is becoming engrained in the law that indecent speech can be constitutionally protected, and cable television, because of its adequate safeguards, is a proper medium for indecent speech. Consequently, the first amendment substantive issues of free speech should obviate the need to address the fourteenth amendment procedural issues.

Michael J. Grobaty

60. Stanley v. Georgia, 394 U.S. 557, 565 (1969).

3. Evangelical Broadcasting: FCC Investigation Of Use Of Donations Does Not Infringe First Amendment Rights

Television viewers often see television preachers soliciting contributions, but do they question whether these ministers are subject to allegations of fraud when their donations are misappropriated? In *Scott v. Rosenberg*,[1] the Ninth Circuit recently held that government employees involved in an investigation of a church's television and radio stations had not unjustifiably violated a television preacher's first amendment rights.[2]

Reverend W. Eugene Scott, Ph.D., president and pastor of the Faith Center Church,[3] sought injunctive relief and actual and punitive damages against employees of the Federal Communications Commission for an alleged violation of his first amendment rights during their investigation of the Church's television and radio stations.[4] Paul Diederich, a former employee of one of the Church's television stations, sent a letter to the FCC; he alleged that Scott solicited funds for projects that were never undertaken and that Scott was using the station for personal gain.[5] As a result, the FCC initiated an investigation and started conducting interviews. Further allegations were made that the Church's stations failed to log paid religious programming as commercial broadcasting, that Scott misstated the amounts of his personal remuneration during broadcast solicitations, and that Scott made personal pledges during broadcasts that were never kept.[6]

FCC investigators subsequently made an unannounced visit to the Church requesting certain station records; the Church relinquished some but not all of the requested records.[7] The FCC then gave notice of its intent to hold a hearing to determine if the station's license renewal application would be granted and whether the license was subject to "forfeiture for violation of 18 U.S.C. § 1343," which governs fraud through the use of radio and television.[8]

Scott brought suit in federal district court to vindicate his individual

1. 702 F.2d 1263 (9th Cir. 1983), *cert. denied*, — U.S. —, 104 S. Ct. 1439 (1984).
2. *Id.* at 1276.
3. *Id.* at 1266.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id. See In re* Application of Faith Center, Inc. Station KHOF-TV, 82 F.C.C.2d 1 (1980) (order dismissing Faith Center's application for license renewal sustained).

rights. He contested the FCC's inquiry into his personal donations, claiming that his religion required that his donations be kept confidential and that an investigation of them violated his free exercise rights under the first amendment.[9] The trial judge granted summary judgment for the FCC employees.[10]

The appellate court first addressed the threshold issue of whether the pastor had standing. The court held that the Constitution's article three prerequisites[11] and other prudential requirements[12] for standing were satisfied. Having made this determination, the court turned to the merits of Scott's claims.

The Attorney General of California initiated an investigation of the Church that was similar to the FCC inquiry.[13] Scott alleged that FCC employees participated in the state investigation[14] and, thereby, violated Title 42, Section 1983, of the United States Code,[15] which provides a civil action for the deprivation of rights by persons who act under color of state law. The court found no material fact which would substantiate Scott's claim.[16]

The court assumed that federal employees, like private individuals, could act under color of state law in violation of Section 1983.[17] The court decided that the FCC employees did not instigate the state investigation nor did they request that certain information be acquired on their behalf by the state investigators. The court held that federal employees sharing information with the state, even information obtained by the state in violation of Scott's first amendment rights, was accomplished under authority of federal law. This, without more, was not enough to establish that the FCC employees acted under color of state law.[18]

Scott further alleged that government employees, ex-church offi-

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9. *Scott*, 702 F.2d at 1266-67 (government employees did not dispute that Scott's religion required donations be kept confidential).

10. *Id.* at 1266.

11. *Id.* at 1267. *See* Baker v. Carr, 369 U.S. 186, 204 (1967).

12. *Scott*, 702 F.2d at 1267. *See* Warth v. Seldin, 422 U.S. 490, 499 (1975).

13. *Scott*, 702 F.2d at 1269.

14. *Id.*

15. 42 U.S.C. § 1983 (1981) states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding proper for redress. . . .

16. *Scott*, 702 F.2d at 1269.

17. *Id.*

18. *Id.*

cials, and the California Attorney General conspired to deprive him of his first amendment rights in violation of Section 1985(3).[19] The pastor failed to allege that the conspiracy had a class-based discriminatory animus, which is a requirement of this statutory cause of action.[20] Since Scott did not state facts sufficient to infer a class-based amimus, the court concluded that he failed to state a claim for relief under the statute.[21]

The court next addressed Scott's damages claim for the alleged violation of his first amendment rights, and stated that damage remedies for governmental actions should be statutorily mandated.[22] However, there are judicially created damage remedies for violations of the fourth, fifth, and eighth amendments.[23] The court enumerated various policy factors to be used when considering whether damages are an appropriate remedy for first amendment violations.[24] The court, instead of deciding whether damages were available to Scott, assumed they would be if the court found that his first amendment rights had been unjustifiably violated.[25]

Scott also alleged that the "government employees dispatched charges of fraud to the press and public" and that "those statements interfered with the free exercise of his religious obligation to convert others to his beliefs."[26] The court stated that the government employees had only confirmed that an investigation was in progress and that therefore Scott's allegations were merely conclusory and unable to withstand the motion for summary judgment.[27]

Scott next argued that the FCC investigation of his pledges violated his constitutional free exercise rights.[28] The court's inquiry took two paths: The court first examined the FCC action with respect to the Church's television station and, second, analyzed the effect on Scott as an

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19. 42 U.S.C. § 1985(3) (1981) states:

> If two or more persons in any State or Territory conspire . . . for the purpose of depriving, . . . any person or class of persons of the equal protection of the laws . . . the person so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

20. *Scott*, 702 F.2d at 1270, *citing* Griffin v. Breckenridge, 403 U.S. 88, 101-02 (1971).

21. *Id.* at 1270.

22. *Id.*

23. *Id.*

24. *Id.* at 1271, *citing* Davis v. Passman, 442 U.S. 228, 245-48 (1979). The *Scott* court listed factors to be considered: whether damages are a historically accepted remedy; whether damages are judicially manageable; whether alternative remedies are available; whether a damage remedy would be contrary to the intent of Congress; and whether the damages remedy would open the floodgates of litigation.

25. *Scott*, F.2d at 1271.

26. *Id.*

27. *Id.*

28. *Id.* at 1272.

individual.[29] The court stated that a lower standard of protection applies to broadcast media under the first amendment.[30] The FCC, with approval of the courts, issues licenses and applies its rules without differentiating between secular and non-secular broadcasters.[31] The court held that the FCC did not have to justify the investigation into allegations of fraud by a television station that was owned by a religious organization.[32]

But, the court noted that investigations of licensees by the FCC could intrude on an individual's free exercise rights. An individual's "free exercise rights can be protected by requiring the FCC to demonstrate a compelling governmental interest."[33] The court observed that Scott's sincerely held religious beliefs, concerning the confidentiality of his donations, were in conflict with the FCC's request for the Church's records of donations.[34] The court concluded that the FCC demand for Church records interfered with Scott's first amendment rights, but stated that an infringement on religious liberty is justifiable if it is necessary to accomplish an overriding governmental interest.[35]

Whether the governmental interest in preventing fraudulent practices is sufficiently compelling to justify the burden on Scott's constitutional rights is a question of law.[36] The court stated, "[t]he governmental interest in preventing some crimes is compelling. . . ."[37] The court noted that religious frauds can be penalized and concluded that the "nature of the fraud" determined whether the governmental interest outweighed Scott's individual rights of religious freedom.[38]

The FCC alleged that Scott solicited funds for specific projects that were never undertaken.[39] Scott stated that, according to his religion, the donations, not their use, were important. It did not matter what the funds were used for, as he followed " 'the leanings of the Lord' " to determine how to spend the solicited funds.[40] The court concluded that the

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29. *Id.*

30. *Id.*, *citing* FCC v. Pacifica Found., 438 U.S. 726, 748 (1978).

