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*Legislation and the Marketplace Model**

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Section 111 of the Copyright Act of 1976 was intended to resolve the long-standing controversy regarding copyright payment by cable television systems that retransmit broadcast signals. In section 111 of the Act, Congress set forth a compulsory license scheme for cable systems.[1] This scheme establishes a statutory fee schedule based on the gross revenues of the cable system and the number of distant signals it carries.[2] The Copyright Royalty Tribunal, a regulatory authority created by the Act, is charged with the task of monitoring and adjusting copyright fees "to reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication . . . ."[3]

Yet, as new patterns for cable distribution evolve, it becomes apparent that the provisions of the Act have not really disentangled the cable-copyright knot.[4] This article will discuss the background of this continuing problem and how the Act fails to

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* The views presented herein are solely those of the author; they are not intended to represent the position of the National Telecommunications and Information Administration, or any of its other employees.

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1. 17 U.S.C. § 111(d) (Supp. I 1977).

2. All cable systems, through the compulsory license fee, must pay a minimum royalty of 0.675% of gross receipts. For systems carrying two to four distant signals, the cable system must pay 0.425% of gross receipts, while for five or more distant signals, the system must pay 0.2% of gross receipts. 17 U.S.C. § 111(d)(2)(B) (Supp. I 1977). The license fee is for "the privilege of further transmitting any network programming of a primary transmitter in whole or in part beyond the local service area of such primary transmitter." 17 U.S.C. § 111(d)(1)(B)(i) (Supp. I 1977).

3. 17 U.S.C. § 801(b)(1)(C) (Supp. I 1977).

4. *See* Meyer, *The Feat of Houdini or How the New Act Disentangles the CATV-Copyright Knot*, 22 N.Y. L. SCH. L. REV. 545 (1977).

remedy the conflict. It will suggest an alternative model—retransmission consent—that is designed to let marketplace forces govern the relationship among broadcasters, cable systems, and copyright owners.

I
The Defects of the 1909 Copyright Act

In the 1950's, cable television emerged as a device to bring in local broadcast signals, via a master antenna, to homes that had difficulty receiving the conventional signal because of limitations of terrain.[5] By the 1960's, however, these early systems gave way to more complex ones that offered distant as well as local signals to homes wired for cable reception.[6] These cable systems imported broadcast signals without paying any royalty to the copyright owners of the various programs being retransmitted. As a result, the broadcaster was the only party liable for payment of a copyright royalty; cable systems profited from the service they offered since they did not pay for any of its product. The cable system's master antenna merely picked up broadcast signals from the electromagnetic spectrum and retransmitted them to homes by coaxial cable.

Fortnightly Corporation owned two such systems in West Virginia that carried two local and three distant signals for a flat monthly subscription rate. All signals were picked up by Fortnightly's master antenna and were carried without editing. The systems did not originate any programs. United Artists Television held copyrights on some motion pictures that the systems picked up from broadcasters. Unlike the broadcasters, however, Fortnightly did not obtain licenses under these copyrights. In the ensuing case, *Fortnightly Corp. v. United Artists Television, Inc.*,[7] the cable distribution was evaluated under the Copyright Act of 1909. Although United Artists contended that Fortnightly's system infringed upon its exclusive right under the Act to "perform . . . publicly" its dramatic works,[8] the Supreme Court held that the systems were not liable for copyright infringement under existing law. The Court's reasoning was based upon an examination of the function that

5. *See* D. LE DUC, CABLE TELEVISION AND THE FCC 60-113 (1973).
6. *Id.* at 114-36.
7. 392 U.S. 390 (1968).
8. 17 U.S.C. § 1(d) (1970) (superseded by Copyright Act of 1976).

cable played in the "total process of television broadcasting and reception."[9] Under this analysis, the Court concluded that only broadcasters should be considered active "performers," since the role of the broadcaster is to select and procure programming and to transmit the converted signals for public reception.[10] In contrast, the Court found that cable was a passive system:

> The function of CATV [cable] systems has little in common with the function of broadcasters. CATV systems do not in fact broadcast or rebroadcast. Broadcasters select the programs to be viewed; CATV systems simply carry, without editing, whatever programs they receive. Broadcasters procure programs and propagate them to the public; CATV systems receive programs that have been released to the public and carry them by private channels to additional viewers. We hold that CATV operators, like viewers and unlike broadcasters, do not perform the programs that they receive and carry.[11]

