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ABSTRACT

After a federal judge ruled in 1982 that some stipulations of the National Association of Broadcasters' (NAB) Television Code were violating antitrust laws, the NAB responded by suspending all code operations. Effects of the suspension on network advertising included (1) the disappearance of preclearance for commercials about cholesterol-related products and for advertising aimed at children; (2) the acceptance of some advertising, especially by local stations, formerly prohibited by the code; (3) a greater burden placed on the advertising industry's own regulatory agencies; (4) a lack of interest among top officials of the NAB in reformulating the code; and (5) greater efforts by the Children's Advertising Review Unit and by major networks to uphold the standards of the old NAB code. Thus, while the disappearance of the television code brought some changes in advertising practices, a number of agencies have accepted much of the burden of reviewing and regulating commercial advertising. (MM)

THE SUSPENSION OF THE NATIONAL ASSOCIATION OF BROADCASTERS' CODE AND ITS EFFECTS ON THE REGULATION OF ADVERTISING

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Abstract

This article uses legal research methodology to discuss the 1982 court decision which found parts of the NAB Code in violation of the Sherman Antitrust Act. The subsequent suspension of all Code activities by the NAB is also discussed. This is coupled with interviews with high-ranking personnel among advertisers, their agencies and the media; also included are interviews with regulators and members of the NAB. Since more than a year has elapsed since the suspension, these permit an evaluation of its effects on the regulation of advertising.

INTRODUCTION

On March 3, 1982, Judge Harold Green of the U.S. District Court for the District of Columbia ruled that parts of the Television Code of the National Association of Broadcasters violated the Sherman Antitrust Act. In response, the NAB immediately suspended all broadcasting Code activities.

When the suit that led to Judge Green's decision was first initiated by the Justice Department in 1979, the Washington Post commented that the government might be "pursuing a wild antitrust theory that conflicts with the best interests of television viewers."[1] Indeed, NAB membership at the time constituted 60 per cent of all commercial television stations; these accounted for 85 per cent of all viewing by the American public.[2] In fact, the Code's influence in regulating advertising went beyond those numbers. Since most station affiliates of the networks are NAB members, the networks had to be sure that all commercials they broadcast met Code standards. In a sense, then, it was irrelevant whether any network station was NAB Code affiliated; they all received network commercials that had undergone Code scrutiny. The only exception was locally produced and placed commercials on non-NAB stations.

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[1] "How Much Television Advertising?" The Washington Post, June 16, 1979, sec A, p. 12.

[2] NAB comments before the Federal Trade Commission, In the Matter of Proposed Trade Regulation Rule: Children's Advertising, TRR No. 215-60, pp. 9-10.

Adherence to the NAB Code was part of the advertising legal clearance process and a vital part of the regulation of advertising in this country. However, Judge Green's decision and the subsequent suspension of the Code by the NAB was greeted by surprisingly little response from the public or even within the industry. That led Advertising Age's Washington Editor Stanley Cohen to comment "The suspension is a very serious matter and it has received no public scrutiny."[3] Another trade publication, Madison Avenue, also viewed the situation with alarm:

> In short, the National Association of Broadcasters decided all ad bets were off, threw its standards up for grabs like a centre (sic) court jump ball in the NBA. The airwaves are thus now seemingly an environment where advertisers built along the bruising lines of Bob McAdoo can push right in, where more "touch-oriented" companies along the lines of Magic Johnson might get crowded out beneath the boards.[4]

This article traces events leading to the suspension of Code activities. It discusses the 1982 court decision and subsequent suspension of the Code. Since more than a year has now elapsed since the suspension, the article also attempts to trace changes that have occurred in the formal and informal regulation of advertising. Have there been changes in the legal clearance process on the part of the advertisers, their agencies or the media? Have formal agencies such as the Federal Trade Commission or informal ones such as the National Advertising Review Board played a larger role? Will the Code be resurrected and, if so, what form will it take? Key decision-makers from government and self-regulatory bodies, advertising industry and media spokespersons have been interviewed and their opinions summarized. Conclusions are offered concerning the case, the suspension and its repurcussions.