31. *Scott*, 702 F.2d at 1272, *citing* Federal Communication Act, 47 U.S.C. § 303 (1962); Red Lion Brdcst'g v. FCC, 395 U.S. 367 (1969).

32. *Scott*, 702 F.2d at 1272.

33. *Id.* at 1273.

34. *Id.* The government employees did not challenge the sincerity of the pastor's religious beliefs. Scott's beliefs were not " 'so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause.' " *Id.*, *quoting* Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707, 715 (1981).

35. *Scott*, 702 F.2d at 1273.

36. *Id.*

37. *Id.* at 1274.

38. *Id.*

39. *Id.*

40. *Id.* at 1274-75.

government had a compelling interest in preventing diversion of donations from the specific projects for which they were solicited.[41]

The court next considered whether the FCC investigation was necessary to further the government's compelling interest.[42] It noted that Scott made his solicitations over public airwaves.[43] Since broadcast licenses are a public trust, the court held that the viewing public and the obligation of government to protect the public are paramount to the rights of broadcasters.[44]

The court questioned whether the information relied on by the FCC in beginning its investigation of the Church was reliable.[45] The FCC received a signed complaint from Mr. Diederich, a person in a position to have first hand knowledge of the alleged violations.[46] Furthermore, the FCC conducted additional interviews before it requested records from the Church.[47] The court, therefore, held that the FCC relied on information that justified an investigation.[48]

A third inquiry concerned the scope of the FCC investigation.[49] The court stated that the investigation "was narrow and avoided any unnecessary interference with the free exercise of religion."[50] The court stated that the FCC objectives were accomplished by the least restrictive means available and that the investigation was necessary to serve the compelling governmental interest.[51]

Scott also claimed that the FCC employees violated the establishment clause of the first amendment.[52] He asserted that the request for his records was the initial step in a government plan to regulate religion.[53] The court stated that the government employees were merely investigating allegations of fraud and that Scott had "alleged no facts from

41. *Id.* at 1275.

42. *Id.*

43. *Id.* Allegations of fraud, even if not sufficiently specific or reliable generally to justify investigations into solicitations made by a congregation while in church, may nevertheless be sufficient to justify inquiries into *broadcast* solicitations.

44. CBS, Inc. v. Democratic Nat'l Comm., 912 U.S. 94, 102 (1973).

45. *Id.* at 1275.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* The court stated that it could "imagine circumstances in which the interference with religion could be substantial enough to overbalance a governmental interest that otherwise would be compelling. . . ."

51. *Id.* at 1276.

52. U.S. CONST. amend. I, states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

53. *Scott*, 702 F.2d at 1276.

which we can infer that pervasive regulation is either planned or threatened."[54] Lastly, the court held that the FCC employees had not "unjustifiably violated Scott's first amendment rights, and therefore [did] not reach the question of immunity."[55]

The FCC may investigate broadcasters that it reasonably suspects are in violation of FCC regulations. The investigation may take place even if it interferes with the broadcaster's first amendment rights. This investigatory power is not diminished by the fact that the broadcaster or licensee has a religious affiliation or theme in its program.

When an investigation might infringe on first amendment rights, the tips which instigate the investigation must be sufficiently trustworthy. The investigation must be narrow and avoid unnecessary intrusions on individual rights. Finally, the inquiry must be necessary to preserve a compelling governmental interest.

It is noteworthy that the court assumed, without holding, that there is a civil cause of action for violations of first amendment rights. The Supreme Court has sanctioned civil damage remedies for violations of the fourth, fifth, and eighth amendments. In absence of congressional action, a judicially created civil damages remedy for violations of the first amendment may be in the future.

Michael K. Wofford

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54. *Id.*
55. *Id.*

C. Broadcast Regulation

1. Sponsorship Identification: When Must A Broadcaster Disclose Who Really Pays For Those Political Advertisements?

During the peak of any political year voters have the dubious pleasure of having their airwaves filled with advertisements for or against various candidates, issues and parties. Generally, these advertisements are accompanied by either an announcer's voice over or a small tag line running beneath the advertisement stating, "Paid for by . . . ." Many of these groups have such innocuous names as "Committee for Responsible Government" or "Committee Against Evil Government." Often, these committees are mere shells for certain political groups seeking to conceal their true identities from the voting public. In *Loveday v. Federal Communications Commission*,[1] the District of Columbia Circuit Court discussed the duty of a broadcaster to identify the sponsors of paid political advertisements.

In 1980, California voters were called upon to decide an initiative requiring separate smoking and no smoking areas in most enclosed businesses, public, health and educational places in California. A large number of advertisements opposing this proposition were purchased from radio and television broadcasters by a committee called Californians Against Regulatory Excess ("CARE").

In a letter sent to all of the radio and television broadcasters carrying CARE's advertisements, a representative of the committee supporting the initiative, an associate of petitioner Loveday, identified the tobacco industry as the sponsor of CARE's advertisements and as the supplier of CARE's funding. The letter also stated that CARE had been purchasing advertisements in excess of its stated resources and informed the broadcasters that, four years earlier, the tobacco industry was almost the sole financial source used to defeat a similar measure. The letter also demanded that the broadcasters discover and disclose the fact that the tobacco industry was sponsoring these advertisements, citing the Federal Communications Commission's ("FCC") sponsorship identification requirements.[2]

1. 707 F.2d 1443 (D.C. Cir.) (per Bork, J.), *cert. denied*, — U.S. —, 104 S. Ct. 525 (1983).

2. The appropriate section of the Federal Communications Act of 1934 provides in part:

> (c) The licensee of each radio station shall exercise reasonable diligence to obtain from . . . persons with whom it deals directly in connection with any program . . . information to enable such licensee to make the announcement required by this section.

None of the broadcasters responded to the committee's letter. A second letter was sent reiterating the committee's position and threatening legal action if the broadcasters failed to identify the tobacco industry as the sponsors of the advertisements.

After several broadcasters notified CARE of the committee's allegations and requested a response, CARE sent the broadcasters a letter identifying CARE's purposes and organizational structure, as well as CARE's campaign efforts to date. Although CARE acknowledged that it had received contributions from some tobacco companies, it denied being an agent of the tobacco industry. No broadcaster chose to stop identifying CARE as the sponsor of the advertisements nor stopped airing the advertisements.

Loveday and the committee in favor of the initiative then requested a declaratory ruling from the FCC. Loveday alleged that the broadcasters had failed to meet their sponsorship identification obligations because the tobacco industry was not identified as the principal behind CARE and its advertisements.[3] He additionally sought to require the broadcasters to identify the tobacco industry as the sponsor of all future advertisements.

Loveday presented extensive evidence to the FCC linking the tobacco industry to CARE.[4] CARE, in response, described its efforts to refute the allegations, as evidenced in its letters to the broadcasters. Con-

47 U.S.C. § 317(c) (1976 & Supp. V 1981).

The appropriate regulation provides in pertinent part:

> (a) When a broadcast station transmits any matter for which money . . . is . . . paid . . . the stations, at the time of the broadcast, shall announce (1) that such matter is sponsored . . . and (2) by whom or on whose behalf such consideration was supplied . . . .
>
> (b) The licensee of each broadcast station shall exercise reasonable diligence to obtain from . . . persons with whom it deals directly in connection with any matter for broadcast, information to enable such licensee to make the announcement required by this section. . . .
>
> (e) The announcement required by this section shall . . . fully and fairly disclose the true identify of the person . . . committee . . . or other unincorporated group . . . by whom or on whose behalf such payments is made or promised, or from whom or on whose behalf such services or other valuable consideration is received . . . . Where an agent . . . makes arrangements with a station on behalf of another, and such fact is known or by the exercise of reasonable diligence, as specified in paragraph (b) of this section, could be known to the station, the announcement shall disclose the identity of the person . . . or entity on whose behalf such agent is acting instead of the name of such agent.

