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CATHOLIC TELECOMMUNICATIONS NETWORK OF AMERICA, INC.: DIOCESAN IMPLICATIONS

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A new era is dawning in telecommunications. In virtually every corner of the communications and information industries, change is occurring much more rapidly than Alexander Graham Bell or Guglielmo Marconi ever could have imagined. So much is going on, both in technology and in government policy, that even summarizing the highlights is a major undertaking. It does not, however, take a huge amount of detail to make the point that all Americans will be very much affected by changes sweeping the telecommunications landscape. Lawyers, such as yourselves, will play a major role in implementing these changes.

New sources of video programming include direct broadcast satellites, super stations, cable television, and low power television. Telephones are beginning to be used as much for data transmission and data processing as for voice transmission. Change is everywhere you look in the telecommunications marketplace. Some of the changes are purely technological. For example, fiber optics, which transmit light waves rather than sound waves, are replacing copper telephone cables, permitting a vast increase in transmission capacity at relatively low cost. Other changes are purely regulatory. For example, the technologies of cable television, low power television and long-distance telephone competition are well established; only changes in policy have permitted the new service offerings.

At the same time, technology and policy are changing each other. For example, the increasing convergence of communications and computers means that telephone companies are capable of providing data processing as well as pure transmission. This raises policy questions as to whether

and under what circumstances this should be permitted. Likewise, many innovations resulted from the policy decision to permit competition in terminal equipment.

The biggest beneficiaries of all this change are large communications users. The range of developments presents unprecedented opportunities for such users as Ford, Sears, and the Catholic Church. Accordingly, the United States Catholic Conference is moving to take advantage of the new age of telecommunications. It has formed the Catholic Telecommunications Network of America (CTNA). CTNA is organized as a for-profit corporation, and it will provide a significant variety of new telecommunications services to the Catholic community. While the specific nature of CTNA's activities has not yet fully been determined, the future holds a great deal of promise.

Already, CTNA has arranged to lease transponder time on a satellite, transponders being the devices on satellites that receive radio transmissions from Earth and transmit them down again. "Uplinks" have been secured to beam signals up to the transponder. Earth stations to receive the satellite signals will be located in every diocese. Once received at the diocesan earth station, the signals can be relayed over a variety of terrestrial facilities such as telephone lines, cable television circuits, and microwave facilities, thereby linking churches, schools, hospitals and homes. What will this vast increase in communications mean to the dioceses? The answer, of course, depends upon CTNA's specific plans. These, in turn, will depend upon which of the many new services are determined to be most useful and cost efficient given the particular communications needs of CTNA and its affiliates.

Although the specific plans remain somewhat unsettled, it is already clear that the range of possibilities is broad and the potential benefits are substantial. For example, CTNA could help assure that Church news is more widely disseminated. Instructional programs could be transmitted to parochial schools. Entertainment programming with values suitable to Catholic families could be made available throughout the nation. Coordination among Church leaders could be facilitated by teleconferencing. Dioceses could draw on access to centralized records, bibliographic services, or a host of other database services. Data processing for individual dioceses could be performed by a centralized computer. Telephone bills could be reduced if call volume justifies establishment of a private network. The list of new opportunities goes on and on. The range of new communications technologies is endless. The following sections describe some of the new technologies and highlight some of the legal issues that may arise in connection with their use.

Broadcast Satellites

One of the most important developments in communications is the explosive growth in the use of satellites. New satellites are being "launched" with increasing frequency, and the space shuttle may soon make it even easier to launch, repair, and replace satellites. Today, satellites feed signals to television stations and to cable television operators, as well as to other media outlets. Increasingly, satellites are being used to beam programming directly to users. The price of a "receive only" earth station is now only about \$2,500. Small roof-top dishes may soon be a common neighborhood sight. Users will be able to receive a wide variety of programming beamed directly from a satellite to their homes. This service is known as direct broadcast satellite (DBS).

Legal issues concerning satellite usage will primarily involve contract questions relating to the availability and cost of transponders. Regulatory policies concerning the means of marketing transponders remain unsettled; a recent auction of transponders caused a great stir at the Federal Communications Commission (FCC) because an auction is inconsistent with the tradition of cost-based, tariff-regulated common carriage. The FCC is also considering the allocation of spectrum between DBS and other services and considering whether to regulate DBS as a common carrier service or broadcast service.

