

## LEGAL ISSUES IN RSN CARRIAGE BATTLES: THE ROLE OF THE COURTS, CONGRESS, AND THE FCC

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## Today's Presentation

- ☐ Recent "controversies" regarding sport carriage battles
- ☐ Role of the:
  - Courts
  - Congress
  - Federal Communications Commission
- ☐ Future Issues
- ☐ Conclusions

## Recent Cable "Battles"

- ☐ YES Network v. Cablevision
- ☐ NFL Network v. Comcast, Time Warner
- ☐ MASN v. Time Warner
- ☐ Big Ten Network v. Comcast

## What are the Important Issues?

- ☐ Terminology
  - "Over-the-air"
  - "Basic Cable" or "Expanded Basic Cable"
  - "Premium Channels" (Premium Tiers)
- ☐ Potential distribution/viewership
  - Is this programming for "everyone" or is it a uniquely defined "narrow" audience?
- ☐ Cost of cable channels – all are not created equal!
- ☐ Are cable distributors making decisions based solely on what is "best" for their customers or are there potential conflicts of interest?
  - Professional sports owners & their "other" businesses

## Role of the Courts in Sport Broadcasting

- ☐ May 17, 1939 – Columbia and Princeton baseball game
- ☐ *Pittsburgh Athletic Co. v. KQV Broadcasting Co.* (1938)
- ☐ *National Exhibition Co. v. Fass* (1954)
- ☐ *U.S. v NFL I* (1953) National Football League Players Association
  - Technology had advanced to stage where different signals could go to different markets
- ☐ *U.S. v. NFL II* (1961)

## Sports Broadcasting Act of 1961

- ☐ Background
  - Pete Rozelle
  - Legal Cases
- ☐ Permitted leagues to pool broadcast rights in violation of antitrust law
  - Utilize blackouts
  - Financial impact

### Role of the Courts in Sport Broadcasting

- ▣ *Blaich v NFL* (1962)
  - 1973 - Blackout rules lifted for sellouts
- ▣ Unlawful interception and broadcast of "free" TV sent over satellite signals
  - *NFL v. The Alley* (1983)
  - *NFL and St. Louis Football Cardinals, Inc. v. McBee & Bruno's* (1985)
- ▣ *NBA v. Sports Team Analysis and Tracking Systems* (1996)
  - Can pagers send out game accounts almost instantly?
  - Copyrightable? Commercial misappropriation?

### Role of the Courts in Sport Broadcasting

- ▣ Cases dealt with rights to extend SBA to cable TV
  - *Kingray Inc. v. NBA* (2002) - can sell out-of-market games to cable outlets
  - *Chicago Professional Sports v. NBA* (Bulls...) - series of issues regarding # of broadcasts, superstition status, etc.

### *Shaw v. Dallas Cowboys*, 172 F.3d 299 (1999)

- ▣ Package sale of television broadcast rights to satellite distributor not "sponsored telecasting" immune from antitrust scrutiny (Mitten, Davis, Smith, & Berry, 2005)
  - Games on the NFL Network not covered by Sports Broadcasting Act
  - Direct TV deal separate from SBA

### The Role of Congress

- ▣ The Sports Broadcasting Act of 1975 failed when conferees from the House and Senate failed to reach a compromise (Lowe, 1995)
  - Directed at the NFL's blackout policy
- ▣ 1976 - Congress passes legislation "protecting" the "rebroadcast, retransmission of the accounts of this game..."
- ▣ 1990 - NFL plans to "scramble" signal
  - Congress pressured to consider amending the Communications Act of 1934
  - Access to Professional Sports Programming Act of 1990, never left committee...

### Senate Judiciary Committee

- ▣ "Competition in sports programming and distribution: Are consumers winning?" (Nov. 14, 2006)
  - NFL
  - Time Warner Cable
- ▣ "Vertically integrated sports programming: Are cable companies excluding competition?" (Dec. 7, 2006)
  - Comcast

### Senate Commerce Committee

- ▣ "Exclusive sports programming: Examining competition and consumer choice" (March 27, 2007)
  - Called by Sen. Kerry (D-MA) in response to MLB's initial refusal to sell Extra Innings package to all MSOs

### House Energy and Commerce Committee

- ▣ Subcommittee on Telecommunications and the Internet
- ▣ “Competition in the sports programming marketplace” (March 5, 2008)
  - Roger Goodell, NFL Commissioner
  - George Bodenheimer, President, ESPN, Inc.
  - Glenn Britt, President and CEO, Time Warner Cable

### Sen. Arlen Specter (R-PA)

- ▣ Sent letter, along w/Sen. Patrick Leahy (D-VT), to NFL Commissioner Goodell urging league to make games more broadly available than solely on NFL Network (Dec. 19, 2007)
  - Catalyst was “potentially-historic” Patriots v. Giants game and “important” Steelers v. Rams game
  - Referenced *Shaw v. Dallas Cowboys* (172 F.3d 299)
  - Quoted Roger Noll saying NFLN was “a profit-enhancing reduction in output” (Noll witness testimony, Senate Judiciary Committee, Nov. 14, 2006)