Cable systems' freedom from copyright liability was further enhanced by a subsequent Supreme Court decision, *Teleprompter Corp. v. CBS, Inc.*[12] The Teleprompter cable systems were substantially less passive than those owned by Fortnightly, since Teleprompter was utilizing a microwave system to import distant signals for retransmission as well as originating some of its own programming. Accordingly, CBS, which owned a number of television stations, argued that the Teleprompter systems were functionally equivalent to broadcast stations and should, for copyright purposes, be deemed to have "performed." Although this argument was accepted by the court below,[13] it was rejected by the Supreme Court. The Court refused to distinguish between systems like Fortnightly's, which picked up existing signals with an antenna, and those like Teleprompter's, which imported distant broadcast signals that could not normally be received by a master antenna. The fact that the cable system itself originated programs was held to be irrelevant in determining copyright liability.[14] In the Court's view, the central question still involved the reception and rechanneling of the copyrighted materials by the

9. 392 U.S. 390, 395-97 (1968).
10. *Id.* at 397-98.
11. *Id.* at 400-01.
12. 415 U.S. 394 (1974).
13. CBS, Inc. v. Teleprompter Corp. 476 F.2d 338, 350 (2d Cir. 1973).
14. 415 U.S. at 405.

cable systems. Again, the Court found cable systems to be passive receivers since they carried, without editing, whatever programs they received.[15] The Court reasoned that even though distant signals were normally not available to local cable audiences, no copyright infringement existed because the material had already been released to the public at large.[16] As a result of these two cases, the copyright-cable problem shifted to Congress and the Federal Communications Commission (FCC). The revision process that culminated in the passage of the 1976 Act was already under way, but the legislative route took a number of years. In the interim, the FCC promulgated regulations aimed at minimizing the problem.[17] In the 1972 Cable Rules,[18] the Commission established a complex system designed to limit the ability of cable to import copyrighted material without payment. The most important provisions in this regard limited the number of distant signals that cable operators in the top 50 markets could import and guaranteed exclusivity for non-network programs carried by broadcasters for the term of the contract between the broadcaster and the copyright owner.[19]

In 1976, Congress passed the new Copyright Act, effective January 1, 1978, mandating compulsory license fees for all cable systems. The Act further provided that fees should be pooled and distributed by the Copyright Royalty Tribunal to copyright holders.[20] Thus, cable systems have for the first time been brought within the structure of statutory copyright law. They must now account for programs received in any manner from broadcast stations and must pay a small percentage of gross revenues as a compulsory license fee.[21]

II
New Patterns of Cable Distribution: The "Superstations"

On October 25, 1978, the FCC officially endorsed an "open en-

15. *Id.* at 410.
16. *Id.* at 409-10.
17. *See* LE DUC, *supra* note 5, at 137-82; S. RIVKIN, A NEW GUIDE TO FEDERAL CABLE TELEVISION REGULATIONS 45-123 (1978).
18. *See* Cable Television Report and Order, 36 F.C.C. 2d 143 (1972).
19. *See* 47 C.F.R. §§ 76.51-76.161 (1977).
20. 17 U.S.C. §§ 111(d)(4), (5) (Supp. I 1977).
21. See note 2, *supra*.

try" policy for satellite-distributed television "superstations."[22] The prototype superstation is WTBS, Atlanta, an independent UHF-station that programs primarily sports and feature films. Utilizing satellite channels leased by a resale common carrier, WTBS reaches cable systems in 43 states and an estimated audience of more than two million homes.[23] The cable systems receive signals from the satellite by earth station and pay the resale common carrier, Southern Satellite Systems, Inc., ten cents per month for each cable subscriber.[24]

Since the Commission announced its open entry policy,[25] three more superstations have begun transmitting to cable systems throughout the country. Approximately 900 earth stations receive programming from one or more of these stations and retransmit the signal to over five million homes.[26] The new group includes WGN-TV, Chicago, whose signal is relayed by United Video Inc., a resale common carrier that leases channels on the RCA Satcom I satellite; KTVU(TV), San Francisco-Oakland, distributed by Satellite Communications Systems Inc.; and WOR-TV, New York, which is distributed by Eastern Microwave, Inc. Cable systems receiving signals from these stations pay the same ten-cent monthly fee per subscriber to the respective common carrier.[27]

The freedom of a common carrier to lease satellite channels and relay broadcast signals to a cable system's earth station has led to differences in superstation broadcasting practices concerning the carriage of signals. WTBS, for example, can be characterized as an active superstation; it pursues a cable audience and solicits advertising at rates that reflect the increased viewership.[28] WGN-TV, in contrast, is a passive superstation; it neither solicits distant cable systems for pickup nor attempts to charge advertisers more for its increased area of coverage. This status has hurt the station's ability to contract for programming. In 1979, WGN-TV obtained the rights to broadcast the NCAA basketball playoff games featur-

22. *See* United Video, Inc., 44 Rad. Reg. 2d (P&F) 1217 (1978).