Satellite usage will also raise licensing and other federal regulatory issues. Currently, transmit-and-receive earth stations must be licensed, whereas receive-only earth stations have no such requirement, but may be licensed. Diocesan attorneys will have to decide whether to seek FCC licenses for their receive-only earth stations. License applications are lengthy, but requirements are not burdensome, and obtaining a license affords protection against certain types of interference.

Another legal issue likely to arise with respect to diocesan earth stations involves zoning. Generally speaking, a chartered city's police powers encompass the right to regulate reasonably the height or location of radio antennae. Because the federal grant of a radio license does not preempt local zoning ordinances, a license to operate a satellite earth station or a microwave tower will not obviate the need to comply with zoning regulations governing the location, construction, or landscaping of the communications facility.

Finally, earth station ownership may raise tax issues, which are of obvious interest to nonprofit organizations like the dioceses. Is an earth station considered real or personal property? Will income associated with the earth station be subject to tax? A variety of factors may affect the answers to these questions.

Cable Television

One of the most familiar developments in telecommunications is the explosive growth of cable television. Introduced primarily because of the lack of television signals in rural areas distant from transmitters, cable has now developed into a major urban industry as well. For city-dwellers and suburbanites, as well as rural Americans, cable provides better signal quality than broadcast signals. Cable also supplies first-run movies and major sporting events. Its huge channel capacity permits it to carry specialized programs that may appeal to a very small percentage of the population. Already, a number of evangelical broadcasters are exploiting this new medium, and the more established churches can be expected to follow suit. If cable operators decide to carry programming supplied by CTNA, such programming may be transmitted by satellite either directly to the cable system's earth stations or indirectly by way of the diocesan earth stations from which it can be relayed in a variety of ways.

Cable systems are not licensed by the FCC but are "franchised" by local governments. Franchise agreements often assure opportunities for "public access" to one or more channels. Diocesan attorneys may find it useful to seek public access guarantees as new franchises are awarded and to review the terms of existing franchises for public access opportunities. Such opportunities may be useful if the cable operator is otherwise reluctant to allocate space on the cable system for regular religious programming. Of course, if the system capacity is sufficient, and a sufficient demand for the programming is perceived, the cable operator may be willing to allocate an entire channel, or large blocks of time on one channel, to programming supplied by CTNA.

Multipoint Distribution Service, Instructional Television Fixed Service, and Private Operational Fixed Service

Three other services that are experiencing significant growth are Multipoint Distribution Service (MDS), Instructional Television Fixed Service (ITFS), and Private Operational Fixed Microwave Service (OFS). MDS, which primarily is used to compete with cable in the pay-TV market, transmits a signal on a microwave beam at a much higher frequency than is normally used in video broadcasting. The signal is received and "down-converted" by special equipment, and the programming can then be viewed on ordinary television sets throughout the receiving building. Like subscription television (STV), which sends scrambled signals over ordinary VHF or UHF frequencies to subscribers who have paid for special decoding equipment, MDS is a single channel offering, and like STV, is experiencing rapid growth despite the increasing availability of cable. The MDS operator, however, is limited in the extent to which it may control the programming; certain common carrier obligations go along

with MDS.

ITFS stations are operated by educational organizations, which transmit instructional, cultural, and other types of educational materials to accredited public and private schools, colleges, and universities. Some incidental usage of ITFS channels is permitted for administrative activities related to the educational organization. OFS, microwave service which until recently was used for data transmission and other business applications, has been made available for new uses, including entertainment programming which for now may only be distributed to hotels and motels. OFS licensees are required to have an ownership interest in the programming they distribute.

The FCC is currently considering rule changes that would affect MDS, ITFS, and OFS. These changes could affect the frequency (radio spectrum) allocations for all three services and the procedures used to process license applications. As CTNA expands, many dioceses may be interested in obtaining ITFS licenses so as to be able to transmit programming from the diocesan earth station to parochial schools throughout the diocese. A limited number of dioceses already have operational ITFS systems, and some additional dioceses have ITFS applications currently pending before the FCC. Because of the current regulatory uncertainty, it is suggested that serious thought be given to ITFS potential in your diocese.

Conventional Broadcast Services

To the extent that the CTNA or any of the various dioceses become originators or broadcasters, rather than just carriers, of programming, attention will have to be given to issues that are traditional concerns of radio and television broadcasters and programming syndicators. Among the most important of these issues are defamation, privacy, copyright, and access.

