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A Major Victory For Cable Viewers

By Sidney W. Dean Jr.
and Eric Schmuckler

Late last year, a settlement was reached in a little noticed Federal antitrust suit against the principle cable television system in Manhattan. The lawsuit, filed by New York Citizens for Cable TV, accused Manhattan Cable TV of monopolizing pay-movie programming and with failing to live up to its franchise agreement.

The out of court settlement, which resulted in the addition of new pay-movie programming, has been a victory for cable viewers in Manhattan. More importantly, it sets a precedent and strengthens First Amendment rights nationwide. It also provides a way for independent programmers to break through cable's local program monopolies.

Here, in short, is what happened. Manhattan Cable, which like all cable systems has a monopoly in its service area, is owned by Time Inc. Time also owns Home Box Office and Cinemax, the only pay-movie services available through Manhattan Cable. Other pay-movie networks, like Showtime and Bravo, were excluded from this lucrative market.

Manhattan Cable's refusal to carry competitors of its corporate cousin looked like a simple case of a violation of specific clauses in Manhattan Cable's franchise with New York City. Yet the city's Bureau of Franchises, a component of the Board of Estimate, did nothing.

In January 1986, the citizens group filed a Federal lawsuit. The suit made broad antitrust allegations and cited specific instances of purported franchise violations. Time's lawyers argued that the citizens group had no standing to sue as third party beneficiaries of the city's franchise with Manhattan Cable. They also argued that Manhattan Cable could choose its programs as a matter of editorial discretion that is protected by the First Amendment.

A district court judge, Robert Sweet, rejected both of Time's arguments in December 1986. The trial continued another year before Time settled the case by agreeing to add one nonaffiliated pay TV service in March and another at a later date.

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While clearly a boon to Manhattan cable subscribers, the case is important to other jurisdictions as well. It sets an important precedent that allows cable subscribers to sue to enforce their rights in franchise agreements. It promises relief for independent programmers who have been denied access to cable. It also establishes that cable viewers have rights over the programming of local cable systems.

The slight difference between pay cable competitors, HBO and Showtime hardly seems the stuff of First Amendment battles. Yet the case shows how cable companies abuse their power. A cable system operator like Time can use its control over the cable wire to gain a monopoly for its own programs. Other cable operators, such as Television Communications Inc., have used their power as gate keepers to demand a financial interest in programs seeking to be carried on their systems.

In this way free competition is held hostage to economic leverage. This may not seem to matter much with cable movie networks, but it presents a very real obstacle to independent programmers. Moreover, imagine the danger of total cable operator control over emerging services like electronic publishing, home banking and shopping services.

The solution to the problem of monopoly control over programming is a policy of leased access. Simply put, a proportion of cable channels should be available at reasonable rates to anyone willing to pay the price.

The rejection of Time's argument of First Amendment immunity bears notice as well. The cable industry has trumpeted its right to "editorial discretion" in selecting all cable programs. But such claims are undermined when used to justify complete monopolization. The Supreme Court has repeatedly ruled that the First Amendment rights of viewers to diversity are paramount to those of broadcasters. Judge Sweet extended that principle to cable operators, although he left other First Amendment questions unanswered.

What's next? Locally, Manhattan Cable's franchise comes up for renewal this summer. Subscribers and programmers will have a chance to require fair and open cable access.

Citizens across the country, especially independent programmers, must be equally demanding. Only through public action can the cable operators' monopoly grip on programming be loosened and the access rights of independent programmers be protected. □