47 C.F.R. § 73.1212 (1983).

3. *Id.*

4. *Loveday*, 707 F.2d at 1446. The evidence consisted of a large variety of exhibits, including articles and affidavits, designed to prove that the tobacco industry was the true sponsor of the advertisements.

sequently, the FCC delegated the hearing to the Broadcast Bureau.[5]

The Broadcast Bureau ("Bureau") found that the relevant issue was whether the broadcasters failed to exercise reasonable due diligence in identifying the sponsor of the CARE advertisements.[6] The Bureau stated that, although a broadcaster was obligated to make "a reasonably diligent effort to identify the sponsor of broadcast material," the broadcaster was not an insurer of the sponsor's representations.[7] After reviewing CARE's letters, the Bureau held that it was reasonable to identify the advertisements' sponsor as CARE. Although the Bureau suggested that it would have been equally reasonable to identify the tobacco industry as the sponsors, it dismissed Loveday's petition.[8]

The FCC affirmed the Bureau's findings.[9] Loveday appealed to the District of Columbia Circuit Court. The court narrowed the issue to whether the broadcasters had an obligation to investigate the sponsorship issue raised by Loveday. Therefore, it only considered the information provided the broadcasters in the two letters sent to them by Loveday's associate.[10] It refused to consider Loveday's additional evidence because it was found too irrelevant since the decision hinged on the issue of notice to the broadcasters.

The crucial inquiry by the court was the interpretation of the Communications Act and FCC regulations[11] which require that a broadcast licensee identify the sponsor of paid advertisements and that the licensee "exercise reasonable diligence" to learn the identity of the sponsor.[12] The court found that the FCC had interpreted this requirement as allowing a broadcaster to accept the apparent sponsor's representations that it was the real party in interest even though the broadcaster had been confronted with undocumented allegations to the contrary.[13] The court held that, in keeping with the FCC's interpretations and in the absence of documented evidence refuting CARE's representations, the broadcasters had acted reasonably in accepting CARE's representations concerning sponsorship of the advertisements. The court found that

5. *Id.* at 1447; *In re* Request for Declaratory Ruling of Paul Loveday and Californians for Smoking and No Smoking Sections, 87 F.C.C.2d 492 (1981).

6. *Loveday*, 707 F.2d at 1447. The Broadcast Bureau is operated as an arm of the FCC, hearing certain complaints and reviewing certain matters on behalf of the FCC. *See* 47 C.F.R. §§ 0.71, 0.281 (1980).

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 1448.

13. *Id.* at 1449.

Loveday's associate had made general allegations but had failed to give the broadcasters specific evidence to substantiate them.[14] Had such evidence been presented, arguably, the broadcasters would then be required to make some kind of investigation regarding the sponsor's true identity.[15]

Much of the court's analysis relied heavily upon a lengthy review of Section 317 of the Federal Communications Act of 1934 ("Act").[16] The court traced the legislative history of Section 317 from its predecessor statute, the Radio Act of 1927,[17] through Congress' statutory amendments of the Act in 1960.[18] The court also focused upon the FCC's interpretations of the section through its administrative rulings.[19]

The court emphasized the failure of both Congress and the FCC to place a stringent duty on broadcasters to investigate the representations of advertisers as to who may be considered the true sponsor.[20] Specifically, the court pointed to instances where Congress could have required broadcasters to undertake independent investigations of potential sponsors but did not.[21] Instead, the court noted, Congress required broadcasters to identify principals only when they knew an agency relationship existed between the agent soliciting the advertisement and an undisclosed third party.[22]

The court also reviewed the action taken by the FCC following Congress' 1960 amendments but found that the FCC had chosen not to expand a broadcaster's duty to investigate.[23]

Since 1960, only two major actions have attempted to clarify sponsorship identification rules. In *United States v. WHAS, Inc.*,[24] an advertising agency purchased air time to run a commentary disparaging the governor of Kentucky. Initially, the agency told the broadcaster that the commentary was paid for by a committee supporting an opponent to the

14. *Id.* at 1459.

15. *Id.* at 1449.

16. *Id.* at 1449-55.

17. The Radio Act of 1927, ch. 169, § 19, 44 Stat. 1162, 1170 (1927).

18. *Loveday*, 707 F.2d at 1449-55. The court reviewed congressional action taken in 1927, 1934 and 1960.

19. *Id.* at 1455-57. The court focused upon United States v. WHAS, Inc., 385 F.2d 784 (6th Cir. 1967) and VOTER, 46 Rad. Reg. 2d 350 (1979). *Loveday*, 707 F.2d at 1456.

20. *Loveday*, 707 F.2d at 1454.

21. *Id.* The court noted that Congress failed to ratify the FCC's opinion in Albuquerque Broadcasting Co., 40 F.C.C. 1 (1946), where the FCC suggested that a broadcaster may have a duty to investigate a sponsor if the circumstances might raise a reasonable suspicion that the true sponsor had not been disclosed by the advertisement's purchaser.

22. *Loveday*, 707 F.2d at 1454.

23. *Id.* at 1455-57.

24. 385 F.2d 784 (6th Cir. 1967).

governor in the upcoming election. Other facts presented to the broadcaster suggested that this was true. However, the agency later identified the "Committee for Good Government" as the sponsor of the commentary. The broadcaster listed this committee as the sponsor when the commentary aired.

The FCC held that the broadcaster failed in its duty to identify the principal as the governor's opponent, since its identity was known to the broadcaster.[25] The Sixth Circuit, in affirming the district court's findings that the broadcaster had not violated its duty to identify the sponsor of the program, held that the broadcaster has the right to identify the payor of the advertisement under Section 317(d). This section provides that, in the case of programs other than for commercial products which are paid for by a committee, the broadcaster shall disclose the name of that committee.[26]

The *WHAS* court stated that since the FCC, by its regulations or otherwise, had not prohibited a broadcaster from interpreting this section as WHAS had, WHAS was free to interpret its obligations in this manner.[27] However, the *WHAS* court noted, in *dicta*, that its opinion was in no way intended to prohibit the FCC from promulgating a regulation that would require a broadcaster "to make reasonable efforts to go beyond a named 'sponsor" for a political program in order to ascertain the real party in interest for purposes of announcement."[28]

As the *Loveday* court noted, the FCC responded to the decision in *WHAS* in 1975 with an amendment to its regulations regarding a broadcaster's duty to investigate.[29] The sponsorship identification rules were amended to require a broadcaster to disclose the identity of the person or entity on whose behalf an agent is acting instead of the agent's name if that identity was known or, by the "exercise of due diligence," could be known to the sponsor.[30]

In its report and order regarding the 1975 amendment, the FCC specifically stated that one of its intentions in promulgating the amendment was to avoid the interpretation and result reached by the court in *WHAS*.[31] The report and order also stated that the amendment was intended to emphasize "the duty of licensees to look beyond ostensible

25. *Id.* at 785.
26. *Id.* at 787; 47 U.S.C. § 317(d) (1976 & Supp. V 1981).
27. 385 F.2d at 787.
28. *Id.* at 788.
29. *Loveday*, 707 F.2d at 1456; 47 C.F.R. § 73.1212 (1983).
30. *In re* Amendment of Commission's "Sponsorship Identification" Rules, 33 Rad. Reg. 2d 975 (1975).
31. *Id.* at 980.

sponsors . . . ."[32]

The only FCC case to interpret these amendments prior to *Loveday*, as the *Loveday* court properly noted, is *VOTER*.[33] In *VOTER*, certain broadcasters ran advertisements paid for by a committee known as Westchester Citizens Against Government Takeover ("Westchester") in opposition to a referendum regarding utilities. VOTER, a committee in favor of the referendum, filed a complaint against these broadcasters for failing to identify Con Edison as the true sponsor of the advertisements. VOTER alleged that Con Edison supplied Westchester with substantially all their funds and that Westchester was acting as an agent for Con Edison.