HISTORY OF THE RADIO AND TELEVISION CODES

Since its earliest days commercial radio has been regulated and advertising has

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[3] Telephone conversation with Stanley Cohen, Washington Editor of Advertising Age, October 6, 1982

[4] Mel Friedman, "Continued, and Solved: Who Killed the NAB Code?" Madison Avenue, August, 1982, p. 36.

been one of the principal targets. In 1928 the Federal Radio Commission (predecessor to the Federal Communications Commission) called for regulation of the amount and character of radio advertising.[5] The following year the NAB responded with a Radio Code that called for broadcasters to voluntarily eliminate all commercials between 7 p.m. and 11 p.m. At least one communications law expert had hypothesized this was a ploy to keep the nose of the federal camel from getting too far inside the broadcast industry's tent.[6]

The basic theme that industry self-regulation and the threat of formal government intervention are causally linked has been noted by others. Some are of the opinion that the promulgation of the NAB's first Television Code in 1952 was due to the prodding of the FCC.[7] A more recent example involved advertising to children. In 1972 members of the public and public interest groups pressured the FCC to propose rulemaking involving children's advertising.[8] Although the rules were never implemented by the FCC, the NAB responded in 1974 by strengthening its children's advertising guidelines.[9] In 1976, in AFTRA v. NAB, the court upheld the NAB Code standard prohibiting host-selling on children's programs, saying it was a "reasonable rule of conduct regarding good practice by its members in the public interest."[10] In recent years the pre-clearance of advertising

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[5] See, Mel Friedman, "Who Killed the NAB Code?," Madison Avenue, July, 1982 p. 42.

[6] Id.

[7] Conversation with Stanley Cohen, supra, note 1.

[8] Proposed Trade Regulation Rule: Children's Advertising, supra, note 2.

[9] See, National Association of Broadcasters, The Television Code, Twenty-Second Edition, 1981, Section IX, Part 6.

[10] 407 F. Supp. 900 (S.D.N.Y. 1976).

directed to children has been a major function of the NAB Code Authority.

The prodding and praising of the NAB by the FCC has been so recurrent that the NAB felt compelled to point out the close liaison in its defense against the most recent charges that ultimately led to the suspension of the Code.[11] Broadcasting magazine concurred-- suggesting the FCC should have served as co-defendant.[12]

EVENTS LEADING TO THE CODE SUSPENSION

On June 14, 1979, the U.S. Justice Department filed a complaint against the National Association of Broadcasters alleging that three Code standards violated the Sherman Act.[13] The standards in question were: (1) the Time Standards rule which limited network stations to nine and one-half minutes of commercials and 30 seconds of promotional material during prime time, and 16 minutes per hour at all other times; (2) the Program Interruption Standard which limited interruptions to prime time programs to four times per hour and further specified the number of consecutive announcements that could be made during various dayparts; and (3) the Multiple Product Standard which prohibited the advertising of two or more products or services in a single commercial less than 60 seconds long.[14]

Nearly two years later, on March 3, 1982, Judge Green upheld the Justice Department contention that the NAB's Multiple Product Standard that prohibited

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[11] U.S. v. National Association of Broadcasters, Civil Action No. 79-1549, U.S. District Court for the District of Columbia, Opinion of Green, J. on cross motion for summary judgment, March 3, 1982, Sec, IX.

[12] "Trapped in the Sanctuary?" Broadcasting, May 18, 1979, p. 98.

[13] Sherman Antitrust Act, 15 U.S.C. Sec 1 (1890), as amended, 15 U.S.C. Sec. 1 (1980).

[14] See, National Association of Broadcasters, The Television Code, Twenty-Second Edition, 1981, Sec. XIV, Parts 1, 2, 3, 4 Sec. XV, Parts 1, 2, 3, 4, 5, and Sec. IX, part 5.

