

ship of newspaper in one locality and corresponding lack of local TV stations in certain areas. Petitioners additionally requested FCC for relief from number of filings required in proceeding, claiming lack of funds.

NAB wants to recover its concessions on cable rules

It accuses NCTA of renegeing on consensus with broadcasters that led to current regulation

The National Association of Broadcasters has asked the FCC to "readjust" its 1972 cable rules to what it termed the "unfulfilled promises of the National Cable Television Association."

The promises, according to the NAB, were contained in the November 1971 consensus agreement, reached among cable operators, broadcasters and copyright owners, which became the framework for the commission's February 1972 second report and order on cable television.

The consensus bound the parties to seek early passage of copyright legislation, the NAB said, but the NCTA has continually "frustrated" a resolution of the copyright issue.

According to the NAB, it was NCTA's copyright commitment that led broad-

casters to accept the consensus and the concessions to cable interests embodied in the agreement. Since the NCTA has reneged on its part of the agreement, the NAB argued, the commission should take another look at its cable rules regarding signal carriage and program exclusivity.

The NAB pointed to the current efforts of the NCTA to relax or delete the commission's nonduplication rules as a further "inexcusable breach of the consensus" (BROADCASTING, Aug. 5, 1974).

Although the NAB acknowledged NCTA's support of Senator John McClellan's (D-Ark.) copyright bill, it noted that the bill rejected the consensus provisions for free arbitration and a compulsory license covering signals authorized by the FCC's 1972 rules (BROADCASTING, Jan. 8, 1973). Such copyright support, said the NAB, is "squarely inconsistent" with the terms of the consensus agreement.

The NAB said the NCTA had a record of "unabashed duplicity." NCTA chooses to embrace the consensus when it serves its ends and ignores it at other times, the NAB asserted.

The NAB pointed to the commission's 1972 report and order, in which it acknowledged the need for congressional action on the copyright issue for "full effectiveness" of the consensus agreement.

Further, the NAB referred to former FCC Chairman Dean Burch's statement during a congressional copyright hearing in 1973, when he said the FCC would have to revisit its rules if a copyright bill were not passed within a reasonable period. Mr. Burch had suggested a year and a half was a reasonable time. Since then, the NAB noted, almost two years have passed.

Rejection of pay-cable waiver has HBO, Fox flexing legal muscles

FCC's decisions on two features set scene for court challenge

The FCC has turned down two requests for waiver of its pay cable rules, and in the process may have set up a court test of its authority to adopt such rules. Indeed, at one point, it seems to challenge those requesting the waivers to initiate a suit.

The films involved are box office blockbusters, "Butch Cassidy and the Sundance Kid" and "The Sound of Music," both produced by Twentieth Century-Fox. Home Box Office, distributor of pay-cable programming presented to 27,000 subscribers in New York, Pennsylvania and New Jersey, sought one waiver, for "Butch Cassidy." Fox sought the other, to permit the showing of "The Sound of Music" for one month beginning March 1.

The rule at issue prohibits pay cablecasting of feature films that have been in general release for between two and 10 years before their proposed showing on pay cable. ABC, which has acquired the television rights to both films, opposed both requests.

HBO and Fox argued that denial of

their respective requests would violate the First Amendment and that the rules themselves violated the antitrust laws by excluding potential competitors of broadcasters from some markets.

The FCC, however, brushed aside the arguments as no more than "collateral" attacks on the rules which should be litigated "in more appropriate forums or proceedings." And it indicated considerable confidence as to the outcome of such litigation.

First, the commission said, the rules are rooted in the subscription-television rules, which the courts have upheld. Second, it said, with what seemed a sense of bravado, there had been no court tests of the pay-cable rules, possibly because the Supreme Court declared the commission's authority to regulate aspects of cable television was very broad so long as the rules were "reasonably ancillary to the commission's jurisdiction over broadcast service."

The commission also rejected HBO's argument that a waiver would not affect the goal of the rule in question—to prevent siphoning of material from television to pay cable—since ABC already owned the rights to telecast "Butch Cassidy" three times between September 1976 and the end of the 1979-80 season.

The commission said that permitting the film to be shown could result in its use by conventional television being delayed well beyond its first permitted broadcast run. It also said that granting the waiver could establish a precedent that would require approval of other waiver requests, with the result that the rule and its purposes would be undermined.

Fox had based its argument on the contention that only an "unintended technicality" prevented the showing of "The Sound of Music" for one month beginning March 1. The commission rules permit pay-cable systems to distribute films 10 years old at the rate of one each month, and "The Sound of Music" was released to selected theaters on a road-show basis on March 2, 1965, prior to its general release on Dec. 21, 1966.

The commission, however, said the distinction it had drawn between films in general release and those exhibited on a road-show basis was the result of careful deliberation—it was not an "unintended technicality" that was involved. It also said it could see no compelling public interest in waiving the rule to permit pay cablecasting of a film already seen by millions in theaters. The most that could be said for granting the waiver, the commission said, was that Fox would earn additional revenues.

Counsel for HBO and Fox said decisions on whether their clients would choose to appeal could not be made until the text of the commission's order was released; the announcement was made in a news release. But both said an appeal was "possible"—the attorney for HBO, that it was "probable."

Theodore Pierson Jr., the HBO counsel, said the decision "makes no sense" and indicated that the commission's hard-line attitude toward pay cable had not changed. He said if an appeal were

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