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CATV AND COPYRIGHT LIABILITY: TELEPROMPTER CORP. v. COLUMBIA BROADCASTING SYSTEM, INC. AND THE CONSENSUS AGREEMENT

One of the great challenges of our legal system in the twentieth century has been the accommodation and integration of profound technological changes with our existing institutions and economic structure. Perhaps no more significant example of this exists than the struggle of competing economic interests over the development of community antenna television ("CATV"). In the courts, before Congress and in innumerable regulatory proceedings conducted by the Federal Communications Commission ("FCC"), cable developers, broadcasters and program owners have fought over the role CATV is to play in our communications system. In its most primitive form, CATV is a reception system for providing access to clearer and more numerous television channels than are available with a home antenna. In the long run, CATV offers the potential of a new and complex communications system. As such, CATV poses a substantial threat to the existing broadcast communications industry. That threat has not gone unobserved. The broadcast industry has undertaken a persistent campaign to protect itself and inhibit CATV growth.

A major point of conflict has been the question of copyright liability for CATV carriage of copyrighted programs. In its basic form, CATV exists by exploiting the work of broadcasters and copyright owners who transmit programs which CATV picks up and delivers to the subscriber's home for a fee. On the surface, fairness would seem to require some kind of return to the copyright owner. However, the copyright law in this country considerably predates the development of television, and the legal answer to this problem is not at all clear. Furthermore, there is an underlying policy question of whether copyright law should serve only to remunerate the creator, or provide reward so as to promote some larger public benefit which comes from the creation and dissemination of artistic and intellectual works.

This note will trace and analyze the significant CATV copyright cases culminating in the recent Supreme Court decision of Teleprompter Corp. v. Columbia Broadcasting System, Inc.\textsuperscript{1} which seems to have finally settled the issue under the Copyright Act of 1909 in favor of nonliability. It will discuss the underlying economic and

\textsuperscript{1} 42 U.S.L.W. 4323 (U.S. March 4, 1974).
policy arguments and considerations in the context of both copyright and administrative regulation. Finally, it will focus on the compromise negotiated by the interested parties for integrating copyright and regulation, and suggest several changes in proposed copyright legislation for a final and more satisfactory resolution of the uncertainties which have plagued CATV over the past decade.

The "Performance" Argument

The Fortnightly Decisions

Litigation over the liability of CATV for copyright infringement under the Copyright Act of 1909 has been confined to two test cases, *Fortnightly Corp. v. United Artists Television, Inc.* and *Teleprompter Corp. v. Columbia Broadcasting System, Inc.* The participation of CBS as a plaintiff in *Teleprompter* and Amicus Curiae in *Fortnightly* indicates the interrelationship of the interests of broadcasters and copyright holders in regard to the copyright issue. Because of the far-reaching impact which resolution of this problem will have on the broadcasting, program production and CATV industries, a large and varied group has been involved in these actions as parties or amici. These two cases thus represent a fiercely waged battle over the control and the scope of development of CATV.

Plaintiffs in both cases alleged that the defendants' CATV systems infringed the exclusive right to perform publicly copyrighted works reserved to plaintiffs as copyright holders under the Copyright

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3. 42 U.S.L.W. 4323 (U.S. March 4, 1974), rev'd in part 476 F.2d 338 (2d Cir. 1973), rev'd in part 355 F. Supp. 618 (S.D.N.Y. 1972). *Teleprompter* was originally commenced in December, 1964. Unsuccessful attempts were made to consolidate this action with *Fortnightly* in the district court. The district court denied plaintiff's motion for summary judgment in 1965 as it believed the action might be a test case and involved subject matter too technical for summary disposition. 148 U.S.P.Q. 417 (S.D.N.Y. 1965). The parties then voluntarily stayed proceedings while *Fortnightly* was on appeal. 476 F.2d at 341 n.1. Defendant Teleprompter is the largest cable television system in the country and is partially owned by Howard Hughes. Defendant Conley Electronic Corp. is a wholly-owned subsidiary of Teleprompter.

4. CBS, through its broadcasting network, furnished programs to approximately 200 affiliated television stations. CBS owns copyrights on certain productions and has been licensed to broadcast programs produced by the other plaintiffs, Calvada Productions, Jack Chertok Television, Inc., and Dena Pictures, Inc. 355 F. Supp. at 619.

5. Among these were the American Society of Composers, Authors and Publishers (ASCAP), the Motion Picture Association of America, Inc., Broadcast Music Inc. (BMI), Writers Guild of America, National Association of Broadcasters, National Cable Television Association, Inc., and a number of individual producers, distributors and broadcasters of television programs.
Act. The issue is narrow: does a CATV system, when it picks up television broadcast signals off-the-air and simultaneously distributes them to its subscribers via cable, "perform" the copyrighted programs contained in those signals?

Years ago, the courts recognized that performance could not be confined to the paradigm theater play, nor only those media envisaged by Congress in 1909. Technological change expanded the scope of the act through statutory interpretation. It became established that radio broadcasters "perform" within the meaning of section 1 of the act, but listeners and those who operate private individual radio

"Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

(c) To deliver, authorize the delivery of, read, or present the copyrighted work in public for profit if it be a lecture, sermon, address or similar production, or other nondramatic literary work...and to play or perform it in public for profit...and
(d) To perform or represent the copyrighted work publicly if it be a drama...

Though the Copyright Act does not define an infringement, it is settled law that an unauthorized exercise of the exclusive rights granted to the copyright owner by section 1 of the Copyright Act, constitutes a copyright infringement. 43 U.S.L.W. at 4324 n.2; 1 M. NIMMER, COPYRIGHT § 100, at 376 (1973) [hereinafter cited as NIMMER]. Section 1(c) grants the exclusive right to perform nondramatic literary works. Section 1(d) grants the exclusive right to perform dramatic works. Thus, if a person performs these works without authorization, that person has infringed the copyright of these works. It is important to note that not every use of a copyrighted work is an infringement. If the use is not contrary to the rights enumerated in section 1 of the Copyright Act, it is not an infringement regardless of the extent of the use. 43 U.S.L.W. at 4324 n.2.

7. "Off-the-air" indicates the reception of broadcast television signals by means of an antenna or similar receiving equipment. It does not include reception of microwave transmission. 476 F.2d at 343 n.5.

8. In *Fortnightly* the defendant also claimed that if there was a performance, it was not "public" as programs were only viewed by subscribers in their private homes. 392 U.S. at 398-401. But in radio litigation it was settled that a broadcast of a work to the public results in a public performance though enjoyed by the individual in private. Jerome H. Remick & Co. v. Auto. Accessories Co., 5 F.2d 411 (6th Cir. 1925). This rule was followed by the second circuit in *Fortnightly*. 377 F.2d at 872, but the Supreme Court never reached the issue as it found no performance. 392 U.S. at 390.


10. *See id.* Though Remick is often cited as direct authority for the proposition that broadcasters perform, the court seems to have presumed they do and instead questions whether radio broadcasting is public performance and whether it is performance for profit, though no admission is charged, nor profit actually made. Both are answered affirmatively. *Id.* at 412. Section 1(c) of the act, amended in 1952, now provides special damages for broadcast infringement. 17 U.S.C. § 1(c) (1970).

receivers "whereby inaudible elements that are omnipresent in the air are made audible to persons who are within hearing" do not perform. Thus, when the district court in Fortnightly was confronted with a copyright claim against CATV, the problem was conceptually focused: is CATV like the broadcaster or the radio listener?

The district court undertook an extensive, involved analysis of the means by which defendant's CATV systems electronically processed and retransmitted the signals received from broadcast stations. The similarity between these electronic processes and those of broadcasting and the similarity of result in providing a reproduction of a primary performance to an audience led the court to hold that CATV was a performer and therefore a copyright infringer.

The Second Circuit Court of Appeals, ignoring the technical characteristics urged by both sides, based its affirmance of the district court decision upon the similarity of results produced by a CATV system and a broadcasting station, "the simultaneous viewing of the programs" by the subscriber.

The most obvious difficulty with these arguments is that they ignore the essential nature of CATV as an intermediary, a relay between the broadcaster and the home television viewer. As such, the CATV system partakes of the characteristics of both, and the factors which these courts found to associate CATV with broadcasting are equally applicable to the television set owner. A television set electronically processes and reproduces broadcast signals, and the result of the use of an antenna and television set by the private owner is the simultaneous viewing of broadcast programs.