"piggy-backing" in spots less than 60 seconds was a per se violation of the Sherman Act. Green further ruled that the other two questionable standards be set for trial since they were not per se violations and therefore could not be considered as part of a summary judgment.[15]

The Government's Case: The Sherman Act

Two types of analyses have been used when considering violations of the Sherman Act: (1) the per se application involves violations that are so plainly anti-competitive that no elaborate study of the industry is needed; and (2) the rule or reason approach is applied when the competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint and the reason why it has been imposed.[16]

The court concluded that the per se application was inappropriate for the time standard and the program interruption standards since certain aspects of the rules and the industry they dealt with involved the public interest and government regulation.[17] Moreover, the court said that in order to apply the rule of reason the extent to which the supply and price of commercial time were influenced by the standards would have to be determined and this could only be done through a trial.[18]

Multiple Product Standard: A Per Se Violation

Since the court concluded that there was a per se violation of the Sherman Act

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[15] U.S. v. National Association of Broadcasters, supra note 11. A summary judgment could not be issued if a "genuine issue as to any material fact" were present. Moreover, the Supreme Court has cautioned that summary judgments should not be readily granted in antitrust cases because the circumstances are generally "novel and complicated." See, Puller v. Columbia Broadcasting System, Inc. 368 U.S. 464, 473 (1962).

[16] National Society of Professional Engineers v. U.S., 435 U.S. 679, 692 (1978).

[17] U.S. v. National Association of Broadcasters, supra note 11, at 7-9. See also, Northern Pacific Railway Company v. U.S., 356 U.S. 1,5 (1958); Broadcast Music, Inc. v. Columbia Broadcast System, Inc. 441 U.S. 1, 19-24 (1979); Silver v. New York Stock Exchange, 373 U.S. 341 (1963); Jacalu v. Bache & Company, 520 F. 2d. 1231, 1237-39 (2d Cir. 1975).

[18] U.S. v. National Association of Broadcasters, supra note 13, at 14.

in the NAB's multiple product standard, a summary judgment was issued. Judge Green found that the questionable standard forced advertisers to purchase more commercial time than needed, artificially increasing the demand for television time, limiting the supply of time, and raising its price. Green estimated that the policy could result in "millions of dollars" in revenues to broadcasters at the cost of advertisers and consumers.[19]

The court further determined that this standard would particularly harm the small marketer who might be able to launch a new product by advertising it with successful products in thirty second spots. To support this argument, the government quoted testimony from Helene Curtis and Alberto Culver during 1964 hearings concerning the proposed NAB ban of all piggybacking.[20] Judge Green further commented that the multiple product standard was an "artificial rule, adopted by the broadcasters, acting in concert, which requires advertisers to purchase more commercial television time than they might wish and in excess of what they would be able to purchase if free market conditions applied.[21]

The court also applied the concept of tying, which occurs when a seller requires the purchasers of one product to purchase a second product which may not be wanted. In an earlier decision, this practice was considered a per se violation of the Sherman Act.[22] The multiple product standard represents the "coercive use of market power to restrict buyers' decision making which is at the heart of tying," according to the court.[23]

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[19] Id.

[20] Id. at 15-16.

[21] Id. at 16-17. See, also, National Macaroni Manufacturers Association v. FTC, 345 F. 2d. 421 (7th Cir. 1965).

[22] Northern Pacific Railway Co. v. U.S., 356 U.S. 1 (1958).

[23] U.S. v. National Association of Broadcasters, supra note 11, at 23.

