
MAJOR COURT DECISIONS OF 1994

The following is a compendium of major communications law decisions handed down by courts of the United States in 1994.

ADMINISTRATIVE LAW ISSUES

Capital Cities/ABC Inc. v. FCC

29 F.3d 309 (7th Cir. 1994)

Issue:

Whether the FCC can change a long-term course of action and justify this change by merely asserting that it is making the change in accordance with a court opinion.

Holding:

The FCC can justify a change in course by relying on a court opinion.

Discussion:

This action stemmed from a petition for review of the FCC's order removing financial interest and syndication restrictions on networks, brought by various television networks, syndicators, producers, and independent television stations. The FCC indicated that it lifted these restrictions because it was persuaded by a Seventh Circuit decision that reversed the FCC's earlier issuance of revised financial interest and syndication rules. Plaintiffs noted correctly that administrative agencies are required to give reasons for changing course. The court was unpersuaded by the Plaintiff's argument that the reasons given by the FCC were insufficient. The court determined that the FCC's assertion that it was following the rationale of the Seventh Circuit was a sufficient reason for lifting the restrictions.

People of the State of Cal. v. FCC

39 F.3d 919 (9th Cir. 1994)

Issue:

Whether the FCC properly exercised its power in issuing an order in a remanded rulemaking proceeding that: eliminated structural separation requirements; imposed strengthened nonstructural safeguards; and preempted only state regulation of common carriers' provision of enhanced services that included interstate as well as intrastate communications.

Holding:

The FCC did not properly exercise its power in ordering the elimination of structural separations requirements for operating companies providing enhanced services.

Discussion:

In reviewing the FCC's order, the court must determine whether the FCC's decision is arbitrary or capricious, and whether the Commission provided a reasoned analysis based on all of the facts before it. The court determined that the elimination of the structural separations requirement was arbitrary and capricious. In an earlier proceeding in this rulemaking, the FCC indicated that it regarded the unbundling of operating companies' services as a key safeguard from access discrimination against competitors in the enhanced services market. In the proceeding before the court, the FCC eliminated the unbundling requirement without providing an explanation or reasoned analysis as to why it still authorized lifting the structural separations requirement.

CABLE SERVICES ISSUES

National Cable Television Assoc., Inc. v. FCC

33 F.3d 66 (D.C. Cir. 1994)

Issue:

Whether telephone companies that provide video dialtone service or video programmers that use the service to solicit customers are subject to the

franchise requirement of section 621(b)(1) of the Cable Communications Policy Act of 1984.

Holding:

Companies using or running video dialtone services in these instances are not subject to the franchise requirements of the act.

Discussion:

In 1987, the FCC began to reexamine the telephone-cable cross-ownership prohibitions in the 1984 Cable Act. As a result of this reexamination, the FCC proposed to modify the cross-ownership restriction to allow telephone companies to offer a new video dialtone service. The Commission determined that the provision of this service would be regulated under Title II of the Communications Act. The Commission further determined that companies providing this service would not be required to obtain a cable franchise under section 621(b) of the Act.

Various cable industry associations and local franchising authorities petitioned for review of this determination. The court gave deference to the FCC's interpretations of the definitions of "transmission" and "cable operator" as they applied in the Act. Using these definitions, the court found that video dialtone service is a common carriage service because it is an obligation to provide service indefinitely to all customers. Conversely, cable operators exercise a significant amount of editorial discretion as to what programming it will carry. For this reason, the service is excluded from the franchise requirement of the Act.

Turner Broadcasting System v. FCC

114 S. Ct. 2445 (1994)

Issue:

Whether the must-carry provisions of the 1992 Cable Act, which require that cable systems set aside specific portions for the carriage of local broadcast stations, are violative of the First Amendment.

Holding:

Must-carry provisions are subject to an intermediate level of scrutiny and serve important government interests. Summary judgment is not appropriate because genuine issues of material fact exist.

Discussion:

The Supreme Court held that must-carry provisions would be subject to an intermediate level of scrutiny because the application of the provision is content-neutral. Although the provision restricts the number of available slots for non-local broadcast stations, this restriction is not made on the basis of content.

The Court also determined that the interest advanced by the government, the promotion of widespread dissemination of information, is an important government interest. The Court, however, found that there were genuine issues of material fact concerning whether local broadcast stations required this protection. Therefore, the Court granted summary judgment.

COMMON CARRIER ISSUES

Bell Atlantic Tel. Cos. v. FCC

24 F.3d 1441 (D.C. Cir. 1994)

Issue:

Whether the Communications Act of 1934 permits the FCC to expressly order physical collocation.

Holding:

The Act does not permit the FCC to order physical collocation.

Discussion:

Local telephone exchange companies petitioned for review of FCC orders requiring LECs to set aside portions of their central office to allow competitive access providers to connect their facilities to the LEC network through physical collocation. This measure served as an attempt to level the competitive playing field of the local exchange market.

The court examined the provision as a physical taking and analyzed it in relation to the Compensation Clause of the Fifth Amendment. The court found that the FCC's interpretation would not produce a compensable taking in all cases. However, in examining the Communications Act of 1934, the Court found that the Act gave no express authority to the FCC to order physical collocation.