This analytical shortsightedness would render these decisions suspect but for the reliance by both courts on two cases involving analogous radio relays. In Buck v. Jewell-LaSalle Realty Co., a hotel received on a master radio set an unauthorized radio broadcast of a copyrighted work and transmitted that broadcast to all the private rooms of the hotel by wires and loudspeakers installed in each room.

14. Id. at 205-06.
15. 377 F.2d at 879. This court argued that Judge Herlands did not base his decision on technological grounds. Id. at 879-80 n.9. Were that so, Judge Herland's elaborate technical discussion would be a monumental waste of time and his explicit statements of the technical similarities between broadcasting and CATV as a basis for finding performance would have to be ignored. 255 F. Supp. at 190-95.
16. For example, CATV systems receive broadcast signals by means of an antenna like the private set owner and they distribute those signals to a large audience, like the broadcaster.
17. 392 U.S. at 399 n.27; Note, CATV and Copyright Liability, 80 Harv. L. Rev. 1514, 1520-21 (1967) [hereinafter cited as CATV and Copyright Liability].
19. Id. at 195.
Justice Brandeis acknowledged that private radio reception in the confines of the listener's home would not be an infringement for one of two grounds: either it would not be a performance or it would not be public and for profit. Nevertheless, the Court found that the multiple electronic reproductions of the original broadcast in this case amounted to performance in an analogy to the making and playing of phonograph records. That this was but a sequential relay of a prior unauthorized performance did not prevent it from also being an infringing performance.

The second case, Society of European Stage Authors and Composers, Inc. v. New York Hotel Statler Co., is factually similar to Jewell-LaSalle Realty Co., except that the hotel had two master receivers providing guests with a choice of two stations and the original broadcasts were licensed by the copyright holder to the broadcasting stations. On the reproduction theory of Jewell-LaSalle Realty Co. and the extensive contribution the hotel made to public reception of the broadcasts, the court found an infringing performance. The analogy between these radio relays and CATV seems apt. In each case there are multiple relays of an original broadcast received off-the-air. On that basis, the lower court decisions in Fortnightly would seem authoritatively correct.

The Supreme Court and Fortnightly: Functional Analysis

The issue of CATV copyright liability was first decided by the Supreme Court in 1968, eight years after legal proceedings were begun and nearly twenty years after the construction of the first cable system. The Supreme Court directed its inquiry in Fortnightly to the broadcaster-viewer dichotomy. Questions of contribution to view-

20. Id. at 196.
21. Id. at 200-01.
22. Id. at 198; accord, Select Theatres Corp. v. Ronzoni Macaroni Co., 59 U.S.P.Q. 288, 291 (S.D.N.Y. 1943). This has been applied as the "multiple infringement" or "multiple performance" doctrine. Each unauthorized performance in a sequence or relay of the original rendition results in an infringement.
24. Id. at 2-3.
25. The circuit court in Fortnightly believed the question of the contribution of the defendant to viewing and hearing the copyrighted work was "the nub of Jewell-LaSalle and SESAC." 377 F.2d at 877.
27. The first system was allegedly constructed by a radio station operator in Astoria, Oregon, responding to his wife's complaint that she wanted pictures with the radio. Smith, The Emergence of CATV: A Look at the Evolution of a Revolution, PROCEEDINGS OF THE IEEE 58: No. 7, 967, 969 (1970), in TECHNOLOGY AND COPYRIGHT 344, 346 (B. Bush ed. 1972) [hereinafter cited as Smith].
28. See notes 10-12 and accompanying text supra.
ing and the technical aspects of defendant’s systems were disposed of summarily in recognition that those considerations are similarly applicable to owners and sellers of televisions sets who are assuredly not copyright infringers. The Court chose to resolve the issue by “a determination of the function that CATV plays in the total process of television broadcasting and reception.”

After analyzing the roles played by the broadcaster and viewer in the total television process, Justice Stewart concluded that the CATV system functioned most nearly like the viewer who does not “perform.” By falling on the viewer’s “side of the line,” CATV was also not a performer or infringer.

Essentially, a CATV system no more than enhances the viewer’s capacity to receive the broadcaster’s signals; it provides a well-located antenna with an efficient connection to the viewer’s television set.

CATV function was found to be essentially dissimilar to the function of broadcasters. Broadcasters select, arrange and broadcast programming, and derive profits by selling time and facilities to sponsors. CATV systems receive a series of programs and redistribute them unedited over private cables to subscribers who pay for the service.

29. 392 U.S. at 396-97, 399 n.27. See notes 16-17 and accompanying text supra. 30. 392 U.S. at 397. 31. Id. at 399-400. 32. Id. at 399 & n.26. The Court cited a tax case which concluded CATV was a “mere adjunct of the television receiving sets with which it was connected . . . .” Lilly v. United States, 238 F.2d 584, 587 (4th Cir. 1956); cf. Pahoulis v. United States, 242 F.2d 345, 347 (3d Cir. 1957).

33. 392 U.S. at 400; cf. Intermountain Broadcasting & Television Corp. v. Idaho Microwave, Inc., 196 F. Supp. 315, 325 (D. Idaho 1961), cited in 392 U.S. at 400 n.28. It is important to note that CATV systems when they distribute programs via cable are not broadcasters within the definitions of the Federal Communications Act of 1934 as they do not disseminate “radio communications intended to be received by the public . . . .” 47 U.S.C. § 153(o) (1970). The courts and the FCC have so held. Cable Vision, Inc. v. KUTV, Inc., 211 F. Supp. 47, 55 (D. Idaho 1962), vacated on other grounds, 335 F.2d 348 (9th Cir. 1964); Report and Order on CATV and TV Repeater Services, 26 F.C.C. 403, 429-30 (1959). Because they are not broadcasters, CATV systems are not subject to the rebroadcast consent requirement imposed on stations which rebroadcast programs of other broadcast stations. 47 U.S.C. § 325(a) (1970). Such a requirement for CATV would probably eliminate this entire controversy. It would give broadcasters and copyright holders the equivalent of copyright control over CATV transmissions by allowing them to decide when, where and at what price CATV could retransmit programs. The necessary result of that would be to make CATV a subsidiary of broadcast television. CATV operations would be limited so as not to compete. The FCC in response to the Supreme Court decision in Fortnightly proposed and experimented with a retransmission consent requirement, but dropped it in the most recent set of regulations after some broadcasters refused to give consent and others were unable to because of restrictions placed on program licenses by copyright holders. See Cable Television Report and Order, 36 F.C.C.2d 141, 150-51 (1972) [hereinafter cited as Cable Television Report and Order].
Logically, the Court's analysis seems correct. Under the rule that individual receiver-operators do not perform, an individual could erect an unusually large antenna and attach it to his television set some distance away thereby receiving additional signals without infringement liability. There would seem to be no difference if a landlord did the same for all the tenants in his building. The result should not be altered if a CATV system carries on the same function for a fee. The Court agreed.

But what of Jewell-LaSalle Realty Co. and the multiple performance doctrine? Justice Stewart chose to limit that case to its own facts, calling it "a questionable 35-year-old decision that in actual practice has not been applied outside its own factual context . . . ." In Fortnightly, the original broadcast had been authorized by the copyright holder. Outside of its analytical difficulties, Jewell-LaSalle Realty Co. seems to have been rejected on policy grounds. The majority held that a questionable decision should not be applied to impose retroactive copyright liability so as to upset established business relationships.

That rationale, however, begs the question: whose business relationships will be upset? Presumably the Court is referring to the relationships of CATV systems and their subscribers, as absent copyright liability, CATV and copyright holders have little or no direct relationship. A persuasive argument can be made, however, that the unrestricted growth of CATV threatens the established relationships of program producers, advertisers and television broadcasters. But the Court seemed to feel its duty was limited to interpreting the Copyright Act of 1909; resolution of these other competing economic considerations was left to Congress. Any broader inquiry, would have involved decisionmaking, legislative in manner and result. In that regard, the Court exercised appropriate restraint.

Teleprompter Corp. v. Columbia Broadcasting System, Inc.