NAB Defense

The court rejected the National Association of Broadcasters' three principal defenses. First, the court rejected the idea that adherence to the NAB Code was voluntary, saying that the Code represented a "classical horizontal agreement;"

> Combinations of entities which fix prices, manipulate supplies, or engage in other anti-competitive conduct are almost always 'voluntary' in the sense that a recalcitrant co-conspirator cannot be required, in a court of law, to keep his bargain. But that lack of legally enforcable coercion -- needless to say -- does not establish defense under the antitrust laws.[24]

In its accusations against the NAB, the government contended that the organization was fully aware of its power to enforce the Code. It cited NAB testimony regarding children's advertising:

> The mere fact that we have the power to threaten to drop people from the Code has its own inhibiting value. . . A station would rather not be known as someone bucking what appears to be a good system.[25]

The court also indicated that the NAB's lack of intention to violate the antitrust laws did not affect the court's judgment. "A civil violation can be established by proof of either an unlawful purpose or an anticompetitive effect."[26]

Judge Green also invalidated the National Association of Broadcasters' argument that the Code protected the public interest, saying that Congress has determined that the public interest is best protected through free and fair competition. Green said that only Congress, not the courts, can decide if there are exceptions to the antitrust laws.[27]

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[24] Id.

[25] Testimony of Stockton Helffuch before the FCC, In the Matter of Petition of Action for Children's Television, supra note 2, at 710.

[26] See, U.S. v. US Gypsum Co., 438 U.S. 422, 436 n. 13 (1978).

[27] U.S. v. National Association of Broadcasters, supra note 11, at 30.

Finally, NAB said that the Federal Communication Commission had endorsed the NAB Code throughout the years. The court responded that even if such endorsement did exist, they could not exempt the organization from antitrust laws.[28] But, the court also suggested that a general governmental support of the self-regulatory function did not necessarily mean that the FCC endorsed the NAB Code.[29]

Shortly after the suspension the Code offices were closed and a total of 24 employees in New York, Hollywood and Washington, D.C. were let go; others were reassigned within NAB wherever possible.[30] Lawyers and top management within the organization began to ponder what future, if any, there was for self-regulation on the part of the broadcast industry.

EFFECTS ON THE REGULATION OF ADVERTISING

Shortly after the suspension Hank Rodder, then manager of the Washington Code office and now assistant convention manager for NAB, stated:

> Understandably, we are surprised and disappointed. And given the confidence and working relationships advertisers and agencies had with the Code and its offices, there must be a certain amount of tentativeness and confusion now. . . different standards applied by each of the networks. . . as well as individual stations. The continuity is gone. I suspect the networks and stations will have to 'beef up' their own clearance procedures.[31]

Rodder's predictions were accurate. All three of the networks revised their clearance procedures and incorporated many of the NAB standards, almost verbatim, into their own standards. ABC was first to publish revised standards and guidelines

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[28] Id. at 30.

[29] Id. at 32.

[30] Telephone conversation with Mr. Hank Rodder, former manager of the Washington Code Office of the National Association of Broadcasters, Washington, D.C., September 24, 1983.

[31] Id.

for advertising and had them distributed within four months of the suspension. Armed with First Amendment protection and no fear of violating antitrust laws as long as they do not act collusively, the three networks are well prepared to enforce their own advertising acceptance policies. For example, ABC has 73 staff members in the Broadcast Standards and Practices Department. Three-quarters of these are concerned with advertising clearance and they review approximately 47,000 commercials per year.[32]

While many of the standards remained intact, there was a crucial shift in who applied the standards and what this meant for regulation. Harvey Dzodin, east coast director of broadcast standards and practices for ABC, noted "It is more difficult now. It was nice to have the Code there as a buffer. Often we could use it rather than having to wrestle with a decision here at ABC."[33] He said it is possible more advertisers will now come and say the commercial has been accepted by the other networks, attempting to whipsaw one network into some re-interpretation of standards. There is also the possibility that the network's own sales represenatives will pressure clearance personnel because they have a vested interest in keeping their advertisers and agencies happpy. Dzodin says there has been an increase in advertisers who have come to the network and asked for changes on Code-related matters. Another high-placed network clearance official who asked not to be identified said "We are now under increased, direct pressure from advertisers to go down that long, slippery slope. . . ."[34]

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[32] Speech by Jeffrey Edelstein, then director of broadcast standards and practices for ABC, "The ABC's of Commercial Clearance and Complaint Resolution," Council of Better Business Bureaus luncheon, New York, N.Y., Jan. 12, 1982.