Westchester denied acting as Con Edison's agent although it did acknowledge that it accepted "substantial financial contributions" from Con Edison. Westchester also pointed out that, as a requirement of its by-laws, it alone could exercise editorial control over the advertisements.

The FCC stated that the sole issue was whether any broadcaster who failed to add or substitute Con Edison as the sponsor of the advertisements violated its sponsorship identification requirements.[34] It held that, although a broadcaster could, based upon the facts provided, substitute *or* add Con Edison as the sponsor of the advertisements, none of the broadcasters failed to act reasonably when they merely listed Westchester as the sponsor.[35] The FCC's rationale was that, since Westchester was required by its by-laws to exercise editorial control over the advertisements, and since the broadcasters acted in good faith in accepting Westchester's representations, their obligations had been met.[36]

The *Loveday* court properly recognized the FCC's unwillingness in *VOTER* to require the broadcasters to look beyond the representations of the purported sponsor so long as the broadcaster relied upon the representations in good faith.[37] While this appears to be a significant turnaround on the part of the FCC from its position in *WHAS*, the *Loveday* court was correct to recognize that such a turnaround had occurred. Based solely on the present position of the FCC, and given the absence of any congressional language requiring some kind of stringent duty to investigate, it appears that a broadcaster is under no duty to investigate the purported sponsor of a political advertisement absent persuasive evidence

32. *Id.* at 985.
33. 46 Rad. Reg. 2d 350 (1979).
34. *Id.* at 352.
35. *Id.*
36. *Id.*
37. *Loveday*, 707 F.2d at 1457.

that the purported sponsor is acting merely as an agent for an undisclosed principal.[38]

The *Loveday* court, in what can be clearly described as *dicta*, discussed its belief that, if the FCC ever desired to impose a more stringent duty upon broadcasters, it might be prevented from doing so because of first amendment considerations.[39] "[W]here the law's attempt to discover the true utterers of political messages becomes so intrusive and burdensome that it threatens to silence or make ineffective the speech in question, the law presses into areas which the guarantee of free speech makes at least problematic."[40]

If a more stringent duty were imposed by the FCC, the *Loveday* decision would seem to require a clearer mandate from Congress before the court would find such a duty constitutionally permissible.[41] Unfortunately, the court did not cite any precedent to support its belief that such a duty would indeed raise any first amendment problems. In fact, much of the court's discussion in this area was spent recognizing that the Supreme Court has afforded the broadcast media with fewer speech and press freedoms than it has afforded other forms of media.[42] Although the *Loveday* court may have raised the issue that will prove to be dispositive in future sponsorship identification cases, it appears from its own discussion that this argument may be nothing more than a tempest in a teapot.

Grant Marylander

38. *Id.* at 1459.

39. *Id.* at 1458-59. *See* U.S. Const., amend. I.

40. *Loveday*, 707 F.2d at 1459.

41. *Id.*

42. *See, e.g.*, FCC v. Pacifica Foundation, 438 U.S. 726 (1978) (holding that in considering the propriety of an FCC attempt to regulate 'indecent broadcasting', broadcasting has most limited first amendment protections of all forms of communication).

2. Fairness Doctrine: Forecast Is Foul Weather

Broadcasters: 1,000; fairness doctrine: one.[1] So far, the average score tallied by the number of successful fairness doctrine complaints against broadcasters suggests a grim future for the vitality of this requirement[2] of the Federal Communications Commission ("FCC").[3] The fairness doctrine imposes an affirmative duty on broadcasters to devote a reasonable amount of their broadcast time to the discussion of issues of public importance, and to cover those issues fairly by affording reasonable opportunities for the presentation of opposing viewpoints.[4] Since broadcasters generally have maximum editorial discretion in determining what constitutes "reasonable opportunity"[5], they tend to prevail in most challenges to their judgment, as evidenced in *Democratic National Committee v. Federal Communications Commission.*[6]

In *Democratic National Committee*, the U.S. Court of Appeals, District of Columbia Circuit Court agreed with the FCC's decision that the broadcasters accused of a fairness doctrine violation were under no obligation to respond to a complaint brought by the Democratic National Committee ("D.N.C.").[7] Despite an acute imbalance of time allotted to each side of the issue,[8] the court held that the D.N.C. failed to adequately show that the stations acted unreasonably in presenting counter-

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1. "The average [fairness doctrine] complainant truly [has] only about one in a thousand chance [of success]". Democratic Nat'l Comm. v. Federal Communications Comm'n, 717 F.2d 1471, 1478 n.5 (D.C. Cir. 1983) (per curiam).

2. The fairness doctrine was developed by the FCC based on the public interest standard of the Communications Act of 1934, 47 U.S.C. §§ 151-609 (West 1976). In 1959, Congress confirmed the FCC's views that the fairness doctrine was part of the public interest standard and amended the "equal time" provision, 47 U.S.C. § 315(a) (West 1976), to provide that:

> Nothing in the foregoing sentence [making certain programming exempt from the equal time requirement] shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford *reasonable opportunity for the discussion of conflicting views on issues of* public importance [emphasis added].

See Fairness Report, 48 F.C.C.2d 1, 7 (1974); Applicability of Fairness Doctrine in Handling Controversial Issues of Public Importance (Fairness Primer), 40 F.C.C. 598, 599 (1964).

3. The FCC is a seven-member commission responsible for regulating all interstate and foreign communication by means of radio, television, wire, cable, and satellite. Broadcast stations are licensed by the FCC for a three-year period subject to renewal. CONGRESSIONAL QUARTERLY, INC., FEDERAL REGULATORY DIRECTORY (1979-80).

4. *See* Red Lion Brodcst'g Co. v. FCC, 395 U.S. 367, 369 (1969).

5. *Democratic*, 717 F.2d at 1476.

6. 717 F.2d 1471 (D.C. Cir. 1983) (per curiam).

7. *Id.* at 1473.

8. *Id.* at 1474.

balancing viewpoints regarding the Reagan Administration's economic policies.[9]

In the fall of 1981, the Republican National Committee ("R.N.C.") paid for a series of thirty-second spots on the Columbia Broadcasting System ("CBS") and National Broadcasting Company ("NBC") networks in support of the Administration's economic plan.[10] After complaining to the broadcasters,[11] the D.N.C. promptly filed a fairness doctrine complaint with the FCC, seeking a ruling requiring NBC and CBS to provide free time to the D.N.C. to present the other side of the issue.[12] The D.N.C. submitted the findings of two news monitoring services as evidence of the unfairness of the programming. The findings concluded that during a three-month period in the fall of 1981, the ratio of time devoted to presenting both sides of the issue had been two to one in favor of the Republicans on CBS, and two and one half to one favoring the Administration's views on NBC.[13] Considering the addition of advertisements bought by the R.N.C., the imbalance rose to over four to one on NBC, and more than three to one on CBS.[14]

In spite of this seemingly obvious incongruity in time allotment, the FCC found that the imbalance was "hardly . . . a glaring disparity,"[15] and was insufficient to warrant its intervention or even further investigation.[16] The FCC found that the D.N.C. failed to make a *prima facie* showing[17] that NBC's and CBS's overall programming had failed to provide a reasonable opportunity for the presentation of contrasting viewpoints.[18] Furthermore, because the D.N.C.'s showing of an imbalanced time allotment did not, to the FCC's satisfaction, reflect such factors as the size of the audience during the various broadcasts or the frequency with which each side was presented, the FCC did not consider the evi-

9. *Id.* at 1473.