Though couched in general terms, Fortnightly did not settle the

34. See notes 11-12 and accompanying text supra.
35. 392 U.S. at 400.
36. Id. at 401 n.30.
37. See notes 21, 31-33 and accompanying text supra. See Nimmer, supra note 6, at 107.41, at 409-10 (1973).
38. 392 U.S. at 401 n.30.
39. For a discussion of the economic impact of CATV, see text accompanying notes 113-58 infra. The FCC has asserted that one of its basic objectives in regulating CATV is to preserve "the basic structure of over-the-air television." Cable Television Report and Order, supra note 33, at 164-65. Part of that basic structure is the business relationships of program producers, copyright holders and broadcasters.
40. See 392 U.S. at 401-02.
question of CATV copyright liability. The *Fortnightly* systems were relatively primitive. They were confined to a simple reception service by means of tall antennae located in or adjacent to each system's city and connected by cables to television sets on subscribers' premises. These systems provided subscribers with signals originating from broadcast stations located in cities fifty-two to eighty-two miles away from the CATV city. The CATV systems in *Teleprompter* were much more advanced, involving a variety of services and devices indicative of the present and future potential of CATV.

Plaintiffs alleged seven different activities distinguishing *Teleprompter* from *Fortnightly* which they argued gave Teleprompter's CATV systems the function of broadcasters: (1) program origination, (2) importation of distant signals, (3) selection of programs, (4) microwave transmission, (5) interconnection with other CATV systems, (6) advertising and (7) sale of commercials. The district court dismissed all but distant signal importation and program origination as insignificant changes in function. As to program

41. The Supreme Court acknowledged that its decision necessarily referred to the facts of the case before it. *Id.* at 399 n.25.
42. *Id.* at 392; 377 F.2d at 874-75.
43. 392 U.S. at 392.
45. 355 F. Supp. at 621. Origination included automated camera scans of time, weather, stock and news information and up to seventy hours a week as of March, 1971 of nonautomated programming by the New York City system.
46. 355 F. Supp. at 621-23. Importation ranged from 43 miles to 600 miles via a roundabout relay of 1300 miles from Los Angeles to Teleprompter's system in Farmington, New Mexico. All of Teleprompter's systems involved in this litigation except New York received and furnished to subscribers signals not ordinarily receivable by house-top or tower-mounted antennae.
47. Plaintiffs alleged that when Teleprompter imports distant signals it makes a decision as to which station should be received and that this is analogous to the function of broadcasters when they select which programs to air over their stations. *Id.* at 623.
48. Microwave is the primary means by which CATV systems import distant signals. Signals are received on antennae located adjacent to cities of originating stations and then are relayed via microwave point-to-point transmissions to antennae in or near the system city from which signals are distributed to subscribers by cable. Microwave was also used within New York City to provide subscribers access to all channels which could not be received by means of a single antenna because of interference from tall buildings. *Id.*
49. On two occasions Teleprompter's systems simultaneously carried live presentations of the Sonny Liston-Muhammed Ali fights by nationwide links provided by American Telephone & Telegraph Co. *Id.* at 623-24.
50. Teleprompter advertises its originated programs and distant signal service to attract subscribers. It also sold a few commercials on its coverage of certain sporting events. *Id.* at 624.
51. *Id.* at 625-26. For a criticism of the court's analysis of these other functions
origination, the court observed that although CATV functioned like a broadcaster, this activity did not alter CATV function as to reception and retransmission of plaintiffs' copyrighted programs. CATV offers two services, program origination and program reception and retransmission. The two services were not considered sufficiently related to require imposition of copyright liability for the latter when they were undertaken simultaneously.\textsuperscript{52}

When a CATV system has achieved a high degree of penetration in a particular area, its program origination activity will compete with broadcast stations and will tend to reduce the latter's revenues through fragmentation of audiences upon which they base their advertising charges. Harm will come to copyright holders through a reduction in the ability of broadcasters to pay licensing fees. Under the district court's interpretation of the \textit{Fortnightly} functional test, this competitive injury from program origination would not render CATV a broadcaster-performer as to its reception service. Similarly, if a broadcasting station were to own the local CATV system, its broadcasting function would not alter the nature of its CATV system, nor its copyright liability for operation of that system.\textsuperscript{53}

A more difficult problem is the importation of distant signals. Plaintiffs urged that the immunity from copyright liability in \textit{Fortnightly} be limited to CATV systems "which 'enhance' the quality of picture that can already be received in the locale."\textsuperscript{54} The goal of this argument was to confine the CATV systems to the market areas of the broadcast stations they carry. Plaintiffs urged that CATV be restricted to the audience a broadcast was intended to include but for interference from uneven topography and tall buildings, and absent any consideration of audience expansion by the CATV system. In other words, program audiences were to be limited to the area where the copyright fee was paid through licensing agreements between broadcasters and copyright holders.\textsuperscript{55} This would have eliminated the


52. 355 F. Supp. at 629. Were a CATV system under the guise of its program originating function to make video tapes of copyrighted materials and disseminate them at some time subsequent, it would be liable for infringement as a copier and performer of these copyrighted works. Walt Disney Prod. v. Alaska Television Network, Inc., 310 F. Supp. 1073 (W.D. Wash. 1969).

53. The FCC has adopted rules requiring CATV systems with more than 3,500 subscribers to commence program origination. 47 C.F.R. § 76.201. The Supreme Court sustained FCC authority in this regard in United States v. Midwest Video Corp., 406 U.S. 649 (1972).

54. 355 F. Supp. at 626.

55. See Brief for Motion Picture Association of America as Amicus Curiae at 13-14, Columbia Broadcasting System, Inc. v. Teleprompter Corp., 476 F.2d 338 (2d Cir. 1973). One author has suggested that FCC rules limiting distant signal importa-
spoilage effect of CATV when it carried programs into markets before copyright holders had licensed those programs to local broadcast stations. Defendants argued that audience surveys upon which broadcasters base their advertising charges and copyright holders base their licensing fees, include additional viewers supplied by CATV carriage. Broadcasters and copyright holders are thus fully compensated for CATV carriage and afforded the equivalent of copyright protection.

Underlying these arguments is still the statutory question whether the defendant CATV systems "perform." The district court concluded that the systems in *Fortnightly* not only enhanced picture quality, but also carried broadcasts to additional viewers unable to receive over-the-air signals at all. Furthermore, the court found no intention in *Fortnightly* to imply a geographical limit for copyright immunity. On this basis, the court concluded that Teleprompter's systems did not function like broadcaster-performers when they import distant signals. They simply provided an "even more 'well-located' " antenna and even more efficient connection to a viewer's set than in *Fortnightly*.

Though this may be a proper interpretation of *Fortnightly*, it ignores the altered nature of CATV as a commercial enterprise when it imports distant signals. The analogy to a private television set owner providing himself with a better antenna to enhance his set's capacity to receive the broadcaster's signals breaks down when the complexity of equipment and enormous expense involved are such as to preclude any private viewer from undertaking to import signals from a great distance. Only a commercial enterprise or large co-operative could provide that service, and when it does so it places itself in direct competition with local broadcasters. Both the Supreme Court in *Fortnightly* and the district court in *Teleprompter* failed to recog-
nize this weakness in the CATV-viewer analogy. The district court concluded that if the *Fortnightly* systems supplied subscribers with signals which they would not otherwise receive, then CATV systems which the Supreme Court held were not performers were similarly not performers where the signals were supplied from a greater distance.

The Second Circuit concurred with the district court as to all CATV activities except distant signal importation.61 The court of appeals read *Fortnightly* as confined to the situation where the CATV system receives broadcast signals from an antenna "erected within or adjacent to the community it serves."62 Relying on a distinction set forth in *United States v. Southwestern Cable Co.*,63 decided one week before *Fortnightly*, the court concluded that CATV serves two functions.

First, they may supplement broadcasting by facilitating satisfactory reception of local stations in adjacent areas in which such reception would not otherwise be possible; and second, they may transmit to subscribers the signals of distant stations entirely beyond the range of local antennae.64

The court reasoned that when the second function is performed, the CATV system is importing a signal not already present in the community. It is no longer merely enhancing the subscribers' ability to receive signals.65

The added factor in such a case is the signal transmitting equipment, such as microwave links . . . . The viewer's ability to receive the signal is no longer a product of improved antenna technology; rather, it results from the system's importation of the signal into the CATV community from a separate, distant community.66

This importation, the court concluded, was a performance of the carried signals.