23. Montgomery, *An Atlanta TV Outlet Seeks to Blanket U.S., Get Ad Rates to Match*, Wall St. J., Jan. 9, 1979, at 1, col. 1. *See The State of the Superstations*, BROADCASTING, Jul. 23, 1979, at 29.

24. *See* BUS. WEEK, Nov. 27, 1978, at 36.

25. United Video, Inc., 44 Rad. Reg. 2d (P&F) 1217 (1978).

26. INTERMEDIA, May 1979, at 4.

27. *The State of the Superstations*, BROADCASTING, Jul. 23, 1979, at 29.

28. *Id.*

ing three area schools. But the sale was ultimately refused since the station is picked up by satellite and distributed nationwide to cable systems. The sale in Chicago, in effect, became a national sale, so that the copyright owner's intended bargain was undermined.[29] The station, which has no control over the carriage of its signal, was similarly impaired in arranging a deal that would have resulted in programming aimed at the area that it was licensed to serve. The bargain, in short, was not controlled by marketplace forces. Rather, it was governed by the extraneous factor of cable reception that was beyond the control of the bargaining parties.

Recently, a third category has emerged: the involuntary superstation. ASN, Inc., a resale common carrier, was granted permission by the FCC to retransmit the signal of station KTTV(TV), Los Angeles, via satellite to cable systems. KTTV subsequently filed a petition with the Commission to review this decision, claiming that ASN, Inc., was appropriating without consent, and selling for a profit, programs the station had purchased for release to the Los Angeles television market.[30]

Despite differences among the kinds of superstations, a common problem emerges. In each situation, marketplace forces are hindered by the compulsory license, which is an artificial pricing scheme that subsidizes cable systems at the expense of broadcasters and/or copyright owners. Thus, the emergence of the superstations again raised the sensitive cable-copyright problem. Copyright owners who originally contracted with local independent television stations now find that signals are picked up by satellite and transmitted to cable systems across the country. Although there is the statutory protection of the compulsory license, it still may not afford the copyright owner equitable financial compensation, since the compulsory license fee extracts a very small percentage of gross revenues.

As the superstation benefits from increasing audiences, it can revise its advertising rates and attact new national advertisers. In fact, this is the way that WTBS is promoted.[31] Cable systems benefit by receiving additional, popular programming that in turn attracts new subscribers. Ironically, the copyright

29. [1979] 19 TELEVISION DIG., Mar. 19, 1979, at 4.

30. *See Soured on Satellites*, BROADCASTING, Jul. 9, 1979, at 50; *Battle Rages at FCC over Reluctant Superstation*, BROADCASTING, Jul. 23, 1979, at 44-45.

31. WTBS, Atlanta, has already set new national rates and is beginning to attract national advertisers. Montgomery, *supra* note 23, at 1, col. 1.

owner is frozen out of the marketplace by the very compulsory license scheme that was designed for his or her protection. The choice is to sell at a local rate, and accept the compulsory royalty, or not to sell at all.

Congress provided the Copyright Royalty Tribunal with flexible powers, enabling it to increase rates to account for technological developments and changing FCC policies.[32] But at best, the Tribunal can only approximate the conditions of the real economic marketplace.[33] It may be argued that copyright holders have the free choice to withhold selling the product to a superstation; but refused sales, in the end, will only result in limiting diversity of programming for both the local viewers of the superstation and those who receive it through cable systems. Such an outcome is antithetical to the First Amendment goal of promoting diversity in mass media.[34] The FCC, since 1972, has provided some protection for copyright owners by enforcing reasonable exclusivity contracts for non-network programs made with broadcasters.[35] The Commission, however, has recently proposed rescinding these rules. The effect would be to allow the importation of programming for cable systems in a market where the television station has obtained exclusive rights from the copyright owner.[36] Consequently, if this change is adopted, the copyright owner would be entitled to receive from cable systems only the minimal income derived from the compulsory license fee. The local television station, unable to obtain exclusive rights, will lower its bid, and the copyright owner will be at a disadvantage when bargaining with either medium.

III
An Alternative Model: Retransmission Consent

One means of alleviating the new copyright problem caused by the emergence of superstations is to require, either by law or FCC regulation, a mechanism that allows the copyright own-

32. 17 U.S.C. §§ 801(b)(1)(C), (2)(B) (Supp. I 1977).