10. *Id.*

11. *See* Broadcast Procedure Manual, 49 F.C.C.2d 1, 5 (1975) (viewer who believes broadcaster is not meeting its fairness doctrine obligations must first complain to the station).

12. *Democratic*, 717 F.2d at 1473.

13. *Id.* at 1474.

14. *Id.*

15. *Id.* at 1477.

16. *Id.*

17. In order to establish a *prima facie* case, the complainant must submit information that, in the absence of rebuttal, establishes a fairness doctrine violation. The complaint must indicate: (1) the particular station involved; (2) the particular issue of a controversial nature discussed over the air; (3) the date and time the program was carried; (4) the basis for the claim that the station has presented only one side of the question; and (5) whether the station had afforded, or has plans to afford, an opportunity for presenting contrasting viewpoints. *Democratic*, 717 F.2d at 1475-76 (quoting *Fairness Primer*, 40 F.C.C. at 600).

18. *Democratic*, 717 F.2d at 1473.

dence sufficient for a determination that "fairness had not been achieved."[19]

The Court of Appeals affirmed the FCC's decision.[20] The court wholeheartedly supported the "formidable procedural barrier" that the FCC erects by requiring a complainant to present *prima facie* evidence of a fairness doctrine violation before it will request a response from the offending broadcaster.[21] Instead of opting to facilitate debate before the Commission, the court preferred the FCC's stringent screening process designed to encourage "robust, wide-open debate"[22] over the airwaves. In reality, the ideal of "wide-open debate" is mitigated by allowing broadcasters "maximum editorial discretion in deciding how to fulfill fairness doctrine obligations."[23]

The standard the broadcaster must meet in order to satisfy the requirements of the fairness doctrine is unclear. The court stated the standard is certainly not one of "mathematical equality."[24] The criterion is "that the American public must not be left uninformed."[25] The court reasoned that this standard must take into account not simply the amount of time given to each side of an issue, but a combination of factors suggesting a lack of fairness, including frequency of presentation and audience size.[26]

The court agreed with the FCC's findings that these various factors had not been addressed by the D.N.C. in its complaint.[27] In the court's view, the D.N.C.'s complaint had overemphasized the disparity of time allotment and the ensuing quantitative "imbalance."[28] The court favored a qualitative standard,[29] governed by the broadcaster's "good faith and

19. *Id.* at 1476.

20. *Id.* at 1477.

21. *Id.* at 1475. *See* Nat'l Comm. for Responsive Philanthropy v. FCC, 652 F.2d 189, 191 (D.C. Cir. 1981) (no fairness doctrine violation where networks refused to present contrasting views to advertisements for the United Way).

22. *Id.* at 1477 (quoting New York Times v. Sullivan, 376 U.S. 254, 270 (1964)).

23. *Id.* at 1476 (quoting American Sec. Council Educ. Found. v. FCC, 607 F.2d 438, 445 (D.C. Cir. 1979)).

24. *Democratic*, 717 F.2d at 1477 (quoting Fairness Report, 48 F.C.C.2d 1, 16 (1974)).

25. Green v. FCC, 447 F.2d 323, 329 (D.C. Cir. 1971).

26. *Democratic*, 717 F.2d at 1476 (citing Fairness Report, 48 F.C.C.2d at 17).

27. *Democratic*, 717 F.2d at 1477-78.

28. *Id.* at 1478.

29. *See* Democratic Nat'l Comm. v. FCC, 460 F.2d 891, 903 (D.C. Cir. 1972): "[I]n opinion after opinion, the Commission and the courts have stressed the wide degree of discretion available under the fairness doctrine and we have clearly stated time after time, *ad infinitum ad nauseum*, that the key to the doctrine is no mystical formula but rather the exercise of reasonable standards by the licensee." *See also Green*, 447 F.2d at 328: "[U]nder the fairness doctrine *identical* treatment of both sides of the issue is not necessary, as this would place an onerous and impractical burden on the licensees."

reasonableness,"[30] and rejected what it considered to be D.N.C.'s attempt to impose an equal time standard.[31] The court was also concerned with the probability that requiring equality with respect to broadcasting political and social issues would involve the FCC "too deeply in broadcast journalism,"[32] and would require the Commission to take an active part in the policing of the electronic media.[33] Apparently, the FCC had no desire to play such a role, and the D.C. Circuit displayed no intention to encourage such intervention.[34]

In the interests of broadcasters' freedom of speech and exercise of discretion, the court also summarily rejected the D.N.C.'s contention that fairness doctrine obligations could not have been met by balancing the R.N.C.'s high-impact commercial advertising with the comparatively low-key presentation of opposing views on news programs.[35] Broadcasters have the option of offsetting commercial messages by other modes of presentation in their overall programming.[36] Both the court and the FCC were unconvinced by the D.N.C.'s argument that the R.N.C.'s "high-priced media blitz,"[37] aided by timing and frequency of airtime, had "overwhelmed other points of view"[38] before the American public.[39]

Despite its ruling against the D.N.C., the court took pains to emphasize "the continuing vitality of the fairness doctrine,"[40] and to contradict dicta in the FCC's earlier opinion which suggested that it may be futile to challenge broadcasters on fairness doctrine grounds.[41] Although the court stated that the fairness doctrine remains a vital aspect in the balance of broadcasters' "fiduciary duties to the public"[42] with their

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30. *Id.* at 1478.

31. *Id.* "[T]he fairness doctrine is distinct from the statutory requirement . . . that equal time be allotted to all qualified candidates for public office." 47 U.S.C. § 315(a) (West 1976).

32. *Democratic*, 717 F.2d at 1477 (quoting Fairness Report, 48 F.C.C.2d at 16).

33. *Id.*

34. *Democratic*, 717 F.2d at 1477. *See* Fairness Report, 48 F.C.C.2d at 17. The FCC will move forward with an investigation only if it is apparent that, in light of all the circumstances, the broadcaster has acted unreasonably or arbitrarily.

35. *Democratic*, 717 F.2d at 1478.

36. *Id.*

37. *Id.* at 1474 n.1.

38. *Id.*

39. *Id.* at 1478.

40. *Id.* at 1479.

41. In effect, the FCC stated that issues raised by national political parties during paid broadcasts are very adequately served by news coverage: "We find it difficult to envision a case in which a major political party would raise an issue of public importance ignored by the electronic press." *Id.* (quoting Memorandum Opinion and Order, 91 F.C.C.2d 373, 383 (1983)).

42. *Democratic*, 717 F.2d at 1479.

"rights of journalistic discretion,"[43] the court may have been saluting a sinking ship.

Since 1975,[44] the fairness doctrine has been under attack from broadcasters, as well as the FCC.[45] As the D.C. Circuit Court seemed to imply, if that "formidable . . . barrier"[46] were not erected by the FCC to ward off all but the most egregious fairness doctrine violations,[47] the FCC and the courts could seriously jeopardize broadcasters' first amendment[48] rights by imposing a "chilling effect"[49] on journalists in the electronic media. Furthermore, opponents of the fairness doctrine argue that its major justification, the scarcity of telecommunications outlets,[50] is an outdated notion.[51] The proliferation of UHF and cable television outlets has greatly increased accessibility to the airwaves.[52]

Based on these arguments, broadcasters and the FCC are currently lobbying for the repeal of the fairness doctrine, asserting that the electronic media must have first amendment rights equal to those enjoyed by

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43. *Id.* at 1478-79.

44. 121 CONG. REC. 1351-53 (March 4, 1975) (statement of Congressman Robert Drinan).

45. *Democratic,* 717 F.2d at 1475 (quoting American Sec. Council Educ. Found. v. FCC, 607 F.2d 438, 453 (D.C. Cir. 1979)).