[33] Personal conversation with Harvey Dzodin, east coast director of broadcast standards and practices for ABC, New York, N.Y. Aug. 23, 1982.

[34] Personal conversation with network clearance official, New York, N.Y., August 24, 1982.

Representatives of advertisers and their agencies sense this shift but minimize its effects. Sam Thurm, senior vice president of the Association of National Advertisers, says "There will be some effect but not a great deal."[35] Jerry Schwartz, a lawyer in the Davis & Gilbert law firm employed by 15 advertising agencies to aid in legal clearance, says the suspension has not affected his everyday work much because the networks incorporated many of the Code standards; he did volunteer "It is possible the networks interpretation of these things will be different."[36] Phyllis Dubrow, the director of legal clearance at Doyle Dane Bernbach, the nation's tenth largest advertising agency, echoed the same sentiments:

> It wasn't a direct consideration for us. We deal with the networks and they enforced the Code. Now, I suppose, there will be more of an onus on the networks.[37]

Ms. Dubrow did mention that Doyle Dane Bernbach created advertisements in two product areas where commercials had to be pre-cleared by the NAB -- cholesterol-related products and children's advertising. This pre-clearance is no longer necessary and is one of the direct effects of the Code suspension.

The process of advertising regulation is a complex web of individuals and agencies involved both in clearance procedures before the commercials are aired and regulation by formal and informal agencies post hoc. It is logical to assume that the disappearance of one element might place increased pressure on other entities involved. The National Advertising Division of the National Advertising Review Board is one such entity. During its first eleven years of operation through July, 1982, this trade-sponsored self-regulatory body conducted 1,650 investigations

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[35] Personal conversation with Sam Thurm, senior vice president of the ANA, Washington, D.C., October 29, 1982.

[36] Personal conversation with Jerry Schwartz, Davis & Gilbert, New York, N.Y., Aug. 5, 1982.

[37] Personal conversation with Phyllis Dubrow, director of legal clearance at Doyle Dane Bernbach, August 4, 1982.

and obtained modification or discontinuance in 840 cases in which advertisements were judged deceptive.[38] However, Ronald Smithies, director of NAD, says there has been no increase in case load directly attributable to the demise of the Code. He said the suspension confirmed his own point of view that an established code and set of rules is a short-sighted way of approaching advertising regulation and that the case-by-case approach adopted by his own organization is far more viable. Smithies noted that the Children's Advertising Review Unit of NAD might be directly affected since pre-clearance of children's advertising under the Code no longer exists.[39] Kathy McGowan, directs the CARU. Although pre-clearance is not required by her unit, she says there has been a general increase in the number of discussions with advertisers and their agencies concerning creative concepts involving children's advertising. But McGowan said there has been no clearly traceable increase in after-the-fact prosecutions that have resulted.[40]

Another agency that might directly be affected by the suspension is the Federal Trade Commission. Howard Beales, assistant to the director of the Bureau of Consumer Prodtection at the FTC, said there won't be much effect if the networks and NAD/NARB continue to do their jobs. In regard to his own agency, "The FTC has not dealt with the issue at all since the suspension; the topic has not really come up."[41] Beales did note that some of the standards of the NAB Code concerned taste and morality and these are not within the statutory realm of the FTC. Beales' remarkes are typical of FTC personnel who share President Reagan's attitudes toward de-regulation. The number of formal prosecutions for deceptive advertising has diminished with the Reagan administration in power and

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[38] NAD/NARB Case Report Status, July 31, 1982.

[39] Personal conversation with Ronald Smithies, director of the National Advertising Division, New York, N.Y. August 19, 1982.

[40] Personal conversation with Kathy McGowan, director of the Children's Advertising Review Unit of NAD, New York, N.Y. August 19, 1982.