Sprint v. Evans

846 F. Supp. 1497 (N.D. Ala. 1994)

Issue:

Whether referral to the FCC is appropriate on the issue of whether common carriers are entitled to refuse to carry information that is sexually explicit, but not yet adjudicated as obscene; and whether referral to the FCC is appropriate in determining whether criminal prosecution of an interstate common carrier under a state's anti-obscenity law is preempted by the Communications Act.

Holding:

It is appropriate to refer issues as to the rights, responsibilities, and requirements of a common carrier to the FCC. It is not appropriate to refer to the FCC whether criminal prosecution is preempted by the Communications Act.

Discussion:

Alabama Attorney General Evans attempted to criminally prosecute U.S. Sprint under an Alabama anti-obscenity statute for providing 1-800 telephone service for sexually explicit calls. Sprint countered by arguing that the statute did not apply because the state-to-state telephone calls qualified as interstate communications, and, therefore, the FCC had jurisdiction.

The Attorney General filed a motion to refer the issue to the FCC. The court concluded that the issue of whether common carriers may refuse service falls under the FCC's jurisdiction.

However, the court decided not to refer the issue of whether the FCC preempted criminal prosecution under the statute to the FCC because the issue is strictly legal and involves neither the FCC's particular expertise nor its fact-finding prowess.

COPYRIGHT ISSUES***American Geophysical Union v. Texaco Inc.***

37 F.3d 881 (2d Cir. 1994)

Issue:

Whether photocopying eight articles from a scien-

tific journal for use by Texaco's researchers constitutes fair use to copyright infringement.

Holding:

The fair use defense to copyright infringement does not apply to the photocopying of the scientific journal articles.

Discussion:

Under section 107 of the Copyright Act, a court must consider four factors when analyzing whether a particular use is fair use. These factors include: the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used, and the effect upon the potential market or value. The court found that three of the four factors favored the publisher of the articles.

In analyzing the purpose and character of the use, the District Court found that because the primary aspect of the use was merely to multiply copies, the use was not transformative. The District Court also found that the research done in conjunction with the copied articles was done solely for commercial gain. The court indicated that the less transformative a work is, the more significant it will be that the work is being used for a commercial purpose. Thus, the District Court concluded that the first factor weighed in favor of the publisher. The Second Circuit affirmed the District Court's decision to favor the publisher on this factor. However, the Second Circuit commented that unless the use was "commercial exploitation," in other words, unless the commercial gain stemmed directly from the copying, the fact that the entity was a commercial one did not necessarily weigh against the use on this factor.

The Second Circuit concluded that the second factor, the nature of the copyrighted work, weighed in favor of Texaco because the journal articles copied were largely of a factual nature. On the third factor, amount and substantiality of portion used, the court favored the publisher, because in each case, the entire article was copied. The Second Circuit found that the fourth factor also weighed in favor of the publisher because, although difficult to quantify, Texaco's use did have a negative effect on potential market or value for the work.

Campbell v. Acuff-Rose
114 S. Ct. 1164 (1994)

Issue:

Whether a parody that is wholly commercial and that takes the heart of a copyrighted work qualifies as fair use.

Holding:

A commercial parody that takes the heart of a copyrighted work may qualify as fair use within section 107 of the Copyright Act.

Discussion:

The holders of the copyright of the song "Pretty Woman" brought an action for copyright infringement against the rap group 2 Live Crew for an unlicensed parody. Defendant argued that the parody qualified as a fair use.

The court recognized the important literary and historical value of parody as a form of commentary and was not troubled by the significant amount that was appropriated from the original. The court indicated that a significant appropriation is necessary for a parody in order to evoke the original and comment on it.

The court was also not troubled by the fact that the parody itself was explicitly a commercial use. This factor did not automatically bar a fair use defense. The fact that the market for the original might be diminished as a result of the critical attack by a parody also does not bar fair use. The only effect on the market for the original that weighs against a finding of fair use occurs if the market for the parody actually supplants the market for the original.

FIRST AMENDMENT ISSUES

Ameritech Corp. v. United States
867 F. Supp. 721 (N.D. Ill. 1994)

Issue:

Whether a provision of the Cable Communications Policy Act of 1984, section 533(b), which prohibits local and regional telephone companies from providing cable television directly to customers within their service areas, violates the First Amendment.

Holding:

Section 533(b) violates the First Amendment right to free speech.

Discussion:

The court applied an intermediate level of scrutiny in analyzing the constitutional challenge. In applying intermediate scrutiny, a court will uphold a restriction if it is content-neutral, narrowly tailored to serve a significant governmental interest, and leaves open ample alternative channels for communication of the information. The court, in determining that the provision is content-neutral, found that the provision restricts programming on the basis of its form or manner, rather than its substance. Furthermore, the court found that the provision does not favor some speech over other speech on the basis of ideas or views expressed.