### Sen. Arlen Specter (R-PA)

- ▣ Sent letter to NFL Commissioner Goodell urging NFL to make games on NFL Network available to all NFL fans (Oct. 28, 2008)
  - Focused on territorial restrictions
  - Threatened Congressional revocation of antitrust exemption (Sports Broadcasting Act)
  - Concern for migration of sports from free television to pay television

### The Role of the FCC

- ▣ Agency charged with regulating all communications in the U.S. - Communications Act of 1934
- ▣ Governed by five commissioners who are appointed directly by the U.S. President. Each member of the commission is appointed for a five-year term
  - Awaiting nomination of new FCC Chairman
- ▣ Retains power to renew licenses to broadcasting entities - primarily if they broadcast “over-the-air”
  - Janet Jackson controversy
- ▣ Under the 1992 Cable Act, the FCC is authorized to referee carriage disputes between cable operators and independent cable networks (Hearn, 2008, Aug. 26)

### The Role of the FCC

- ▣ Cable Television and Consumer Protection Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992)
  - Required the FCC to conduct an examination of “the carriage of local, regional, and national sports programming by broadcast stations, cable programming networks, and pay-per-view services”
  - FCC published its findings in a “Final Report” on June 30, 1994 (Sports Programming Migration Final Report, FCC 94-149)
    - Among many conclusions, the FCC stated “we discern no case for additional government intervention of the sports programming market at this time,” except in the case of college football (para. 167)

### “Adelphia Order”

- ▣ July 2006 - FCC approves sale of assets of Adelphia Communications Corporation to Time Warner Inc. and Comcast Corporation
  - “The Commission adopted a condition allowing unaffiliated RSNs unable to reach a carriage agreement with Time Warner or Comcast to seek commercial arbitration” (FCC News Release, July 13, 2006).

### Given this background...

- ☐ What happened in the earlier situations?
- ☐ YES Network v. Cablevision
  - Yankees spurn former broadcaster of NY-area sports
  - Michael Bloomberg: "Baseball is not only America's pastime, it is a New York City tradition, and all of its fans should be able to watch their favorite team play" (Sandomir, 2003, para 4)
  - Monopoly of cable distribution?
  - Settlement...

### Given this background...

- ☐ NFL Network v. Comcast, Time Warner
  - Expanded basic or sports tier?
- ☐ MASN v. Time Warner
  - What tier?
  - Discrimination in favor of RSN owned by cable operator
- ☐ Big Ten Network v. Comcast
  - Distribution dispute settled prior to 2008 football season

### MASN Timeline

- ☐ Aug. 7, 2006 - MASN signs deal with Comcast
- ☐ June 5, 2007 - Citing Adelphia Order, MASN requests arbitration in carriage dispute with Time Warner (TWC)
- ☐ Jan. 21, 2008 - Arbitrator (Jerome Sussman) ruled TWC discriminated against MASN by refusing to carry network on analog tier while all other RSNs carried in the state, including one owned by Time Warner, were on analog tier (Hearn, 2008a)
  - Sussman stated TWC's motive for placing MASN on digital tier was to protect its own RSN, News 14 Carolina which airs Charlotte Bobcats' games
  - Sussman said it is a possibility, for which there was no evidence in the record, that TWC wanted to see MASN collapse so it could add that programming to News 14
- ☐ Feb. 21, 2008 - AAA removes Sussman from case

### MASN Timeline

- ☐ July 1, 2008 - MASN files complaint asking FCC to force Comcast to carry network in Harrisburg, Pa. and Roanoke/Lynchburg, Va. (Hearn, 2008b)
  - Oct. 13, 2008 - FCC determines complaint can go before an ALJ
- ☐ Oct. 30, 2008 - FCC media bureau chief rules TWC discriminated against MASN by refusing to carry network on analog tier (Hearn, 2008c)
- ☐ Nov. 26, 2008 - TWC asks FCC to nullify staff order requiring TWC to carry MASN in N.C. (Hearn, 2008d)
- ☐ Dec. 24, 2008 - FCC media bureau chief says ALJ failed to meet Dec. 9 deadline and intends to rule on several carriage disputes (Hearn, 2008e)
  - Nothing happens before Martin resigns as chairman Jan. 20, 2009

### What will be the main issues going forward?

- ☐ Money generated by subscriber "subsidies"
  - 88% of homes subscribe to at least expanded basic cable service (Lieberman, 2007).
- ☐ Costs of sports programming
  - Greatly exceeds most other channels
  - A la carte potential
- ☐ Free market issues - NFL Sunday Ticket only on DirecTV
  - Technology issues solved...
- ☐ University of Texas paving road for the future in college athletics?
  - Available content - now? Eventually? Negotiations?

### Conclusions?

- ☐ Courts
  - Consumer rights? Content provider rights?
- ☐ Congress -
  - All bark, no bite?
  - Motives are largely political, focused on interests of constituents (Specter = Steelers; Kerry = Red Sox)
  - Repeated threats to revoke the NFL's antitrust exemption provided by the Sports Broadcasting Act
    - If this occurred, potentially dramatic shift...
- ☐ FCC - will they do anything without guidance from Congress

**Thank You**