33. *See generally* Besen, Manning & Mitchell, *Copyright Liability for Cable Television: Compulsory Licensing and the Coase Theorem*, 21 J.L. & ECON. 67 (1978).

34. *See, e.g.*, Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367, 390 (1969); New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); Associated Press v. United States, 326 U.S. 1, 20 (1945).

35. *See* 47 C.F.R. §§ 76.92-76.161 (1977).

36. *See* Notice of Proposed Rulemaking in Docket Nos. 20988 and 21284, 71 F.C.C.2d 1004 (1979).

er to compete in the marketplace on an equal basis with broadcasters and cable systems. This result could be achieved by requiring cable systems to obtain retransmission consent from broadcasters before carrying their signals to their viewers. Broadcasters, in turn, could only grant such consent if they had previously bargained for it with the copyright owner. If this had not been done, the copyright owner could seek injunctive relief or monetary damages from the station,[37] because broadcasters have been subject since 1909 to full copyright liability.[38] The broadcaster, who deals with program suppliers in the normal course of business, is the logical agent for facilitating retransmission consent. Cable systems, however, may wish to establish their own agents, or middlemen organizations may develop to bargain for various copyrighted programming packages.

A retransmission consent requirement could restore balance among the competing interests and could reconcile the still-existing incompatibility between broadcasting and cable, the two delivery systems for non-network programs. Once the superstation revises its advertising rates to reflect the nationwide cable audience, it will be in a position to pay the copyright owners (*e.g.*, program suppliers such as MCA, Inc. and Paramount Pictures, Inc.) for the right to distribute programs nationally through cable systems. If increased revenues from advertising were insufficient or if the superstation did not revise its rates, the broadcaster could pass on some of its programming costs (*i.e.*, the price negotiated with the copyright owner) to the cable systems in the form of a reasonable fee for obtaining retransmission consent. If this were done, the cable systems could in turn raise subscriber rates to reflect market demand. In any event, each distribution system would get what it was willing to pay for, without worrying about a third-party undermining the bargain.

A system of retransmission consent for advertiser-supported, non-network programming is also consistent with the other primary scheme of video distribution: pay television.[39]

37. *See* 17 U.S.C. §§ 502, 504 (Supp. I 1977).

38. *See* Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. at 398-99; Copyright Act of 1909, ch. 320, § 1, 35 Stat. 1075 (1909) (current version at 17 U.S.C. § 106(4) (Supp. I 1977)). *See also* H.R. REP. No. 2222, 60th Cong., 2d Sess. 4 (1909).

39. Pay television is a system whereby a subscriber, utilizing either a coaxial cable hook-up or a receiver equipped to unscramble coded broadcast signals, is charged a fee

Pay television entrepreneurs in both the cable and broadcasting fields are governed by marketplace forces. They must bargain with copyright owners for the sale of programming and are subject to full copyright liability. The only difference between pay television and cable that retransmits broadcast signals is that in the latter system, the advertiser, rather than the viewer, pays directly for the program.

The concept of requiring retransmission consent is not new. It was first proposed by the FCC in 1968 to short-circuit the *Fortnightly* controversy,[40] but was abandoned by the Commission in 1972 as not feasible under then-existing market conditions.[41] Since there was total disharmony between broadcasting and cable at that time, it was likely that broadcasters would have withheld retransmission consent in an effort to eliminate cable as a viable competing distribution system.[42]

The situation today, however, is far different. Cable has achieved increased penetration in the marketplace,[43] and there are indications that it may finally expand to cover significant urban markets.[44] The satellite has also come into the picture. Independent television stations can now move to expand their audiences and advertising revenues; cable systems are seeking more attractive programs to gain additional subscribers; common carriers are interested in leasing channels for satellite distribution; and program suppliers, as always, are aiming for increased sales of their product.

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on a per-program or per-channel basis for receiving specialized programming (*e.g.*, feature films or sports events).

40. *See* Cable Television Report and Order, 36 F.C.C.2d 143, 153 n.24.

41. *Id.* at 150-54, 165.

42. During the pendency of the rulemaking that froze distant signal authorizations except for those that requested waivers by imposing retransmission consent (Notice of Proposed Rulemaking and Notice of Inquiry in Docket No. 18397, 15 F.C.C.2d 417 (1968)), the Commission authorized only two experiments with this mechanism: one by Top Vision Cable Company and the other by Tri-Cities Cable TV, Inc. The Tri-Cities experiment was terminated "before useful results were obtained." Cable Television Report and Order, 36 F.C.C.2d 143, 153 n.24. Apparently, broadcasters during this period were reluctant to initiate actions that would have allowed retransmission consent to function.

