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Cable Network Policies Stymie Growth of SMATV

by Fred Hopengarten

The author warns that anti-trust action could be in store for networks and franchised cable operators who conspire to deny programming to SMATV systems.

The insurgence of satellite master antenna television systems (SMATV) in apartment complexes and condominiums is an increasing threat to the once unchallenged supremacy of franchised cable.

Competition in the marketplace can be beneficial where, as here, the competitive edge often translates into advanced technology. However, the private cable operator is often stymied by program suppliers whose primary allegiance is to their franchised affiliates.

Home Box Office's policies exemplify the situation. Until last February, the largest pay TV programmer refused to deal with private cable. Then it decided to provide its services to SMATV operators "on a selected basis."

In practice, HBO has been dealing directly only with private cable operators serving 25,000 homes or more. Other private operators must purchase the service from franchised cable affiliates who can add their own charge on top of the licensing fee they pay to HBO.

Such distribution systems discourage competition and can keep prices artificially high for consumers," notes U.S. Rep. Judd Gregg (R-NH). Even though HBO and the franchised local cable operator may not be able to prohibit private cable, they can attempt, by working "hand in glove" together, to price private cable out of existence."

Showtime/The Movie Channel sells its services directly to private cable operators for $4.75 per month per subscriber, which is higher than what they charge franchised cable operators.

Supporters of the price differential justify such discriminatory business practices by pointing to a fundamental difference between franchised and private cable operators, the source of the operator's authorization.

Franchised cable operators obtain their franchises (i.e., the authorization to construct and operate a cable system), from a municipality, or any other governmental entity empowered by federal, state, or local law to grant a franchise. In contrast, private cable operators obtain their authorization from the private sector, i.e., a property owner, a condominium association, etc.

Where the franchise is obtained from a governmental authority, the cable operator is able to obtain Showtime/The Movie Channel at standard rate card rates. The private cable operator however, is forced to pay a substantially higher rate for identical programming, merely because his grant of authority derives from the private sector.

Is such price discrimination proper?

The Robinson-Patman Act

The Robinson-Patman Act of 1936, 15 USC section 13, although commonly regarded as but another obscure statute, may have application here. The statute provides in relevant part that:

> "It shall be unlawful for any person engaged in commerce,. . .either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality. . .*where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce*. . .: Provided, that nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacturer, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered. . . ." (Emphasis Added)

Programmers such as Showtime/TMC, ESPN, CNN and others, seek to escape the aegis of the Act by appealing to the literal language of the statute. For example, according to ESPN's Vice President and General Counsel Andrew Brilliant, ESPN sees its position as clearly one of providing services, and therefore outside the purview of the statute which, by its owns words, applies only to commodities.

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Commodities or Services?

Given the language of the statute, the question arises: "Is cable TV programming a commodity or a service?" In *City of Kirkwood v. Union Electric Company*, 671 F.2d 1173 (1982), the Eighth Circuit Court concluded that electricity, for purposes of the Robinson-Patman Act, is within the definition of a commodity and is therefore entitled to the protection of the Act.

Reasoning that the anti-trust laws should not be given a restrictive interpretation, the Court held that electricity, for purposes of the Robinson-Patman Act, could not be distinguished from goods or commodities otherwise entitled to the full protection of the Act.

On the grounds that satellite-delivered signals are a fungible commodity, several attorneys are now considering the possibility that the Robinson-Patman Act may apply to satellite delivered services, and that they are not the type of services exempt from prosecution and treble damages.

The Sherman Anti-Trust Act

The Sherman Anti-Trust Act of 1890, 15 USC Section 1 *et seq* provides that:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared illegal. . . .Every person who shall make any contract or engage in any combination or conspiracy hereby declared illegal shall be deemed guilty of a felony. . ."

Despite this prohibition, franchised cable operators are exerting tremendous pressure on programmers not to do business with the private cable industry. This has led to the conclusion that there is the distinct possibility of violations of antitrust laws. Such violations are, by satute, subject to treble damage recoveries.

Lifetime and The Disney Channel, among others, deny their program services to any one other than a franchised cable operator. They will neither deal with, nor supply programming to, private cable operators.

By favoring one form of delivery over another, these programmers have hindered the private cable operator's ability to purchase equivalent programming packages, effectively reducing his ability to compete with municipally franchised operators.

Admittedly, vertical restraints of trade are legal. The Colgate doctrine, first recognized by the Supreme Court in 1919 in *United States v. Colgate & Co.*, affirms a seller's right to refuse to do business with one dealer in favor of another. However, the seller must act *unilaterally*, and *without a monopolistic purpose.*

However, when a franchised cable operator has "suggested" to a programmer, that it ought not to do business with the private cable industry, or has demanded a contractual arrangement, precluding the programmer from doing business with private cable, and it is for that reason that the network turns away such affiliates, we see precisely the type of "combination or conspiracy" forbidden by the Act.

Programmers: Hear No Evil

Should a programmer be concerned when he hears threats or suggestions in conjunction with the possibility that a programmer may serve the private cable industry? No. Despite their mean looks, most franchised cable operators are rational business people. Even if they aren't, their bankers are.

Rational operators will not enrage a substantial portion of the subscriber base by removing, delaying, or other tactics which have the effect of hurting programmers while shooting the operator himself in the kneecap.

In other words, the threats are likely to be bluffs. That's why when push comes to shove, both franchised cable operators and programmers are likely to fold. That's what happened in Arizona.

Arizona Protects Private Cable

In *MCS Communications v. Showtime et al*, programmers agreed that, essentially, there was an adequate basis for litigation. Although the consent decree is under seal (i.e., the terms of the settlement are secret by court order) significant concessions resulted. ESPN and Showtime agreed to do business with the private cable industry.

In a similar suit brought by the State of Arizona, involving many of the same defendants, the Attorney General of Arizona alleged that "the consumers of cable television residing in multiple dwelling units in Arizona were deprived of the benefits of competition in the cable television industry as a result of alleged efforts by cable companies to obtain agreement from programmers to cease providing their signals to Satellite Master Antenna Television ("SMATV") operators. . .", *State of Arizona v. Showtime Entertainment et al.*

Although Showtime retains the right to "exercise its independent business judgment in deciding whether to deal with particular SMATV operators. . ." it is prohibited from exercising its discretionary judgment "(i) arbitrarily, (ii) to deny service to all SMATV operators in Arizona or (iii) for the purpose of benefiting competitors or potential competitors of SMATV operators in Arizona or protecting Showtime/TMC's business relations with such competitors or potential competitors."

Storer and Cox each agreed not "to seek to obtain any agreement from Showtime/TMC regarding the provision of the Showtime Service or The Movie Channel Service to SMATV operators in Arizona for a period of five years." They also paid Arizona's legal costs.

The Next Step?

What can one conclude from this? Is it possible that MSO's are leaning on programmers not to provide programming to competing technologies? Is it possible that HBO discriminates against private cable

operators to promote the interests of the nation's second largest MSO (and HBO's sister company), ATC? In other words, isn't it possible, in fact, probable, that there is *concerted action* and *monopolistic purpose*, and that neither the programmer nor the MSO acts alone?

Perhaps the time has come for more aggressive action on the part of private cable operators. There are tremendous incentives (i.e., attorney's fee and treble damage awards) in the realm of anti-trust law for a plaintiff's attorney to act as a private attorney general.

Of course, all of the above discussion could become irrelevant overnight, should the providers of cable programming decide to end their discrimination against private cable operators. CM