46. *See Democratic,* 717 F.2d at 1476.

47. U.S. CONST. amend. I.

48. *Democratic,* 717 F.2d at 1475.

49. As an example of this "chilling effect", one proponent of deregulation cites in *In re* Complaint of Sherwyn H. Hecht, 40 F.C.C.2d 1150 (1973), which was filed against a television station in Spokane, Washington:

> The licensee there editorialized on a controversial local issue. There was a discrepency in time of 3 to 1 in favor of the side that the licensee favored in its editorial. The Commission . . . looked into the complaint and ruled in favor of the licensee. So, the Commission says, this is another example where it weighed the licensee's judgment and did not chill debate. But when you examine the facts, you find that the investigation took 2 1/2 years; that the license was held up during this period; that it cost $20,000 in legal fees, and the station only earned probably $50,000 during the entire year; and that it took 480 man-hours of the station's time and was quite traumatic to the station. The next time some very controversial local issue arises, the station may well, consciously or unconsciously, decide not to air such an issue—to do a 'safe issue' like school vandalism or canoe safety instead.

Geller, *Television and Legal Problems in the Decade of the Eighties,* in LAW AND TELEVISION OF THE '80'S 12-13 (1983). *But see* Red Lion Brdcst'g Co. v. FCC, 395 U.S. 367, 388-90 (1969) (Supreme Court enunciates bases of the fairness doctrine requiring: (1) that broadcast facilities must operate in the public interest; and (2) that under the first amendment the public has a right to free and open debate).

50. *See Id.* at 388.

51. *See* Diefenderfer, *Proposed Federal Legislation and the Next Decade of Television,* LAW AND TELEVISION OF THE '80'S 237 (1983).

52. This scarcity concept was premised on the grounds that, since there was only a limited number of frequencies available to the public for radio and television signals, the Federal government had the responsibility to regulate those allowed to broadcast over those frequencies. *Id.*

the print media.[53] While the proposal is opposed by some lobbying groups and members of Congress,[54] it appears that the doctrine has been rendered all but impotent by the FCC and the courts. The fairness doctrine may not have breathed its last, but it appears that the FCC and Congress may deal it a fatal blow in the not too distant future.

Sheila Bayne

53. Daily Variety, Sept. 7, 1984, at 1, col. 4.
54. *Id.*

D. Contract

1. Broadcaster's Unjustified Refusal To Air Advertiser's Commercials Equals Breach Of Contract

In a contract action, under what circumstances is a television broadcaster justified in refusing to broadcast an advertiser's commercial? Moreover, if the failure to broadcast is considered a breach of the contract, how should the amount of damages suffered by the advertiser be computed?

In *Sam's Style Shop v. Cosmos Broadcasting Corporation*,[1] the Fifth Circuit held that Cosmos Broadcasting unjustly refused to broadcast the plaintiff's commercials. However, on the issue of damages the Court of Appeals remanded the case to the trial court since it believed that the damage award was not substantiated by the evidence.[2]

Sam's Style Shop was a Florida based clothing retailer. In 1977, it decided to run an advertising campaign, comparing its prices to those of other clothing retailers. Sam's advertising representative contacted the sales representative of WDSU, Cosmos' New Orleans affiliate. An agreement was reached for the sale of television time for Sam's to air its comparative price commercials. The contract called for twelve thirty-second commercials, at a total cost of $2,400.[3]

Sam's then sent its prepared commercial to WDSU. After viewing the commercial, however, the station's management refused to televise it. They felt that it would be too difficult to verify Sam's price claims each time the commercial was broadcast, and thus the commmercial might tend to mislead the television audience. Sam's sued for breach of contract.[4]

Cosmos alleged that even if the court found that the parties had agreed that Cosmos would broadcast a particular commercial, the contract contained a potestative condition, under which Cosmos could decide not to be bound by the agreement.[5] There is a distinction in Louisiana law between a "purely" potestative condition and a "simple" potestative condition. A "purely" potestative condition is dependent solely upon the whim, will, or caprice of the obligor, whereas a simple potestative condition suspends execution rather than formation of the ob-

1. 694 F.2d 998 (5th Cir. 1982).
2. *Id.* at 1007.
3. *Id.* at 1000.
4. *Id.*
5. *Id.*

ligation and, in addition, requires the obligor to make a good faith effort to carry out the obligation.[6]

Louisiana law does not favor the interpretation of a contract condition as being "purely" potestative.[7] Consequently, the court reasoned that the clause in the contract implicitly imposed upon the broadcaster the duty of making a good faith judgment based upon industry custom as to whether Sam's commercial was acceptable.[8] Thus Cosmos could, for example, justify its rejection of Sam's commercial if the commercial was of poor quality, or if the commercial violated Cosmos' licensing obligation.

Therefore, Cosmos had the burden of proving that its rejection of Sam's commercial was reasonable and in accordance with objective standards prevailing in the industry.[9] It was then for the jury to decide if Cosmos successfully met its burden of proof. At the trial court level, the jury found that Cosmos did not meet its burden and awarded Sam's $50,000 in damages.[10] The Fifth Circuit accepted the jury's decision about the burden of proof, but held that the damage award was excessive.[11]

The Fifth Circuit stated that its review of the jury award was a decision as to whether or not the damage award was a serious abuse of discretion.[12] Therefore, before setting aside the verdict as excessive, the court had to be satisfied that the award was completely without support in the record.[13]

At trial, Sam's had presented a witness who had conducted a survey for Sam's. He compared Sam's sales in markets where Sam's did advertise with those in which it did not broadcast its commercials. The conclusion of the survey was that, if Sam's had advertised in New Orleans, it could have increased its net profit by $57,000.[14]

Reasoning that the survey did not take into account many determining variables, the court refused to accept the survey as sufficient evidence to support the verdict.[15] The court reasoned that, if a retailer could

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6. Franks v. Louisiana Health Serv. and Indem. Co., 382 So. 2d 1064, 1068 (La. Ct. App. 1980).

7. Schwegmann Bros. v. Calvert Distillers Corp., 184 F.2d 11, 14 (5th Cir. 1950), *rev'd on other grounds,* 341 U.S. 384 (1951).

8. *Sam's Style Shop*, 694 F.2d at 1003.

9. *Id.* at 1005.

10. *Id.*

11. *Id.* at 1007.

12. Menard v. Penrod Drilling Co., 538 F.2d 1084, 1088 (5th Cir. 1976).

13. Glazer v. Glazer, 278 F. Supp. 476, 481-82 (E.D. La. 1968).

14. *Sam's Style Shop*, 694 F.2d at 1007.

15. *Id.*

make a $57,000 profit after spending only $5,000 to produce and televise an advertisement, television would be flooded with commercials of this type. Furthermore, if Sam's could make this type of profit, the court could not understand why Sam's did not advertise in all of its market areas. Consequently, the court decided that the trial court abused its discretion in not granting a remittitur on the damage issue.[16]

The court concluded its opinion by stating that, since Sam's did prove some damage, namely, the $2,500 that it spent to prepare its commercial, it was possible to arrive at a more reasonable amount as to the damages award. A figure of $17,500 was reached by awarding Sam's the cost of the commercial and then multiplying this figure by six, which would represent the amount of the lost profits.[17] The court believed that an award of $17,500 would not offend its sense of proportion.