The court's analysis seems defective in several respects. Its reliance on the language in *Southwestern Cable*67 seems wholly misplaced. This case involved the question of FCC jurisdiction over

61. 476 F.2d 338.
62. *Id.* at 346.
63. 392 U.S. 157 (1968). The Supreme Court, in this case, upheld the jurisdiction of the FCC to regulate CATV.
64. *Id.* at 163, cited in 476 F.2d at 349.
65. *Fortnightly* described CATV function as no more than enhancing viewer capacity to receive signals.
66. 476 F.2d at 350. The court refused to find a performance solely on the basis of microwave links. Microwave being point-to-point communication is not broadcasting. Further, though microwave is most often used for distant signal importation, it can be used within the CATV community to interconnect reception antennae in a manner within the ambit of *Fortnightly* as this court interprets that case. *Id.* at 348-49.
67. See text accompanying note 63 *supra*.
CATV, and the Commission’s authority to issue a prohibitory order against further expansion of CATV service pending a hearing on a broadcaster’s complaint that the CATV system’s signal importation had an adverse impact on the station in a manner inconsistent with the public interest.\textsuperscript{68} The case involved no question or reference to copyright infringement, and the functional distinctions were drawn solely with reference to the regulatory issues.

Furthermore, in a footnote\textsuperscript{69} to the cited language, the Supreme Court made clear that it was referring to a specialized definition of the FCC describing a distant signal as one extended or received beyond the Grade B contour of the originating station.\textsuperscript{70} The Second Circuit in \textit{Fortnightly} explicitly referred to the fact that of the ten stations carried by the two CATV systems, five of them were extended beyond their Grade B contours,\textsuperscript{71} and therefore were distant signals under the existing FCC rules and the language in \textit{Southwestern Cable}. The Supreme Court in \textit{Fortnightly} did not consider this fact significant in determining whether CATV performs and refused a compromise which would have held CATV liable for extending signals beyond their Grade B contours.\textsuperscript{72} In summary, the language in \textit{Southwestern Cable} was in no way intended to limit the copyright immunity established one week later in \textit{Fortnightly}.

An acceptance of the market theory of copyright protection underlay the Second Circuit’s decision to find CATV performance where signals are received by antennae located neither within nor adjacent to the CATV community.\textsuperscript{73} Amici in \textit{Teleprompter} argued that when CATV imports signals it competes with local broadcast stations and that in so competing, CATV functionally becomes a broadcaster.\textsuperscript{74} Although this competition may be an economic reality, it has no rela-

\textsuperscript{68} 392 U.S. at 159-60.
\textsuperscript{69} Id. at 163 n.16.
\textsuperscript{70} The FCC definition was contained in 47 C.F.R. § 74.1101(i) (1971), \textit{deleted in} 37 Fed. Reg. 3278 (S972), and pertained to the former rule prohibiting extension of signals by CATV systems beyond their Grade B contours into the top one hundred television markets. 47 C.F.R. § 74.1107 (1971), \textit{deleted in} 37 Fed. Reg. 3278 (1972). The Grade B contour is the outer line along which reception of acceptable quality can be expected at least 90 percent of the time at the best 50 percent of locations. Sixth Report and Order, 17 Fed. Reg. 3905, 3915 (1952).
\textsuperscript{71} 377 F.2d at 883.
\textsuperscript{72} See note 59 \textit{supra}.
\textsuperscript{73} See text accompanying notes 55-57 \textit{supra}. The court seemed to be convinced by plaintiffs and amici that the expansion of audience size through CATV carriage would not offset the loss in revenue when CATV carries a program into a market area before the copyright holder has had a chance to license the program to a local broadcaster. \textit{See} 476 F.2d at 342 n.2.
\textsuperscript{74} Brief for Motion Picture Association of America as Amicus Curiae at 30, Columbia Broadcasting System, Inc. v. Teleprompter Corp., 476 F.2d 338 (2d Cir. 1973).
tion to the functional analysis test under *Fortnightly*. That decision impliedly rejected economic considerations\(^7\) in favor of functional ones involving the nature and method of service supplied by CATV and broadcasters.\(^7\)

The Second Circuit's argument was weakest in the area of functional analysis. Relying solely on the *Fortnightly* language describing CATV as a means of enhancing viewer ability to receive signals,\(^7\) the court ignored all of the other distinctions between broadcasters and CATV systems set forth in *Fortnightly*.\(^7\) Instead, it substituted a technological distinction in a clumsy attempt to define a distant signal.

To say that a particular signal is already in the community, which is to say there is no need to import it through a relay or retransmittal device . . . is to indicate that it can be received in the community during a substantial portion of the time by means of an antenna, such as a large community antenna or other receiving device, that is available under current technology. Thus, the meaning of "distant signal" must be determined in light of the current broadcasting and receiving technology.\(^7\)

Unable to define distant signal more precisely, the court established a presumption that when the CATV receiving antenna was not located in or adjacent to the CATV community and the received signals were broadcast from a different community the signals were distant. This presumption could have been rebutted by a showing that the received signal "would be equally receivable off-the-air in the first instance and would project an image of similar quality, if there were substantially similar receiving equipment located in or adjacent to the CATV community."\(^8\) Thus the question of whether a CATV system performs did not turn on an analogy to the function of broadcasting. The functional analogy for distant signal importation is that CATV carries signals to additional viewers as does broadcasting. But as the district court demonstrated, the *Fortnightly* system also carried signals to additional viewers.\(^5\) Instead, under this later decision, CATV copyright liability depended on a technological analysis to determine what is a distant signal.

This test would have led to enormously complex litigation requiring an untrained judge to determine very technical factual issues. It is doubtful if any judicially created definition of a distant signal consistent with *Fortnightly* could be precise enough or sufficiently re-

75. See note 40 and accompanying text *supra*.
76. See notes 31-33 and accompanying text *supra*.
77. See note 67 and accompanying text *supra*.
78. 392 U.S. at 400 & n.28. See note 33 and accompanying text *supra*.
79. 476 F.2d at 351.
80. *Id.* at 351-52.
81. See text accompanying note 58 *supra*.
lated to the goal of copyright protection to avoid complex and frequent litigation. Such a determination is essentially regulatory, involving sophisticated technological and economic fact finding which takes into consideration factors of public interest and national telecommunications policy as well as of copyright protection. The FCC has recognized that "[b]ecause market patterns vary and there is only a gradual deterioration in a station's receivability as the distance from its transmitter increases, there is no necessarily clear dividing line between 'distant' and 'local' signals." In its signal carriage rules, the FCC has adopted a number of different tests for a distant signal. These tests have been applied in various combinations depending upon the size of the market in recognition of differing needs of broadcast stations for protection from adverse economic impact of CATV. The distant signal test enunciated by the Second Circuit appears arbitrary in comparison with the sophistication of FCC regulation.

