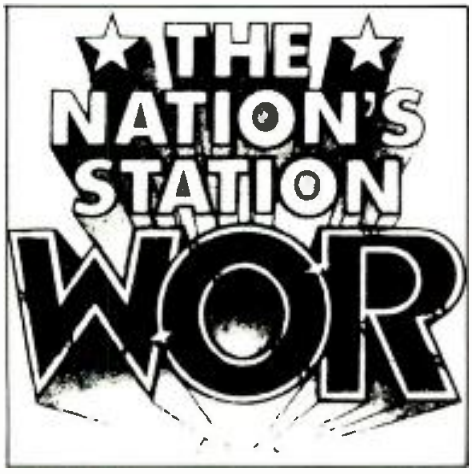
retransmission of Mets games that are broadcast by WOR-TV.

The case turns on what constitutes a passive carrier. The district court held that EMI did not fit that description, as contained in the law, since it selected WOR-TV's signals, exercised control over recipients of its retransmissions, and did not limit its activities to providing wires, cables or other communications channels for the use of others.

The decision was a cause of deep concern to resale carriers generally who saw themselves paying for programing they had been picking up at no cost. By the same token, it was welcomed by producers, who already received copyright payments from the stations as well as fees from cable systems based on their compulsory licenses.

The House Judiciary Committee, responding to expressions of concern from the cable industry and the resale carriers, made a number of changes in the law that



would in effect overrule the district court's decision. The changes are among those approved by the full House before the recess. But whether Senate action on the copyright bill will begin next month is questionable. The legislation is pending before the Commerce and Judiciary Committees.

Accordingly, the decision of the Second Circuit takes on considerable importance, assuming it survives. Lawyers for Doubleday, who have been arguing in court as well as before congressional committees that sports interests must have control over their product, last week said the decision on what course to take had not yet been made. David Lloyd, of Arnold & Porter, said the options included petitioning the court for rehearing, seeking Supreme Court review—and seeking relief from Congress, where sports interests are already working hard for amendments to the copyright legislation.

The members of the Motion Picture Association of America, who are interested bystanders in the case, were as disappointed with the decision as the sports groups. To Fritz Attaway, counsel for MPAA, the decision did not comport with reality. As for the court's basic conclusion, he said carriers like EMI "are as passive as someone holding up a 7-11 store."

The three-judge panel, in an opinion written by Chief Judge Howard T. Markey, of the U.S. Court of Customs and Patent Appeals, who was sitting by designation, made these points in concluding that EMI is a passive carrier:

- EMI had only one transponder available for its extra-terrestrial services, so "naturally" sought to retransmit the signals of "a marketable station." In meeting the demand for WOR-TV's signals, EMI acts "passively, retransmitting exactly what it receives and the entirety of what it receives." The technical restrictions that forced EMI to make an initial determination as to the signals of a particular station do not evidence the "'control' ... intended to be precluded" by the Copyright Act.
- The requirement of an absence of direct or indirect control over the particular recipients of [a passive carrier's] retransmission "is fully satisfied by EMI." The carrier, subject to FCC regulation, is bound to furnish its communications services on reasonable requests. And "the record indicates that no reasonable request for its services was ever refused by EMI."
- EMI only provides "wires, cables, or other communications channels for the use of others"—the cable systems receiving the signals of WOR-TV and other "originators." And the carrier is selling only its transmission services, not, as Doubleday contended, the Mets games. Cable systems pay EMI on the basis of the number of subscribers only up to a maximum of $3,000, regardless of the content of the transmitted signals.

The court's holding that EMI is a passive carrier appears to run counter to the decision of another appeals court in a case brought by WGN Continental Broadcasting Co. That company complained that United Video was violating the copyright law when, in retransmitting WGN-TV Chicago's 9 p.m. news program, United stripped a teletext transmission from the vertical blanking interval and substituted material of its own. The U.S. District Court that heard the case rejected the complaint, but on appeal, the U.S. Court of Appeals in Chicago reversed, holding that United must carry the WGN-TV teletext material (BROADCASTING, Aug. 16). United is seeking rehearing in that case.

But the appeals court last week noted that the court in the WGN case held that, "unlike" EMI, United "actively removed material inserted by WGN-TV into the 'vertical blanking interval' and substituted business news" and, thus, was not a passive intermediary.

Beyond the question of whether EMI is a passive carrier, the appeals court dealt with the congressional copyright policy that, the court believes, is aimed at assuring cable systems a variety of programing sources.

The court noted that "the centerpiece of the compromise reflected in the act is the compulsory scheme." And that scheme, it added, "presupposes a continuing ability of [cable] systems to receive signals for distribution to their subscribers." Adoption of Doubleday's position, the court said, "would stand all copyright owners athwart that conduit between the original broadcast and the opportunity for subsequent performances by [cable] systems."

Adoption of that position would also, in the court's view, enrich copyright owners to a degree not intended by Congress. If it were to impose a requirement that all intermediate carriers "negotiate with and pay all copyright owners for the right to retransmit their works, assuming such requirements were not impossible to meet," the court said, "such action would produce a result never intended by Congress, namely a substantially increased royalty payment to copyright owners with no increase in the number of viewers." □

Century files suit against Ventura, Calif.

Present cable operator says new request for proposal violates company's constitutional rights

Century Communications Corp., the nation's 26th largest MSO, has challenged the authority of local municipalities to regulate cable television systems.

The Canaan, Conn.-based MSO filed suit against Ventura, Calif., in Los Angeles district court alleging in part that the city's demands for franchise fees and access channels and regulation of basic cable rates were infringements of its First and 14th Amendment rights.

The suit was percipitated by Ventura's decision to open up bidding for a new cable franchise, rather than merely renewing the franchises of the two companies that now provide cable service to the city—Century and Avenue TV Cable Service Inc.—and that are set to expire in 1983.

The suit also alleges that the city and its cable consultant, CTIC Associates, Washington, violated federal antitrust and racketeering laws and that the city breached its original franchise contract with Century, by not renewing it.

The city's new request for proposal, which was issued Sept. 3, makes demands that "deprive and restrict" its First and 14th Amendment rights, Century said. It pointed specifically to the city's proposal to regulate rates and its insistence on a five percent franchise fee and other noncash charges. "Century's ability to exercise its function as an organ of the press ... are inextricably bound up with and are dependent upon its capital expenditures, its annual expenses and its revenues," the complaint said. "Due to the inextricable bond between revenues and the ability to disseminate, city price controls in combination with other city-imposed financial burdens permit city control over the quantity, quality, content and form of Century's First Amendment dissemination." The RFP's requirements that Century