

telegrams from Doubleday Sports Inc., owner of the New York Mets baseball team. Doubleday, which sells the Mets' television rights to WOR-TV, was asserting its copyright over the games and objecting to EMI retransmission of them. Instead of pre-empting the games, EMI asked the Syracuse court last April to declare that, under the copyright law, it was not infringing on Doubleday's copyright interest and that it was free to retransmit the games.

To violate someone's copyright, EMI argued, there has to be a "public performance" of the copyrighted material and its retransmission of Mets games to cable headends was surely not a public performance. It also contended that it was immune from copyright liability under the carrier exemption of the Copyright Act of 1976. That provision says that a retransmission is not an infringement if the carrier has no direct or indirect control over the content or selection of the signal and if the carrier's activities consist only of providing "wires, cables or other communications channels for the use of others." The court ruled that neither of EMI's arguments was "availing."

In rejecting EMI's public-performance argument, the court said EMI's definition of the "public" as cable subscribers was too narrow. "Had Congress intended the 'public' to be limited to members of the viewing public, it could easily have limited the definition . . . In the absence of such intention on the part of Congress, this court is not willing to narrow this definition. EMI's CATV customers are themselves members of the public."

(The Syracuse court was in sharp disagreement with the Chicago court on the public-performance question. It's true that without United Video, cable systems would not be able to offer WGN-TV to their subscribers, the Chicago court ruled, but United Video "is only an intermediary in the distribution chain. The retail distributors, the cable television systems, pay royalties because they distribute to the public.")

Judge McCurn agreed with part of EMI's argument that it was not liable under the carrier exemption. He accepted EMI's contention that it had no control over the content of WOR-TV, but rejected the claim that it had no control over the station's selection. The court noted that EMI conducted a survey to determine the "marketability" of WOR-TV and that when it could come up with only one satellite transponder, it decided to carry WOR-TV instead of WSBK-TV Boston. EMI's argument that the only reason it selected WOR-TV was its inability to retransmit every station in the country, the court said simply, is "without merit." EMI also selects the cable systems that receive the WOR-TV signal, the court added.

Even if EMI did not control the selection of its signal or the recipients of that signal, the court said, "this exception would still not be available" because its transmission facilities are not available for use by others. The facilities are "used ex-

clusively to make available the product [EMI] is marketing, WOR-TV."

According to Jim Fitzpatrick, a Washington attorney for Doubleday, the decision "will help sports and other suppliers to control the distribution of our programming and permit us to deal with the satellite carrier in the same way we do with the broadcasters—across the bargaining table." Assuming the decision survives appeals, Fitzpatrick conceded that programmers would be getting paid twice by the cable industry, but he said "the compulsory license is an anachronism, totally inadequate to compensate sports." Doubleday has already claimed general damages, he said, and now can ask for specific damages.

A spokesman for the Motion Picture Association of America said the decision "certainly undermines the fiction that these guys are common carriers . . . If the initial decision stands, each resale carrier would be liable for actual or statutory damages of between \$250 and \$10,000 for each infringement. Even if Congress amends the law to exempt resale carriers from liability, it cannot make the amendment retroactive so carriers could be sued for every infringement during the last

three years under the statute of limitations."

Although EMI is expected to appeal the decision, Bob Miron, the company's executive vice president, said last Thursday the company hasn't made up its mind on what to do. Bob Ross, an attorney representing superstation WTBS Atlanta on copyright matters, said EMI has to appeal. He called the decision "totally bizarre" and said that it "nullified distant signal carriage." David Silverman, an attorney for United Video, agreed. The decision "emasculates" the cable provision of the cable copyright law. The ruling "says that you can have any signals you want, but try to get them," he said.

The conflict between the two district courts can be resolved by either the Congress or the courts. The WGN-United Video case has already been appealed and the EMI case probably will be. If the appeals court upholds the lower courts in each case and the conflict remains, the Supreme Court would probably be asked to resolve it. There is also the strong possibility that the NCTA-NAB amendment clarifying the carrier exemption in the law might be passed into law, rendering the court decision moot. □

ABC commits to additional prime time commercials

Starting next fall network will begin three-step phase-in of 18-19 30-second prime time spots

ABC-TV notified its affiliates last week that it intends to proceed with its plan to create 18 or 19 new 30-second prime time commercial positions a week, but will do so in three stages, over a period of a year.

Word that the network had decided to go ahead with a plan most of them didn't want was given to the affiliates Thursday morning in a closed-circuit message by John Severino, president of ABC Television, and James Duffy, ABC-TV network president.

Severino and Duffy said seven 30-second spots for network sale and two for affiliate sale would be added at the start of the new season next fall, with three more for the network and one more for the affiliates to be added in April 1983 and "a maximum" of four or five more for the network, plus one more for the affiliates, to complete the expansion in the fall of 1983.

All new 30's for affiliates will be positioned in station breaks. When the plan is fully implemented, it is expected to add an average of about two 30's per night for network sale, inserted in programs that do not already carry more than a "normal" load.

Officials of CBS said that for competitive reasons they felt compelled to adopt a similar plan. Officials of NBC said they didn't.

Tony Malara, CBS-TV vice president

and general manager, said "the challenge for us is to be as creative as we can" in setting up a plan. "I'm nervous about losing so many program promos [to make room for the extra commercial time]," he added, "but I'm sure it will work."

An NBC spokesman, noting that NBC all along has felt the ABC plan was "a lousy idea," said that the four extra 30's to be awarded ABC affiliates merely "brings them up to parity with the amount currently received by NBC affiliates." Accordingly, the spokesman said, "NBC has no present plans to make any changes in its prime-time commercial format."

The chief opposition to the plan, first disclosed almost two months ago (BROADCASTING, Feb. 1), has been on the ground that it would take millions of dollars out of the spot advertising market and put them into network revenues. Leaders of the Station Representatives Association have estimated that if ABC put its plan into effect and the other networks followed suit—as almost everybody assumes they will—the loss in spot dollars could reach or exceed \$150 million a year, almost 5% of national and regional spot's current annual total.

Critics of the plan also contended that the extra commercials would antagonize viewers, open up the old "clutter" argument and, with cable moving into the advertising market, would not be smart business.

ABC argued that the plan was necessary to help offset sharply rising costs. In the