These criticisms of the Second Circuit's decision are not intended to undermine the very real complaints broadcasters and copyright holders may have against CATV. When CATV, through the exploitation of the work of broadcasters and copyright holders, has an adverse economic impact on them, an element of commercial unfairness in CATV operations becomes apparent. CATV has recognized this through its participation in negotiations with broadcasters leading to a consensus agreement which subjects CATV to FCC limitations on distant signal importation and which, when enacted into law by Congress, will obligate CATV to pay reasonable copyright fees on compulsory licenses for retransmission granted by copyright owners. In

82. *Cable Television Report and Order, supra* note 33, at 173.
83. In this regard, state statutory and common law unfair competition actions against CATV have, until now, been unsuccessful. In *Cable Vision, Inc. v. KUTV, Inc.,* 211 F. Supp. 47 (D. Idaho 1962), the district court concluded that CATV importation of distant signals into the plaintiff television station's broadcast area constituted unfair competition. On appeal the Ninth Circuit reversed the lower court decision on the basis of *Sears, Roebuck & Co. v. Stiffel Co.,* 376 U.S. 225 (1964), and *Compco Corp. v. Day-Brite Lighting, Inc.,* 376 U.S. 234 (1964). 335 F.2d 348 (1964). The court concluded that *Sears-Compco* precluded state unfair competition actions, absent an element of "palming-off," where federal copyright laws leave the objectionable activity in the public domain. *Id.* at 350-51. The recent Supreme Court decision in *Goldstein v. California,* 412 U.S. 546 (1973), may have revived the possibility of a state law unfair competition action by suggesting that *Sears-Compco* only eliminates such an action in regard to those classes of works specifically enumerated by Congress in the Copyright Act, 17 U.S.C. § 5 (1970). 412 U.S. at 567-70. Though television programs of various types are within those enumerated classes, if it is decided that when they are in the form of broadcast signals, exploitation by CATV is not within the ambit of the copyright laws (as the Supreme Court held in *Teleprompter,* Goldstein may allow an unfair competition action. See Note, *Goldstein v. California: Validity of State Copyright and Supremacy Clauses,* 25 HASTINGS L. J. — (1974).
the *Teleprompter* litigation, however, the courts and parties were confined to the Copyright Act of 1909 and the question of performance.85

The weakness with the *Fortnightly* functional analysis test for determining performance is that it is not analysis at all, but rather analogy.

[T]he courts have built on the basic analogy of the producers of a stage play and their audience; the producers perform the play, the audience does not . . . . This metaphor was then analogized to the dichotomy between a listener and a broadcaster . . . which in turn was used as a model for differentiating a broadcaster from a non-infringing CATV in *Fortnightly*. We have here carried this analogy yet another step by comparing the instant CATV's with those in *Fortnightly*.86

The *Teleprompter* district court shuddered at this piling on of analogies;87 the circuit court seemingly ignored it by developing a technological test.

The ultimate difficulty is that when viewed as a whole, CATV resembles broadcasting in providing viewers with original programs as well as those from other sources, in advertising its service and in general in serving as a medium of entertainment and information. In this way, the two media are in direct competition. Keeping within the rule of *Fortnightly*, the courts have had to ignore this general comparison and confine their review to CATV as a reception service. That would seem sound, however, if the issue were whether that reception service is a performance of the received and retransmitted signals under the Copyright Act.

### Supreme Court Resolution of the Statutory Issue

*Teleprompter* was presented to the Supreme Court through petitions for writs of certiorari by both plaintiffs and defendants. Plaintiffs sought reversal of the court of appeal's determination that activities such as program origination, sale of commercials and CATV sy-

85. One author has suggested that this problem could have been avoided had the Supreme Court in the *Fortnightly* case not in effect overruled *Jewell-LaSalle Realty Co.* The Court could have distinguished that case by finding that in regards to CATV retransmissions the performance takes place when the individual subscriber operates his television set. This would be based on the fact that the subscriber not the CATV system actually made the signals visible and audible whereas in *Jewell-LaSalle* the hotel operators made the signals audible over loudspeakers. The Court could have then held that the subscribers' performances were private rather than public and CATV systems would not have been copyright infringers. Nimmer, *supra* note 6, § 107.44, at 414.3. The Court chose, instead, to develop its functional analysis test and found no performance at all.

86. 355 F. Supp. at 630 (citations omitted).

87. *Id.*
stem interconnection did not render CATV functionally equivalent to broadcasting and therefore not a copyright infringer as to its broadcast signal reception and retransmission service. Defendants asked for reversal of the Second Circuit's decision that CATV was a copyright infringer when it imported distant signals. On March 4, 1974, the Court decided that CATV was not a copyright infringer as to the exercise of any of these functions.

The majority opinion was written by Justice Stewart, the author of the majority opinion in *Fortnightly*. As to program origination, sale of commercials and interconnection, he quickly dismissed plaintiffs' contention that performance of these services rendered CATV functionally equivalent to broadcasters in regard to the reception and retransmission of broadcast signals.

The copyright significance of each of these functions ... suffers from the same logical flaw: in none of these operations is there any nexus with the defendants' reception and rechanneling of the broadcasters' copyrighted materials.

It made no difference that these functions "may allow CATV systems to compete more effectively with the broadcasters for the television market."

Plaintiffs' argument appears to have been more ingenious than sound. The argument was advanced because the Supreme Court in *Fortnightly* had employed an analogy test to see if CATV fell on the broadcasters' or viewers' side of the line separating infringement from permitted use. Implicit in the test, however, was the limitation that functionally equivalent activities have some connection with the use alleged to be an infringement, the reception and redistribution of television signals. Plaintiffs were unable to establish the connection except to suggest that simultaneous performance of these functions enabled CATV to compete more effectively with broadcasting. In rejecting this connection as a basis for copyright infringement, the Court reinforced the policy of the copyright laws to reserve to the copyright owner only certain exclusive uses of his work regardless of whether permitted uses cause the owner economic injury.

In reversing the court of appeals' decision that the importation of distant signals constituted a "performance" under the Copyright Act, Justice Stewart initially rejected the appellate court's reliance on the description of CATV contained in *United States v. Southwestern*

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88. See notes 45, 49-50 *supra*.
89. 42 U.S.L.W. 4323 (U.S. March 4, 1974) (a six-to-three decision).
90. *Id.* at 4326.
91. *Id.* See text accompanying notes 52-53 *supra*.
92. See text accompanying notes 31-35 *supra*.
93. See note 6 *supra*. 
He pointed out that the language quoted related only to the regulatory authority of the FCC. "[I]t did not and could not purport to create any separation of functions with significance for copyright purposes."\(^{96}\)

Justice Stewart then went on to consider and reject three rationales advanced by the court of appeals and the plaintiffs that CATV "performs" copyrighted material when it imports distant signals. First, the Second Circuit had declared that distant signal importation was more than just enhancing "the viewer's capacity to receive the broadcaster's signals..."\(^{97}\) Instead CATV was bringing signals "into the community that would not otherwise be receivable on an antenna, even a large community antenna, erected in that area."\(^{98}\) Justice Stewart equated this argument with the theory of the court of appeals in *Fortnightly* that the determination of whether CATV "performs" depends on how much CATV contributes to the viewing and hearing of the material.\(^{99}\) This contribution theory had already been rejected by the Court in *Fortnightly* in favor of a determination based on the function CATV "plays in the total process of television broadcasting and reception."\(^{100}\) This would have been sufficient authority to render his argument against the contribution theory unassailable if Justice Stewart concluded with this point. Instead, he went on to explain in very broad language that distant signal importation does not alter the function of CATV towards its subscribers.

The privilege of receiving the broadcast electronic signals and of converting them into the sights and sounds of the program inheres in all members of the public who have the means of doing so. The reception and rechanneling of these signals for simultaneous viewing is essentially a viewer function, irrespective of the distance between the broadcasting station and the ultimate viewer.\(^{101}\)

That language seems analytically correct when the rechanneling is done by means of an antenna and cable for individual subscribers who pay for the service. The analogy to a viewer erecting an antenna on a hill and stringing a cable to his television set, still seems appropriate, even though the expense would be a deterrent to such activity.\(^{102}\) But if Justice Stewart means that once broadcast signals are dissemi-

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94. 42 U.S.L.W. at 4326. See text accompanying note 64 supra.
95. 42 U.S.L.W. at 4326.
96. *Id.* See text accompanying notes 68-72 supra.
97. 476 F.2d at 350, citing *Fortnightly* supra.
98. 476 F.2d at 349.
99. 377 F.2d at 877.
100. 392 U.S. at 397. See text accompanying notes 29-30 supra.
101. 42 U.S.L.W. at 4327.
102. See text accompanying notes 58-61 supra.
nated to the public, anyone has the right to redistribute them by whatever means, then he has proven too much. One wonders if he would refuse to hold an individual liable for copyright infringement if that person rechanneled the signal by means of a translator which simultaneously retransmitted the signal as radio waves for public reception? Under communications law, such an activity by definition would be broadcasting, and under copyright law broadcasting is infringing performance.