[41] Telephone conversation with Howard Beales, assistant to the director of the Bureau of consumer protection of the Federal Trade Commission, Washington, D.C., October 19, 1982.

it is unlikely the agency will respond in any way to the demise of the Code.

In the introduction of this article it was noted that, in contrast with the FTC attitude, the media and business publications that cover the advertising and broadcasting industry had strong sentiments on the matter. Perhaps the strongest opinion was voiced by Stanley Cohen of Advertising Age: "When the case arose the NAB turned tail and ran. They welcomed the opportunity to get out from under this expensive public service responsibility."[42] Administration of the Code accounted for 14 per cent of the NAB budget.[43] When asked to respond to Cohen's statements, personnel at various levels of the NAB refused to comment on them or anything else regarding the situation, noting their "legal department has advised against it."[44] Robert Hallahan, director of the news bureau in the public affairs department, said the president of NAB is going to name a "study group" to look at the situation.[45] That group has not been named to date and it appears the top management of NAB is dragging its heels on any re-formulation of the Code.

CONCLUSIONS

Advertising regulation is a complex web of formal and informal agencies that begins with advertiser and agency legal clearance procedures, proceeds through media clearance and ends with post hoc regulation through both government and informal regulatory agencies. Historically, the NAB has been part of this process, first with a Radio Code and, later, with a Television Code regulating advertising practices. Although the Television Code has been in operation since 1952, the Justice Department instituted a suit in 1979 that alleged antitrust violations.

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[42] Telephone conversation with Stanley Cohen, Washington, D.C., October 5, 1982.

[43] Rodder conversation, supra, note 30.

[44] Telehpone conversation with Robert Hallahan, director of the news bureau of the public affairs department of the NBA, Washington, D.C., April 1, 1983.

[45] Id.

In 1982, the U.S. Court of Appeals concurred that some Code stipulations violated the Sherman Antitrust Act. The NAB responded by suspending all Code operations.

Over one year has passed since the suspension and the effects are now discernable. First, pre-clearance of commercials for cholesterol-related products and advertising to children has disappeared. In regard to children's advertising, the burden has partically been picked up by the Children's Advertising Review Unit of NAD. Second, the three major networks have revised their own advertising standards by incorporating many-- but not all-- of the old NAB Code standards. In general, they have "beefed up" their own scrutiny. However, network clearance personnel are under increased pressure from advertisers and agencies-- not to mention sales personnel in their own networks. At the local level, some stations have begun to accept advertising formerly prohibited by the Code.[46] Third, there is a larger burden placed on agencies that regulate on a case-by-case basis after the ads have appeared in the media-- notably the advertising industry's NAD/NARB in New York and the FTC in Washington, D.C. In this era of de-regulation the FTC is not predisposed to take any action on the matter. The NAD/NARB notes little change in its case activity in short run but allows that any effects of the suspension may be only felt in the longer run. Fourth, it appears top management of the NAB are not anxious to re-formulate the Code or develop a new one because of possible legal repurcussions and the expense involved in the administration of a new Code.

In sum, one entity that regulates commercial advertising has disappeared. Since a number of steps and agencies are involved in regulation, a larger burden

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[46] Howard Beales in the conversation already cited noted that some stations in Boston began to carry liquor advertising but backed off after adverse public response. In another example, Marilyn Hayden, special projects manager of WJLA-TV, Washington, D.C., noted in a telephone conversation on October 19, 1982, that issue-oriented advertising that might not have been accepted under the Code is now being run on that station. Other examples can be found in the trade press.

has fallen on them. In truth, the remaining agencies are largely capable of shouldering the burden. But some changes in the regulation of false and deceptive advertising have occurred in the short run; it is possible more will occur in the longer run.

Directions for future research in this area could involve a legal analysis to determine what new Code features would be both effective and legal. Research could also focus on public awareness of the Code, its prohibitions, and the subsequent suspension. Last, this analysis could be replicated after a five year period to look for long run effects of the demise of the NAB Code.