The court was correct in deciding that Cosmos could not capriciously refuse to televise Sam's advertisement once a contract had been formed. If Cosmos did have such power to reject a commercial that it had previously contracted to air, the whole contract agreement would be one-sided and meaningless.[18] However, Cosmos offered a substantial reason for refusing to televise Sam's advertisement: Cosmos was afraid that if it did televise a potentially deceptive commercial, the public might be misled, and that, therefore, Cosmos could possibly be held liable in some way for televising such deception. Cosmos stated that it would be extremely difficult for it to verify the accuracy of the commercial each time it would be broadcast since there would be a possibility that the competitor's price quoted in Sam's commercial would be modified once the competitor had seen that Sam's was advertising that Sam's price was lower.[19]

It is unclear from the court's opinion whether there is any validity to this claim. If Cosmos' fear was unjustified, the court should have said so and then discussed why the reason lacked merit. Instead, the court evaded the issue and proceeded to the question as to whether or not the commercial lived up to the industry's standards. The court then concluded that Cosmos failed to meet its burden of persuading the court that its rejection of Sam's advertisment was justified.

Unfortunately, the court failed to give Cosmos, or any other broadcaster, any hint as to how it should conduct itself with respect to comparative pricing commercials. Without such guidance, broadcasters might

16. *Id.* at 1008.
17. *Id.*
18. McTee & Co. v. Brown Funeral Home, 183 So. 558 (La. Ct. App. 1938).
19. *Sam's Style Shop*, 694 F.2d at 1000.

reasonably avoid this type of commercial, and, thereby limit the amount of information available to consumers. Another alternative might be for broadcasters to agree to televise such commercials only once, for only then can it be certain that the named competitor has not changed his price in response to the initial broadcasting of the commercial.

Comparative price commercials are being broadcast. KNBC, the NBC affiliate in Los Angeles, televises C & R Clothier's advertisements in which the clothing retailer compares the price it charges for a suit with the price that named competitors charge for the identical suit. Along with the commercial that it wishes to broadcast, C & R must also send to KNBC a receipt from the named competitor indicating the price the competitor charged for the suit and the date that the suit was purchased.[20] KNBC then keeps this receipt on file as support for the data that C & R presents in its commercial.[21] If the named competitor wishes to challenge the accuracy of the C & R commercial, it submits its documented claim to KNBC, which then forwards this information on to C & R. It then becomes C & R's responsibility to refute the competitor's allegations, or amend its commercial.[22] As of November 1984, none of the C & R commercials had been challenged;[23] thus, it is difficult to conclude with certainty whether KNBC's procedures are effective. As KNBC admitted, the FTC has offered no guidelines on comparative price commercials. The broadcasters, therefore, have had to devise their own procedures.[24] It thus becomes even more apparent that it would have been very helpful for the *Sam's Style Shop* court to have offered some guidance.

The court's handling of damages is also questionable. The court stated that Sam's would not be required definitively to prove the amount of the alleged damages, but would only have to offer enough evidence to allow the jury to find with reasonable certainty that the damages claimed could reasonably have occurred.[25] Sam's did go to the expense of conducting a survey to substantiate the difference in net profits between those areas in which it did advertise with those in which it did not. However, the court refused to accept that this survey had any validity since the survey did not take into account the different times of the year compared and the general economic situation of the years used in computing

20. Telephone interview with William Emerson, Manager, Broadcast Standards and Practices, KNBC, Burbank, California (Nov. 20, 1984).

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Sam's Style Shop*, 694 F.2d at 1007.

the results of the survey.[26]

The court's criticism of the survey may be valid, but one has to wonder how comprehensive the survey would have had to have been to persuade the court. The more detailed and pervasive the survey, the more it would cost to be conducted, computed, and analyzed. Thus, by this court's decision, small to moderate retailers have, perhaps, been backed into an economic corner of financing high cost litigation, or forced to accept whatever the court considers appropriate damages, no matter how effective and accurate comparative pricing advertising campaigns might be.

William F. Penzin

26. *Id.* at 1005.

E. Labor

1. California Talent Agencies Act Applied To Television Commercial Production Company

Like the mythical Cheshire cat, Hollywood's personal managers have often seen their contracts disappear, for California has an inherent invalidation procedure for many contracts executed by entertainment artists. This procedure is accomplished under the regulation of the Talent Agencies Act,[1] which prohibits any person or corporation from engaging in the occupation of a talent agency without first procuring a license from the State Labor Commissioner.[2]

In *Cummins v. Film Consortium,*[3] the California Labor Commissioner invalidated an artist's contracts under circumstances beyond the usual artist-manager relationship. The contracts were entered into by television commercial director Brian Cummins, and the television commercial production company, The Film Consortium. This was the first time the Labor Commissioner considered the role of television commercial production companies in the context of the Act.[4]

An advertising agency generally desires specific directors for its client's television commercials because a commerical is the artistic product of the director.[5] Consequently, an advertising agency's primary concern in accepting bids from commercial production companies is to obtain the services of a specific director under contract to that company. The advertising agency then finances the production company, which in turn pays the production costs and the director of the particular commercial.[6]

The process that brings a director and an advertising agency together often begins with the sales efforts of companies like Film Consortium. Film Consortium's business activities consisted of signing directors to long-term contracts and promoting their artistic services to advertising agencies. Cummins and Film Consortium executed two em-

1. An Act to Amend . . . the Labor Code, relating to Talent Agencies, 1978 Cal. Stat., ch. 1382, § 3 (amending Artists' Managers Act, 1959, Cal. Stat., ch. 888, § 1, codified at CAL. LAB. CODE §§ 1700-1700.47 (West 1971 & Supp. 1985)).

2. CAL. LAB. CODE § 1700.5 (West 1984).

3. No. TAC 5-83 (Cal. Lab. Comm'r Oct. 4, 1983).

4. *Id.*, slip op. at 2-3.

5. In order to produce a commercial, the director determines the costs, organizes the shooting schedule, hires the production crew, controls their actions and all the action that occurs before the camera. *Id.*, slip op. at 8.

6. *Id.*, slip op. at 10.

ployment contracts under such an arrangement.[7]

On April 4, 1983, Cummins petitioned the Labor Commissioner, alleging that Film Consortium had procured employment for him, and thus acted as a talent agency as defined by the Talent Agencies Act. Cummins asked that his contracts be declared unenforceable because Film Consortium was not licensed to act as a talent agency.[8] He further claimed that, in acting as a talent agency, Film Consortium had breached its fiduciary responsibilities.[9]

Section 1700.4 of the Labor Code defines a talent agency as ". . . a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment . . . for an artist or artists . . . ."[10] The Labor Commissioner found that this language and the purpose of the Act required its application to single acts of procuring employment regardless of the procuring entity's overall activities.[11] Therefore, Film Consortium's acts of procuring employment for artists brought it under the regulations of the Act regardless of its claim to be a production company. As a result, its contracts with Cummins were unenforceable.[12]

To support this strict application of the Talent Agencies Act, the Commissioner cited *Buchwald v. Superior Court.*[13] In *Buchwald*, the Jefferson Airplane rock group's manager was held to be subject to the Artists' Managers Act[14] whether he was licensed or unlicensed as an artist's manager.[15] The Labor Commissioner, in *Cummins*, interpreted the ab-

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7. *Id.*, slip op. at 2.

8. *Id.* Section 1700.44 of the Labor Code establishes the procedures for the resolution of controversies arising under the Act. It subjects all applicable cases to the jurisdiction of the California Labor Commissioner. CAL. LAB. CODE § 1700.44 (West Supp. 1985). The *Cummins* case was heard by Carl G. Joseph, attorney for the Division of Labor Standards Enforcement, serving as hearing officer under provisions of this section. *Cummins*, slip op. at 1.

9. *Id.*, slip op. at 3-4. This was not a unique action in talent agency law. The Talent Agencies Act, and its forerunner, the Artists' Managers Act, (*see supra* note 1) have been the foundation on which entertainers, unhappy with their managers, commonly have declared their contracts to be void. "Such artists traditionally have asserted that the personal manager with whom they had contracted was not licensed as an 'artists' managers' and had committed 'procurement activity,' thus violating the Artists' Managers Act." Johnson & Lang, *The Personal Manager in the California Entertainment Industry*, 52 S. CAL. L. REV. 375, 386 (1979).