Implicit in Justice Stewart's language, therefore, must be the limitation that the public has a right to receive and reconvert signals into television pictures and sounds only when that is done by means of an antenna and cable for individual subscribers. No such right exists to redisseminate signals to the public indiscriminately. If so, this would seem to reinforce Professor Nimmer's argument that a better rationale for not finding CATV a copyright infringer in Fortnightly would have been to hold that the performance takes place when the television set owner operates his set because the signal is relayed directly by private cable from the antenna. Such a performance would be private and noninfringing. A rebroadcast by a translator could be distinguished as a public performance.

Further, Justice Stewart refused to accept plaintiffs' contention that because importation of distant signals disrupted the market structure of copyright licensing it was an infringing activity. This was the most difficult argument for the associate justice to counter and his rejection of it reflects a policy rather than a legal decision.

He begins by pointing out that CATV does not "interfere in any traditional sense with the copyright holders' means of extracting recompense for their creativity or labor." Unlike other copyright owners such as book sellers, television copyright owners are not paid directly by those who enjoy their work. They are paid by advertisers who mass market their goods by means of the copyrighted work. CATV only interferes with this system indirectly by affecting the size of the audience for the work upon which advertisers base what they will pay for a copyrighted work. Justice Stewart then notes that because the broadcaster transmitting under a license from a copyright holder has no control over what portion of the public will view the work, and because advertisers will base their fees on increased audience resulting from CATV carriage, CATV does not significantly

105. See note 85 supra.
106. See text accompanying notes 113-58 infra.
107. 42 U.S.L.W. at 4328.
Plaintiffs had argued, however, that while CATV augmented audience size, it also spoiled markets for licensing of programs by importing copyrighted works into these markets before copyright owners had sold them to local stations. Plaintiffs claimed a net loss resulted from this audience increase and market destruction. Justice Stewart concluded, however, that proof of such an economic injury was not substantially relevant to the question of whether distant signal importation constitutes a "performance" under the Copyright Act. "While securing compensation to the holders of copyrights was an essential purpose of that act, freezing existing arrangements for doing so was not." Justice Stewart rejected this economic argument for the same reason he refused to apply Jewell-La Salle Realty Co. to the Fortnightly case. He would not use outdated law to impose copyright liability so as to upset business relationships not contemplated when the law was enacted.

These shifts in current business and commercial relationships . . . simply cannot be controlled by means of litigation based on copyright legislation enacted more than half a century ago, when neither broadcast television nor CATV was yet conceived. Detailed regulation of these relationships, and any ultimate resolution of the many sensitive and important problems in this field, must be left to Congress.

With this decision, the Court has apparently settled the question of whether CATV is a "performer" under the Copyright Act and therefore an infringer. It is not. The ultimate legal problem was the semantic limitations of the act. The word "perform" could be stretched by logic and analogy only so far. The Court had to acknowledge that despite the admirable efforts of all these courts, this law, written in a technologically different era, could not have been intended to cover all forms in which people would communicate their ideas and intellectual works. The Court finally had to admit that the present Copyright Act simply does not apply to CATV. As a result, the arguments of the parties as to economic impact, telecommunications law and theory and copyright theory have assumed their proper perspective as considerations appropriately applied to the scope and content of proposed copyright legislation.

108. Id.
109. Id. at 4328-29 n.15.
110. Id.
111. See text accompanying notes 38-40 supra.
112. 42 U.S.L.W. at 4329 (footnote omitted).
The Underlying Arguments

Economic Impact of CATV Penetration

Broadcaster and copyright holder challenges to CATV have been closely related to the development and growth of distant signal importation into local broadcasting markets. In its infancy, when CATV brought signals to areas not served by any kind of television, it extended audiences without disturbing existing markets. Broadcasters and copyright owners perceived a threat from CATV carriage only when CATV began to compete by importing distant signals where there was a local market for copyrighted works.113

CATV importation of distant signals has a potentially adverse impact on broadcasters and program owners in two ways.114 First, when

113. See CATV and Copyright Liability, supra note 16, at 1525 n.60. This delayed threat posed by CATV accounts for the delay in bringing copyright infringement actions. See note 25 and accompanying text supra. It also suggests a reason the FCC reluctantly and belatedly asserted jurisdiction over CATV. See Barrow, supra note 55, at 697-99. The first case in which the FCC claimed indirect jurisdiction over CATV involved a challenge by a local broadcaster to the construction of a microwave relay system which a cable system was to lease in order to import distant signals into the local market. Carter Mountain Transmission Corp., 32 F.C.C. 459 (1962), aff’d, 321 F.2d 359 (D.C. Cir. 1963).

114. The only adverse impact from carriage of local signals is the danger of non-carriage. A station not carried in the local market because of expense in receiving it or because it is not as attractive as other stations is effectively deprived of the entire segment of its potential audience which subscribes to CATV. The FCC signal carriage rules distinguishing distant from local signals are designed to identify the latter and assure their carriage in the local market. The basic rule requiring carriage of signals licensed to communities within thirty-five miles of the cable system’s community is intended to assist stations who because of technical limitations are not able to compete with more powerful stations. These stations, generally UHF independents, will achieve a net gain in audience circulation from CATV carriage. Other rules requiring carriage of significantly viewed stations and all stations in hyphenated markets (e.g., San Francisco-Oakland-San Jose, Cal.) also serve to equalize competition by expanding audiences for stations in markets of large area or where terrain and population distribution have hindered audience access. See Cable Television Report and Order, supra note 31, at 173-76. While assuring carriage of local stations, these new rules seem to reduce the total number of signals which may be carried by a CATV system in the top one hundred markets by reducing the number of out of market signals which may be carried. Under the old rules CATV could carry all signals whose Grade B contours included part of the local market. Under the new rules, only those signals outside of the thirty-five mile radius of the local market which are significantly viewed in the market are to be carried. For instance, under the old test, CATV systems in the San Francisco-Oakland-San Jose market were allowed to carry five out-of-market Grade B signals, while under the viewing test new systems are not allowed to carry any out-of-market signals. This loss is partially offset by allowing for carriage of distant signals, which was formerly prohibited in the top one hundred markets. But, only two such signals can be carried in the San Francisco-Oakland-San Jose market. See Cable Television Report and Order, supra note 33, at 281-84. These rules are ameliorated some-
a CATV system has substantially penetrated a particular market, availability of nonlocal programming increasing viewer choice may tend to fragment local audiences. Since broadcast advertising charges and copyright license fees depend on audience size, revenues to both broadcasters and program owners will be diminished to the extent fragmentation reduces audience size. CATV program origination on nonbroadcast channels will further contribute to this effect. Second, when CATV carries distant stations into another station's market, audience exposure to the programs carried impairs the ability of the copyright holder to subsequently license that program to this market. Where CATV penetration in the market is substantial, exposure may be so widespread as to destroy the market for future licensing for some time. Local stations will be reluctant to pay royalties and advertisers will be unwilling to sponsor programs previously shown or shown to such a large segment of the market as to leave only a small residual audience for second showings. Even where market penetration is not great, stations may be willing to buy these syndicated programs only at a reduced charge.

Discussion of these arguments has been distinguished by conflicting data and the inability of the parties to agree upon a model for the growth and development of CATV upon which to base their predictions. The FCC has acknowledged the inconclusiveness of the
data and the difficulties of predicting CATV impact. Nevertheless some conclusions can be drawn.

Audience Fragmentation

The most obvious counter to the fragmentation argument is the fact that the most attractive programming in terms of viewer interest and advertiser support is broadcast on network affiliated stations, primarily powerful VHF stations. Of the top one hundred markets, only three lack a full complement of network stations within or significantly viewed in the market so as to allow CATV systems under FCC rules to import distant network stations. The 90 percent of prime time entertainment produced by independent copyright holders is almost entirely sold to the networks for initial broadcast. The distraction effect from increased availability of programs should be minimal for these network stations as evidenced by the great difficulty that independent UHF stations have had breaking into major markets.

It is these independent UHF stations which because of less attractive programming and lower broadcast power, would appear to suffer most from audience fragmentation. Cable interests, however, have argued to the contrary contending that UHF and, in fact, all local stations will benefit from increased audience access through CATV carriage in local or distant signal markets and that this will more than offset any loss from distant competition. In support of the above, they refer to the national audience surveys which include CATV subscribers and upon which station's calculate their advertising charges. Copyright holders counter that copyright revenues are based only on the audience in a station's local market. In so far as copyright payments are based on revenues from local or regional advertising, it is true that increased audience will not benefit copyright holders and broadcasters where the increase results from carriage to markets not served by the advertiser. Where the audience gain is within the local market or, in the case of national advertisers, where the gain is in local and distant markets, the broadcaster and copyright holder should benefit.