As for whether section 533(b) was narrowly tailored to serve a significant governmental interest, the court looked at the relevant interest. The provision was implemented to prevent cross-subsidization and network discrimination. No convincing evidence was advanced on the record that other current methods of regulating anti-competitive behavior would be ineffective. Therefore, the provision imposes a greater than necessary burden on plaintiff's speech, and thus does not pass muster under the second requirement.

The court concluded that the provision also failed under the third requirement. The court found that there were not adequate alternative channels of communication, despite the Government's assertion that plaintiffs are free to provide video programming to customers outside their service areas or through independent media outlets.

Bellsouth Corp. v. United States
868 F. Supp. 1335 (N.D. Ala. 1994)

Issue:

Whether a provision of the Cable Communications Act of 1984 prohibiting local telephone companies from providing cable service to customers within their service areas violates the First Amendment.

Holding:

The provision violates the First Amendment right to free speech.

Discussion:

The court utilized an intermediate level of scrutiny in this analysis because the restriction on speech in this case is not content-based. The court determined that the government must show that a legitimate governmental interest is behind the application of the restriction and that the regulation will alleviate these harms in a direct and material way. Also, the restriction must be narrowly tailored to deal with the harms.

The government stated that the governmental interests were the promotion of diversity and the prevention of anti-competitive conduct, including cross-subsidization, network discrimination, and pole/conduit discrimination by local telephone companies in cable markets. The court did not reach a decision on this issue because it found that alternative regulations identified by the plaintiffs would be less restrictive than the total ban on speech represented by the restrictions. For this reason, the court found that the restriction is not narrowly-tailored, thus it a violation of the First Amendment right to free speech.

Chesapeake & Potomac Telephone Co. v. United States

42 F.3d 181 (4th Cir. 1994)

Issue:

Whether a provision of the Cable Communications Act, which prohibits local telephone companies from providing cable service to customers within their service area, violates the First Amendment.

Holding:

The provision violates the First Amendment right to free speech.

Discussion:

In analyzing the provision, the court determined that the provision itself was content-neutral because there was no distinction as to the particular message of the prohibited communications. The government may impose reasonable restrictions on the time, place, and manner of speech, provided that the provision is content-neutral. The court used an intermediate level of scrutiny to evaluate the provision.

Under an intermediate level of scrutiny, the provision must be narrowly tailored to serve a significant governmental interest, and there must be sufficient

alternative channels of communication for the information. The court found that the governmental interest, the elimination of restraints on fair competition, is significant. The court, however, did not find that the provision was narrowly-tailored, because a less burdensome alternative was available. For instance, Congress could limit the telephone companies' editorial control over video programming to a fixed number of channels and require phone companies to lease the balance of channels to various video programmers. The presence of this alternative causes the provision to fail the "narrowly tailored" test, and as a result, is found to violate the First Amendment right to free speech.

Preferred Communications v. City of Los Angeles
13 F.3d 1327 (9th Cir. 1994)*Issue:*

Can a city, consistent with the First Amendment, limit access to a given region of the city to a single cable television provider by means of an auction when the facilities of the city are capable of accommodating more than one system.

Holding:

A city cannot limit access to a single cable television provider by means of an auction where the city has facilities capable of accommodating more than one system.

Discussion:

The city of Los Angeles in this case asserted that this measure, whereby a single cable company was assigned to a particular region by auction, was appropriate, because the installation of another system would be a disruption, a visual blight, and a safety hazard. The facilities of the city were capable of providing for multiple cable providers in a particular region. The city offered proof that its concerns were real and substantial, but the court found that the measures were not narrowly tailored to deal with these concerns. It found that limiting speech to a single operator is substantially broader than necessary to achieve the government's interest, and therefore invalid.

The court held that the First Amendment allows any and all cable operators to operate in a particular region. The court characterizes the analysis as a balance. Once there is more than one cable operator in

a region, the First Amendment concerns somewhat are diminished. The court recognizes that at some point the balance shifts, and the addition of another cable operator will have created costs greater than the benefits that it will provide. At this point, the threat to the First Amendment is not as great. The court reiterates that it does not have a problem with the city restricting the number of entrants to the cable market, provided that the number of entrants is not restricted to one.

Rosenberger v. Rector and Visitors of the University of Virginia

18 F.3d 269 (4th Cir. 1994)

Issue:

Whether university restrictions against funding religious activities violates the First Amendment freedom of speech and of the press.

Holding:

State university funding restrictions against religious activities do not violate the First Amendment

where there is a compelling interest by the state university to withhold funding.

Discussion:

A religious publication at the University of Virginia was denied student activity funding based on the fact that the University chose not to fund religious groups. The court found that the refusal of the university to allow funding for religious activities placed a presumptively unconstitutional condition upon the access to government benefits. However, the court found that the University had a compelling interest in refusing to fund religious organizations because it chose not to advance religion at the University and because religious activities do not relate to the purpose of the University. The court found the University's interest to be valid, and that the restriction was narrowly tailored so as to best address the University's concerns.

In addition, the court concluded that the state university's refusal to disburse funds for the religious publication did not violate the equal protection clause because the publication failed to argue that a discriminatory intent existed.