10. CAL. LAB. CODE § 1700.4 (West Supp. 1985).

11. *Cummins*, slip op. at 7-8.

12. *Id.* slip op. at 2.

13. 254 Cal. App. 2d 347, 62 Cal. Rptr. 364 (1967).

14. The Artists' Managers Act was the statutory predecessor to the Talent Agencies Act. The Artists' Managers Act was fundamentally identical to the Talent Agencies Act but for the substitution of "a talent agency" for "an artists' manager" wherever it appeared. *See supra* note 1.

15. 254 Cal. App. 2d at 355, 62 Cal. Rptr. at 370.

sence of a court's determination as to the Airplane's manager's primary activities as authority for applying the Talent Agencies Act " . . . to any person engaged in acts of the type regulated by the statute, regardless of such person's 'primary activity.' "[16]

Persuasive authority was also found in an amicus brief filed by the Labor Commissioner in *Raden v. Laurie*.[17] In the *Raden* brief, the Commissioner contended that employment agency regulations should be interpreted to include any and all activities whereby one procures employment for another for a fee.[18] The *Raden* court, however, found the plaintiff-manager of Piper Laurie[19] had a valid claim for management services although he was not licensed to procure employment for Laurie.[20] Absent evidence that the management contract was a mere subterfuge, the court was required to give effect to its provisions notwithstanding the employment agency regulations.[21]

The circumstances in *Cummins*, however, led the Labor Commissioner to conclude that Film Consortium was engaged in procuring employment for directors.[22] The Consortium opposed this conclusion by maintaining that there was no correlation between the fees paid to it and the director's salary it paid to Cummins. The Commissioner found that this argument only proved that Film Consortium was able to earn a commission directly from Cummins' earnings in addition to its markup on its bids.[23]

Film Consortium also sought to differentiate itself from standard talent agencies on the grounds that it was primarily a production company. These production activities were irrelevant because the threshold test remained whether it had engaged in the type of activity regulated by the Act.[24] The protections of the Act could otherwise be frustrated and an entity could evade the Act merely by engaging in activities other than procuring employment. The possibility that an artist could be exploited by a single contract or single instance of procuring employment necessi-

16. *Cummins*, slip op. at 6.

17. 120 Cal. App. 2d 778, 262 P.2d 61 (1953).

18. *Cummins*, slip op. at 7 (quoting the Labor Comm'r in the amicus brief filed in *Raden*).

19. Piper Laurie was a leading actress during the 1950's and today is still active in entertainment. Among her memorable films is "Dangerous Mission" (1954), in which she was chased by Vincent Price because she had witnessed a gangland murder.

20. *Raden*, 120 Cal. App. 2d at 783, 262 P.2d at 65. If the contract misrepresented the true agreement of the parties to evade the law, then it would be the act of seeking employment and not the contract which brought the legislation into play. *Id.* at 782, 262 P.2d at 65.

21. *Id.* at 783, 262 P.2d at 65.

22. *Cummins*, slip op. at 11.

23. *Id.*, slip op. at 12.

24. *Id.*

tated application of the Act in such situations.[25]

Film Consortium argued further that is relationship with Cummins reflected the industry norm. The Commissioner also rejected this argument, stating "[t]hat other such companies may also procure employment for directors . . . does not reduce the need for or effect of application of the Act to [Film Consortium's] procurement activity on behalf of Mr. Cummins."[26] Film Consortium further contended that the Act was inapplicable because it had suffered losses on commercials directed by Cummins. Provided losses could be proved, this too failed to negate the fact that Film Consortium had engaged in activities regulated by the Act.

In a final gasp, Film Consortium claimed that it was not enaged in the occupation of procuring employment for artists. It relied on the New York case of *Pawlowski v. Woodruff*[27] for the proposition that procurement activity incidental to a management contract was insufficient for the application of the Talent Agencies Act. The Commission distinguished *Pawlowski* because it had construed a New York statute that contained an exemption from licensing requirements where the business of managing artists only incidentally involved the seeking of employment.[28]

The Commissioner also found that Film Consortium had violated its fiduciary duties as a talent agency. Its practice of circulating directors' videotapes and film reels without identifying the work of the individual directors obscured the identity of Cummins to his detriment.[29]

Application of the Talent Agencies Act according to the strict standard of *Cummins* raises the risks for those who contract with artists. Interestingly, the facts of the case showed that Film Consortium had engaged in multiple transations covered by the Act.[30] The *Cummins* determination, however, increases the risks for those who contract with artists even further. By applying the Act to a *single* procurement act, nearly every contract executed by an artist faces possible challenge.

The wide variety of tasks in which a manager may engage would make it rather easy to find at least one instance that could be construed

25. *Id.*, slip op. at 7.
26. *Id.*, slip op. at 12.
27. 122 Misc. 695, 203 N.Y. Supp. 819 (App. Term. 1924).
28. *Cummins*, slip op. at 13. New York's regulation of talent agencies is encompassed within that state's employment agencies laws. N.Y. GEN. BUS. LAW. §§ 170-90 (McKinney 1979). The *Pawlowski* court interpreted a statute then in force and upheld a manager's award for services rendered to a musician.
29. *Cummins*, slip op. at 15.
30. *Id.*, slip op. at 5.

as procuring employment. To restrict managers so that there would be no violations of the *Cummins* standards would leave artists and managers alike with ineffective representation. Another alternative would be for all managers to comply with the talent agency licensing requirements. Notably, the Commissioner implied that some incidental procurement activity might be excused.[31] However, beyond this general language, the result and rationale of *Cummins* points to an almost strict liability standard for the applicability of the Talent Agencies Act.

A further consideration for the behavior of personal managers is the effect that changes in the Act will have on future petitions. The definition of a talent agency has recently been amended and now contains an exemption for contracts made with musicians. Until January 1, 1986, the activities of procuring recording contracts for an artist will not, of itself, subject a person to regulation and licensing under the Act.[32]

The reasons for the creation of this window period exemption are twofold. Prior to the exemption, the Labor Commissioner had applied the Act to musicians' contracts in circumstances where it was not clear that it should have been applied.[33] The purpose of the exemption was to state clearly the intent that the Act should not apply to musicians, at least during the window period.[34] The legislation that created the musicians' contracts exemption also formed an Entertainment Commission to study the problems in the talent agency area. The Entertainment Commission's report is due January 1, 1986, and will recommend legislation if the studios show a need for new regulations.[35] For the present, there will continue to be several more years of unsettled contractual relationships between artists and their managers.

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31. *Id.*, slip op. at 13. The Commissioner also implied that a significant financial gain by the person being subjected to the regulations of the Act might be an important factor in determining the Act's applicability. *Id.*, slip op. at 14.

32. CAL. LAB. CODE § 1700.4 (West Supp. 1985). The exemption was originally to remain in effect until Jan. 1, 1985. Presumably, the area of talent agency law required further study. The exemption was extended during the 1984 session of the California Legislature. An Act to Amend . . . the Labor Code, relating to Talent Agencies, 1982 Cal. Stats., ch. 682, sec. 1, § 1700.4(b) (amended 1984 Cal. Legis. Serv., ch. 553 (West) (codified at CAL. LAB. CODE § 1700.4(b) (West Supp. 1985)).

33. Verbal legislative counsel report. Telephone interview with Kari Burks, assistant to Assemblyman Richard Robinson, author of the statutory amendments in the Talent Agencies Act (Oct. 3, 1984).

34. *Id.*

35. An Act to Amend . . . the Labor Code, relating to Talent Agencies, 1982 Cal. Stats., ch. 682, § 6 (codified at CAL. LAB. CODE §§ 1701-1704 (West Supp. 1985)).