In evaluation of these arguments, a study by the Rand Corpora-

118. Cable Television Report and Order, supra note 33, at 169.
123. Brief for Motion Picture Association of America, at 16-17, id.
tion, assuming importation of four distant signals, concluded that overall revenue loss due to cable would be approximately 9 percent. Stations in the larger markets would be least affected by cable growth. UHF network stations would be harmed only slightly, and cable would substantially help UHF independents by eliminating the technical edge of VHF over UHF. Similar studies conducted by broadcast interests took sharp issue with the Rand conclusions. They forecast serious detrimental impact to local broadcasting from importation of four signals. The FCC's own studies reached conclusions somewhere between these two extremes.

While acknowledging the inherent uncertainty in these conclusions and any future predictions, the FCC nevertheless believed that cable benefits to UHF in terms of clearer pictures and wider coverage would offset fragmentation of UHF audiences by distant signals. As to VHF in the smaller markets, the FCC foresaw no severe danger in allowing carriage of two distant signals. In light of the FCC's past protectiveness towards broadcasting in regard to CATV, one can assume that these conclusions were carefully and deliberately formulated.

The greatest difficulty with the fragmentation argument is the lack of experience with distant signal importation in the major markets. From 1966 to 1972, distant signal importation was effectively prohibited in the top one hundred markets. With the opening of the major markets in 1972, an opportunity has been presented for observing the effect of CATV on local broadcasting and for gathering some meaningful data. In the mean time, reliance must be placed on the apparent superiority of the network stations in providing attractive programming and the conclusions of the FCC that CATV will benefit rather than harm the predominantly independent UHF stations.

**Market Destruction**

The destructive impact of CATV upon future copyright licensing potential in distant markets is the most telling argument levied by

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124. This is two more than will be allowed in all but 11 of the top one hundred major markets under the FCC's new rules. Seiden, CABLE TELEVISION U.S.A. 119 (1972).
125. R. PARK, POTENTIAL IMPACT OF CABLE GROWTH ON TELEVISION BROADCASTING 77, 80 (1970) (a report prepared by the Rand Corporation under a grant from the Ford Foundation).
126. Cable Television Report and Order, supra note 33, at 168.
127. Id.
128. Id. at 169.
129. Id. For FCC signal carriage rules, see 47 C.F.R. § 76.51-65 (1973).
130. Chazen & Ross, supra note 98, at 1825.
To a certain extent, copyright and broadcast interests conflict on this problem. The broadcaster whose signal is carried into the distant market benefits from increased audience coverage as indicated above. The copyright holder may also benefit by obtaining larger fees from the imported station. It is doubtful, however, if these increased fees will fully offset the loss in revenue through reduced or lost ability to license programs in the distant market. Until CATV achieves 100 percent penetration in the distant market, carriage in that market cannot be as valuable as broadcasting over a local station. Further, the distant audience is likely to be less valuable to the exported station than the local station since only national advertisers will derive any benefit from such exposure; the additional copyright fee is likely to be less than for a local broadcast. The local broadcaster is also injured because of the reduction in the number of original programs available.

The net effect of distant signal carriage is to undermine the system of exclusive contracts by which copyright holders obtain high fees for syndicated program sales. The copyright holder will sell a program to a distributor under an agreement not to sell the same program to another broadcast station in the same market. In return, the station often agrees to limit the showings of the particular program. These contracts normally run from two to seven years. This long-range nonduplication protection renders a program especially valuable to a station by assuring that it is the only source for audience viewing. Even where CATV has not previously carried a program, the threat that it might do so, while a local station has a license to broadcast the program, undermines the value of an exclusive contract. Where the CATV carriage is prior to a local broadcast, such a program merely has rerun value which diminishes with each successive showing.

This system of exclusive licenses has come under harsh criticism from scholars. Chazen and Ross believe that if exclusive contracts were barred, CATV would be able to compete in the open market for copyright licenses. Under the present system, exclusive contracts command such a high price that CATV cannot compete against profit-

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132. For a more complete discussion of the interrelationship of CATV penetration in distant markets and distant market licensing impairment, see CATV and Copyright Liability, supra note 17, at 1522-25.
133. Chazen & Ross, supra note 120, at 1822.
134. See Brief for Motion Picture Association of America, at 18-20, Columbia Broadcasting System, Inc. v. Teleprompter Corp., 476 F.2d 338 (2d Cir. 1973). The financially troubled motion picture industry has been particularly disturbed by CATV's threat to television royalty payments which have done much to sustain the industry during this long period of declining theater attendance. Id. at 20-22.
able VHF stations. CATV interests add that they would find it difficult to bargain in the open marketplace because of the great numbers of copyrighted programs carried of which they have little advance notice and no means of identifying and locating the copyright owner.

Nevertheless, the FCC has accepted the principle of exclusivity as a means for copyright holders to protect the value of their programs. The only restriction on exclusivity agreements, in so far as broadcasters and copyright holders are concerned, limits them in scope to the market area of the purchasing station.

A major goal of FCC regulation of CATV is ameliorating the threat to the structure of over-the-air broadcasting, which necessarily includes the system of exclusive contracts. Through limitations on distant signal importation and requirements that CATV honor certain copyright owner-broadcaster exclusive contracts, potential competition is reduced and program owners are able to insure that they will be able to license programs to local stations prior to CATV carriage.

The new FCC rules essentially allow CATV systems in the top one hundred markets to import two independent stations, two wild cards. Additionally, the systems may import network and independent stations to provide what the FCC considers to be adequate service where there are insufficient local stations, but the number imported under this rule reduces the number of wild cards to be imported. For example, in the top fifty markets, the rules allow CATV to import enough commercial signals to provide a complement of three full network and three independent stations when added with the local stations carried on the cable. The two independent wild card signals allowed to be imported will be reduced by the number of network and independent signals imported to aggregate the three network and three independents. In the second fifty markets, the rules are the same except that two rather than three independents are considered

139. Cable Television Report and Order, supra note 33, at 164, 173.
141. Id. 76.61.
adequate service.\textsuperscript{142} CATV in markets below the top one hundred may only import enough signals to provide a total of three network signals and one independent signal and may not import the two wild cards.\textsuperscript{143} In other words, if a system in the top fifty markets carries enough local and significantly viewed signals to equal the number considered adequate service, three networks and three independents, it may still import two independents. If the local area lacks one network or one independent to have adequate service, the CATV system may still only import two signals. Only when the local system lacks three signals for adequate service may the CATV system import three signals.

Under these rules, only in fourteen of the top one hundred markets can CATV import the signals of three stations. Furthermore, in only three of those markets can CATV import distant network signals.\textsuperscript{144} Hence, in these three markets alone the possibility exists that the great number of programs which are first shown on network stations will have their first audience exposure over CATV.