Defamation

A particularly sensitive area for broadcasters and programmers is defamation. The first amendment affords everyone a great degree of protection to discuss issues and express opinions, but it does not immunize false communications that injure someone's reputation. It is important for broadcasters and programmers to be as fair and accurate as possible, not only in news reports but also in other programming. Inadequate care may lead to substantial liability.

A news story that is biased and incomplete, but not inaccurate, may give rise to liability, as can a fictionalized work in which a characterization is reasonably understood as a defamatory statement about an actual

person.¹ It is somewhat more difficult for a public official or a public figure to prevail in a libel or slander case, since the broadcaster will be liable only if the defamatory falsehood was made with knowledge that it was false or with reckless disregard as to its truth or falsity.² Also, it is not always clear whether a given individual is a public figure.³

Privacy

An increasingly important concern for broadcasters and originators of programming is the right of privacy. Privacy rights, of course, are governed by state law,⁴ but generally, the law recognizes four distinct privacy interests: the right to commercial exploitation of one's own name and likeness;⁵ the right not to have embarrassing private facts publicized;⁶ the right not to be intruded upon by such things as wiretapping and hidden cameras;⁷ and the right not to be placed in a false light.⁸ The latter two aspects resemble the protection afforded by the common-law actions of trespass and defamation.⁹ The same legal principles that apply to privacy rights through other forms of communication also apply to television broadcasts and, presumably, the production of religious programming.

Copyright

The expansion of religious programming and communications will also implicate copyright issues. An idea for a television program or other creative expression is entitled to common-law protection if it is new and novel and is reduced to concrete form.¹⁰ In general, the owner of a copyright has the exclusive right to do, and to authorize others to do, the fol-

¹ See *Smith v. Huntington Publishing Co.*, 410 F. Supp. 1270, 1273 (S.D. Ohio 1975) (in the context of fictional characters, "the test [for liability] is whether a reasonable person could reasonably believe that the article referred to the plaintiff"), *aff'd*, 535 F.2d 1255 (6th Cir. 1976).

² See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

³ A "public figure" has been illustrated as one "who [has] achieved some degree of reputation by appearing before the public." W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 118, at 823 (4th ed. 1971). Actors, professional baseball players, war heroes, and famous inventors, *inter alios*, have been included within this definition. *Id.* at 823-24.

⁴ See, e.g., *State ex rel. Mavity v. Tyndall*, 225 Ind. 360, 74 N.E.2d 914, 916 (1947) (individual's right to privacy must give way to the state's reasonable exercise of police power).

⁵ See W. PROSSER, *supra* note 3, § 117, at 803-05.

⁶ See *Melvin v. Reed*, 112 Cal. App. 285, 297 P. 91, 93-94 (Ct. App. 1931).

⁷ See W. PROSSER, *supra* note 3, § 117, at 807-08.

⁸ *Id.* at 812-14.

⁹ See generally Woodbine, *The Origins of the Action of Trespass*, 34 *YALE L.J.* 343, 344, 353 (1934).

¹⁰ See *Thompson v. Famous Players-Lasky Corp.*, 3 F.2d 707, 707 (N.D. Ga. 1925).

lowing: to reproduce the copyrighted work;¹¹ to prepare derivative works;¹² to sell, lease, or lend copies of the copyrighted work;¹³ to perform the copyrighted work;¹⁴ and to display the copyrighted work.¹⁵ A broadcaster may be liable for copyright infringement not only through his direct interference with those rights but also by assisting or participating in an infringement of which he had actual or constructive knowledge.¹⁶ Use of the copyrighted work of another requires a license, for which royalties are generally paid, unless the use falls into the limited exception called "fair use."¹⁷ In simple terms, this doctrine permits one to use small portions of copyrighted works for criticism, commentary, or news reports with no royalty requirements.¹⁸

To the extent that CTNA becomes a creator as well as a carrier of programming, it will be necessary to protect its own copyright interests in addition to respecting the copyrights of others. To protect CTNA-originated programming, a notice of copyright will be required; it is not necessary, although it may sometimes be desirable, to register a work with the Copyright Office to obtain copyright protection.

Access

Another issue in which diocesan attorneys may be especially interested is the question of access to media outlets. With the exception of the public access cable channels mentioned earlier, it may be difficult to obtain access to traditional broadcast media. Although television and radio licensees are required to represent viewpoints fairly on controversial issues of public importance, they have no obligation to provide air time to any given individual or organization, except under very special circumstances.