43. There are now nearly 4000 cable systems operating; over 19 percent of American homes are wired for cable. [1979] 19 TELEVISION DIG., Mar. 5, 1979, at 2. Within the past ten years, cable penetration into homes has more than tripled. C. STERLING & T. HAIGHT, THE MASS MEDIA: ASPEN INSTITUTE GUIDE TO COMMUNICATION INDUSTRY TRENDS 56 (1978).

44. *See Vastly Broadened Cable Service in Columbus, Ohio, Planned by Warner*, BROADCASTING, Feb. 14, 1977, at 33.

There would be, in fairness, serious problems left to work out upon adoption of this model. Ideally, if the retransmission consent requirement governed this area exclusively, and the compulsory license for secondary transmission by cable systems was abolished, all cable programming—whether advertiser-supported or pay—would have to be obtained in the marketplace. Yet, this would be inconsistent with the congressional intent in enacting the Copyright Act of 1976,[45] which sought to resolve the problem through compulsory licensing, a scheme that represented a consensus among broadcasters, cable systems, and copyright owners. As a matter of equity and political practicality, compulsory licensing should be retained for all existing cable systems, along with the existing FCC rules that enforce exclusivity agreements for non-network programming.

For new cable systems, or for systems expanding into new franchise areas, a retransmission consent requirement rather than the compulsory license scheme should govern. These systems are full-fledged competitors that can bargain on their own, and they should not be protected in the same way that Congress protected cable in the 1976 Copyright Act, when the model cable operation was more akin to the Fortnightly and Teleprompter systems, rather than the multi-channel, multi-service medium of today and certainly of tomorrow.[46] This distinction justifies a two-tier system, and there is no reason that both compulsory licensing and retransmission consent cannot coexist. These latter systems should be exempt from the FCC

45. *See* H.R. REP. No. 1476, 94th Cong., 2d Sess. 88-101 (1976); S. REP. No. 473, 94th Cong., 1st Sess. 78-83 (1975).

46. A number of other independent television stations, such as WPIX(TV), New York; WSBK-TV, Boston; KBMA-TV, Kansas City, Mo.; and KTVT(TV), Dallas, are being distributed through traditional cable carriage and microwave links to areas extending well beyond their respective broadcast service areas. They, too, are in effect "superstations." *The State of the Superstations*, BROADCASTING, Jul. 23, 1979, at 29. Presumably, Congress had both cable and microwave links in mind when it enacted the Copyright Act of 1976, so that the compulsory license should be applicable. On the other hand, is it really a meaningful distinction to treat satellite transmission of superstations differently than microwave transmission of superstations? This question, which is not dealt with in the legislative history of the Act, should be addressed when Congress or the FCC considers the imposition of a retransmission consent requirement. In this regard, the difference in transmission modes seems less important than the difference between primitive cable systems and the more advanced ones. Thus, retransmission consent could be made applicable to any superstation that was received by a new or expanding cable system, regardless of how the signal was transmitted.

rules governing non-network program exclusivity, because retransmission consent itself is designed to provide for fair bargaining. In this way, at least for the future of cable development, the marketplace forces will be allowed to operate.

Conclusion

It is unrealistic to assert that the Copyright Act of 1976 finally resolved the CATV-copyright controversy. The Act represents a solid effort to mediate this controversy among the parties in the aftermath of *Fortnightly* and *Teleprompter*. Given the evolutionary process of this legislation, it is understandable that Congress could not account for rapid technological developments or new FCC policies. The Act, in creating a Copyright Royalty Tribunal, acknowledges this.[47] The Tribunal could at present seek to resolve the controversy in light of the development of superstations, but this could only be in the form of mandated fees that do not necessarily reflect what the parties themselves would bargain for. Although Congress could take a second look at the problem, it may be unwilling to do so since the new Act was so recently enacted. Therefore, the most practical forum for considering the problem is the FCC, since it can harmonize its old cable rules with the competitive environment of today and can account more readily for emerging technological trends. Eliminating the non-network program exclusivity rules while retaining a compulsory licensing scheme would merely shift the situs of government regulation from the FCC to the Copyright Royalty Tribunal. Although this effort would be deregulatory in form, it would not be consistent with the ultimate principle of deregulation that a retransmission consent requirement would advance: allowing marketplace forces to govern where full and fair competition, such as that which exists among broadcasters, new and expanding cable systems, and copyright owners, is possible.

47. *See* 17 U.S.C. §§ 801(b)(1)(C), (2)(B) (Supp. I 1977).