Also, there are deregulatory proposals now under consideration in Congress,¹⁹ and the FCC may reduce, or eliminate, broadcasters' obligations to meet community needs through their programming.²⁰ The result of the deregulation debate is difficult to predict, since so many complex

¹¹ See *Leon v. Pacific Tel. & Tel. Co.*, 91 F.2d 484, 486 (9th Cir. 1937).

¹² See *Ricordi v. Mason*, 201 F. 184, 184-85 (S.D.N.Y. 1912).

¹³ See *Atlantic Monthly Co. v. Post Publishing Co.*, 27 F.2d 556, 558 (D. Mass. 1928).

¹⁴ See *Buck v. Hillsgrove Country Club, Inc.*, 17 F. Supp. 643, 645 (D.R.I. 1937).

¹⁵ See D. JOHNSTON, *COPYRIGHT HANDBOOK* 61-62 (1978).

¹⁶ See *Fishel v. Leuckel*, 53 F. 499, 500-01 (C.C.S.D.N.Y. 1892) (liability found for copyright infringement on certain engravings because defendants authorized the infringing act).

¹⁷ See *Letter Edged in Black Press, Inc. v. Public Bldg. Comm'n*, 320 F. Supp. 1303, 1311 (N.D. Ill. 1970).

¹⁸ See *Hill v. Whalen & Martell, Inc.*, 220 F. 359, 360 (S.D.N.Y. 1914).

¹⁹ H.R. 3333, 96th Cong., 1st Sess., 125 CONG. REC. H1853-54 (daily ed. Mar. 29, 1979); S. 622, 96th Cong., 1st Sess., 125 CONG. REC. S2525 (daily ed. Mar. 12, 1979).

²⁰ See J. BITTNER, *BROADCAST LAW AND REGULATION* 324 (1982).

issues are involved. It is virtually certain, however, that third-party rights of access to broadcast media will not be increased as a result of the process.²¹

Long-Distance Telephone Service

Another change in the communications environment that may affect dioceses across the country is the growth of competition for long-distance telephone service. American Telephone and Telegraph is no longer the only provider of long-distance telephone service. A number of companies now provide lower cost, and sometimes lower quality, alternatives. The most familiar of the new intercity competitors are the specialized common carriers which both own and lease microwave facilities and other transmission media which carry calls from city to city. At both ends of the call, the standard wires of the local telephone exchange are used.

Other new carriers are called resellers. These carriers lease transmission facilities, which they resell at a profit to users whose buying power the reseller has in effect consolidated. Satellite common carriers are also appearing, and for large users they locate earth stations directly on the subscriber's premises, thus bypassing the local telephone company. All of these carriers offer services at less than the cost that American Telephone and Telegraph charges for long-distance transmission.

Depending upon the volume and routing of its telephone traffic, a large institution like the Catholic Church may find it advantageous to route some of its telephone traffic by way of some of these new carriers' facilities. A more interesting possibility would be for CTNA itself to become a resale carrier, or to engage in a shared use arrangement. Sharing, as the name implies, is an arrangement in which services and facilities are shared by several users, which pay proportionately for their use.²²

Sharing is essentially an unregulated activity, but the degree of regulation of resale remains undecided.²³ There is widespread recognition that an entity which does not own transmission facilities but merely leases them from others generally has limited market power, but a perceived shortage of video transmission facilities, especially satellite transponders, has thus far prevented total deregulation of resale. Resellers currently require FCC facilities authorization and tariff approval,²⁴ although these are already more pro forma than such authorization and approval for fa-

²¹ See *id.* at 324, 331.

²² See *In re Economic Implications and Interrelationships Arising from Policies and Practices Relating to Customer Interconnection, Jurisdictional Separations and Rate Structures*, 61 F.C.C.2d 766, 795 (1976).

²³ See *id.* at 783 ("tariff provisions preventing or restricting unlimited resale or sharing of private line services are unlawful").

²⁴ See *id.*

cility-owning carriers.

Since resale is not fully deregulated, it carries with it obligations that may dissuade some organizations from using this mechanism to market excess transmission capacity. For example, since resellers are currently treated as common carriers, they are required to provide service without discriminating. This prevents a reseller from refusing to serve a person merely on the basis of morality. It is for moral reasons that CTNA has decided not to become a reseller of uplink or transponder time; since a reseller may not control the content of its customers' communications, CTNA could not forbid the transmission of programming that is sexually oriented or violent. For a religious organization, sharing may be a more desirable arrangement than reselling. Generally, sharing arrangements must involve a small number of users that forego any opportunity for profit and that contract for time on a long-term basis.

The above discussion assumes that the services involved are "basic" transmission services. The applicable regulatory framework changes if an "enhanced" service is offered. Enhanced services provide more than just the pure transmittal of electromagnetic impulses. Such services use computer technology to interact with the transmitted information in some way, as in remote access data processing. The FCC may determine that it will not regulate any enhanced services.²⁵

It should also be noted that the nature of the regulatory framework changes if the communication both originates and terminates within a single state. Such communications are currently regulated by the state public utility commissions.²⁶ State commissions have generally resisted the concept of resale. There may also be battles over the extent to which states may assert jurisdiction, other than tariff regulation, over intrastate enhanced services, especially those where the "communications" aspects of the service are much more pronounced than the "processing" aspects.

Terminal Equipment

During the same period that long-distance transmission markets were being opened to competition, the market for telephone terminal equipment also became more competitive. Formerly, American Telephone and Telegraph and other telephone companies refused to permit users to connect to the telephone network any equipment that was not supplied by the telephone company. In fact, the telephone companies took such an expansive view of their local franchise monopoly that they went to court to block charities from selling plastic covers for telephone books. Ulti-

²⁵ See Note, *Storming the AT&T Fortress: Can the FCC Deregulate Competitive Common Carrier Services?*, 32 *FED. COM. B.J.* 205, 205-06 (1980).

²⁶ See *Western Union Tel. Co. v. Lee*, 174 Ky. 210, 192 S.W. 70, 71 (1917).

mately, regulatory and judicial decisions created the opportunity for competition. Signs of the resulting benefits are everywhere.

People no longer have to rent telephones from the phone company. They can be purchased at almost any shopping mall. For businesses and other large communications users, the range of terminal equipment offerings is truly staggering. There are a number of different types of private branch exchanges, also known as office switchboards or PBX's, some of which can route outgoing calls over the cheapest route, process graphic images and data as well as voice, and even monitor a building's energy usage. There are multiplexers, which permit four terminals at point *A* simultaneously to communicate with four terminals at point *B* using one telephone line, not four. There are network diagnostic systems, which permit a communications manager in New York to ascertain quickly why data being sent from Houston is not being received correctly in Chicago.

As participants in the new information age, you will benefit greatly from the expansion of terminal equipment offerings. Today, telephone companies offer their terminal equipment on a regulated basis, while independent manufacturers offer their terminal equipment on an unregulated basis. Soon all new terminal equipment offerings will be deregulated, although it is not yet clear what will be the regulatory treatment of regulated terminal equipment that is already installed.

Other Telephone Services

The range of new telephone services and products is astonishingly wide. New "custom calling" services let us have our calls routed to another office for the afternoon, interrupt a conversation with one friend to speak to another, or even to chat simultaneously with two people in a three-way call.

In the brave new world of telecommunications, you may soon obtain directory assistance from a small electronic screen rather than from a telephone book or a telephone operator. You may call up your electronic mailbox at your office or home to see if anyone has left you any messages. Teleconferences may eliminate much of the time and expense of business travel, as meeting participants in New York see and hear their counterparts in Washington and can even "hand" each other documents. With new technology, all of this is becoming routine, efficient, and economical.

This very abbreviated discussion is not intended to address all of the communications services that may prove of interest to CTNA, nor does it purport to serve as a textbook of legal issues raised by communications activities. Communications lawyers routinely are involved with dozens of other areas of the law such as antitrust, equal employment opportunities, and wage and hour regulations. Broadcast attorneys, on a daily basis, face the need for prompt responses to questions involving the "equal time"

doctrine, spectrum allocation, payola and plugola, contests, obscenity, and numerous other matters. Common carrier communications attorneys grapple with, among other things, tariff restrictions, interconnection standards, and carrier accounting rules. "Must-carry" rules, cross-ownership restrictions, and reporting requirements are all part of the diet of the communications attorney.

Diocesan attorneys also may be faced with many new communications issues. Some of these matters will require the application of settled policies to new situations; others will require adjustments to still-changing policies. The challenges will be great, but so too are the potential benefits of the many new and diverse communications opportunities.