The exclusivity rules add another level of protection. Network programs are given simultaneous duplication protection in all markets.\textsuperscript{145} For syndicated programs\textsuperscript{146} in the top fifty markets, copyright owners and broadcasters are entitled to exclusivity for one year after the program has been first licensed or sold to any station in the United States and for the duration of the term of the exclusivity contract when the program has been licensed to a station in the CATV community. In the second fifty markets, the rules are more limited, providing exclusivity for one or two years after the first broadcast in the market or first availability depending on the type of program.\textsuperscript{147} Leapfrogging rules complete the FCC's protective scheme by limiting the choice of distant signals which may be imported. If permitted to import a network affiliate, CATV must import the closest such station. When importing an independent station from those within the top twenty-five markets, the cable system must import the station from the nearest such market.\textsuperscript{148}

\begin{enumerate}[\textsuperscript{142}]
\item Id. 76.63.
\item Id. 76.59.
\item See Cable Television Report and Order, \textit{supra} note 33, at 281-83.
\item 47 \textit{C.F.R.} §§ 76.91-.93 (1973).
\item Syndicated programs are nonnetwork programs sold, licensed, distributed or offered to television stations in more than one United States market for broadcast. \textit{Id.} § 76.5(p). As indicated previously, the vast majority of television programs produced by independent copyright holders have their first showing over networks so that most syndicated program broadcasts are subsequent showings. See text accompanying note 120 \textit{supra}.
\item 47 \textit{C.F.R.} § 76.151 (1973).
\item 37 \textit{Fed. Reg.} 3265 (1972).
\end{enumerate}
Whether these rules will afford to the broadcaster and copyright holder the protection they have demanded can only be determined over time and through experience. Still, the FCC believes these rules preserve the existing broadcast structure while promoting CATV development.149

[T]he Commission is convinced that the new cable rules do not pose serious risk of adverse impact on broadcast television. That conclusion is, of course, still to be tested. But we would not have taken the route we are now pursuing if we thought it would result in the demise of the existing system.150

It is appropriate to point out, however, that one report has taken issue with the contention that the exclusivity provisions will significantly protect broadcasting and promote CATV in the manner anticipated.151 This Rand Corporation report concludes that in the top fifty markets where distant signals are not such a threat because of existing good over-the-air independent service, the exclusivity provisions will require about half of all distant programming to be blacked out on the cable. In the smaller markets where distant signals make up for the lack of local independent service, the exclusivity provisions will require blackouts of distant signals only 5 to 15 percent of the time.162 The FCC justifies reduced exclusivity in the second fifty markets on the ground that they are underserved by independent stations. These markets need cable in many instances for a full complement of stations, and the FCC suggests that the limitation on distant signal importation in the smaller markets would offer adequate protection.153

The refusal to provide exclusivity in markets below the top one hundred was felt necessary to promote cable construction. Such exclusivity would provide "only marginal benefit to copyright holders who derive the substantial bulk of their revenues from the top markets."154

If the FCC rules preserve the existing market system and practice of exclusive contracts while bringing CATV into that structure as in-

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149. There is considerable scholarly protest against the new rules as being unnecessarily protective of broadcasting and overly restrictive of CATV development. See, e.g., Barrow, supra note 55, at 707-08.

150. Letter from Dean Burch, Chairman of the FCC, to Senator Howard H. Baker, April 21, 1972, in Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, 92d Cong., 2d Sess., ser. 92-54, at 141-42 (1972) [hereinafter cited as Letter from Dean Burch].


152. Id. at 6-8.

153. Cable Television Report and Order, supra note 33, at 170.

tended, then broadcast and copyright interests will have achieved their goal of protecting their existing market relationships155 without the necessity of imposing copyright liability and exacting payments from CATV. If not, the FCC retains the flexibility and determination to make necessary rule adjustments.156

This detailed discussion of the effect of FCC rules on the economic threat of CATV indicates the importance of recognizing that the issue of copyright liability for CATV cannot be discussed in a hypothetical freemarket situation. FCC jurisdiction over CATV has been based in part on the theory that "its authority to regulate broadcasting gave it 'ancillary' jurisdiction over CATV in any degree necessary to prevent frustration of its policies and regulations relating to broadcasting."157 Insofar as full copyright liability for distant signals promotes preservation of the existing structure, FCC regulatory goals and broadcaster copyright interests are consistent, if one ignores a proprietary copyright claim. But where copyright liability conflicts with FCC regulation, copyright interests will conflict with national telecommunications policy as established by the FCC under the authority of the Communications Act of 1934.158

Conflict With FCC Regulation of Distant Signals

FCC permission for limited distant signal carriage was granted in anticipation and on condition that copyright legislation in regard to CATV would be forthcoming.159 Imposition of full liability under the court of appeals decision in Teleprompter would have disrupted the regulatory scheme and compulsory copyright license model under which the rules were adopted. It also would have conflicted with public interest goals as articulated by the FCC.

It would be impossible—and indeed probably unhealthy in terms of the public interest—if we were to determine that we should totally insulate the existing systems of communication at the expense of preventing any development of new technology.

Our concern is what is best for the public. Because there is little argument that a broadband communications system such

155. See text accompanying notes 54-56 supra.
156. Memorandum of the General Counsel of the Federal Communications Commission with Respect to the Commission's Ability to Deal with Destructive Competitive Injury to Television Broadcast Service From Cable Television Systems Carrying Distant Signals and the Commission's Power to Deal with Obscene Transmissions by Cable Systems in Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, 92d Cong., 2d Sess., ser. 92-54, at 133-36 (1972).
159. Cable Television Report and Order, supra note 33, at 167.
as cable television offers would be beneficial and that existing broadcast television by and large serves the public interest, our task is to determine how to integrate these two technologies so both may flourish simultaneously.\(^\text{160}\)

The FCC has determined that allowing a minimum number of distant signals to insure growth of cable, subject to some form of compulsory copyright licensing, would serve the public interest, integrate the two technologies and bring cable within the television programming distribution market.\(^\text{161}\) Full liability would have defeated that goal by placing in the hands of the copyright holder the power to determine if the license should be granted without regard to public interest considerations. Copyright interests argue, however, that national communications policy requires a fair and adequate return to the copyright owner for his creative work.\(^\text{162}\) Nevertheless, compulsory licensing requiring payment of appropriate fees affords an adequate return while allowing signal carriage within the requirements of the public interest.

Under the definition of a distant signal suggested by the Second Circuit in *Teleprompter*,\(^\text{163}\) there was a danger that full liability would be imposed for carriage of signals which the FCC required to be carried. Under FCC rules, systems outside all television markets must upon request of the station licensee carry "broadcast stations within whose Grade B contours the community of the system is located, in whole or in part."\(^\text{164}\) The Second Circuit determined that a signal imported by Teleprompter's system in Farmington, New Mexico from Durango, Colorado probably was subject to full copyright liability.\(^\text{165}\) Teleprompter demonstrated, however, that Farmington is within the Grade B contour of the Durango station and must be carried pursuant to the above quoted rule.\(^\text{166}\) This untenable position for cable interests would have been a frequent possibility under the imprecise *Teleprompter* decision. Where market areas are large, a CATV system required to carry a signal under the significantly viewed or hyphenated market rules and yet only able to capture the signal by use of an antenna outside the local CATV community would have been subject to full liability. The same situation would have resulted if the Supreme Court had accepted plaintiffs' argument and imposed liability for program origination. Teleprompter argued this "required
liability" would have been unconscionable and would have created an irreconcilable conflict between copyright and communications law.  

This author must agree. Even if CATV could negotiate copyright licenses in a free market situation as copyright interests believe, FCC regulation precludes an open market. Copyright holders would have had no motivation to compromise on fees or permissible carriage and CATV would have been deprived of their only bargaining lever, the possibility of noncarriage of the copyrighted program.

This direct conflict between copyright liability and FCC regulation of CATV brings into focus the essential problem of accommodating telecommunications policy with copyright policy and theory. Over the past decade, CATV has been the most significant obstacle to revision of the copyright laws. At the same time, confusion over the copyright issue has impaired the ability of the FCC to resolve CATV's "status vis-a-vis the television programming distribution market," a central goal of FCC regulatory policy. Absent blanket liability, copyright legislation for CATV must partake of regulatory characteristics in determining for what kind of signal carriage CATV is to be subject to liability. FCC regulation, on the other hand, takes on a copyright function in protecting copyright holders from unfair exploitation of their creative efforts. Distribution of these regulatory and copyright functions must involve reconciliation of policy goals underlying telecommunications and copyright law.

CATV and Telecommunications Policy

The Communications Act obligates the FCC to "generally encourage the larger and more effective use of radio in the public interest." The FCC's minimum objective has been provision for some form of television service to all the people of the United States. Beyond that, the FCC has sought "a fair, efficient and equitable distribution of television broadcast stations to the several states and communities." The FCC has established a series of priorities for allocating television channels first to provide for as many communities as

170. See Letter from Dean Burch to Senator John L. McClellan, Jan. 26, 1972, in Cable Television Report and Order, supra note 33, at 286.
173. Id.
possible and then to allow for multiple service.\textsuperscript{174} A natural and ultimate corollary of these policies has been the goal of promoting diversity of viewpoints and program choice.\textsuperscript{176}

The significance and focus of the diversity goal cannot be confined to achieving a greater variety of entertainment. Television's function goes far beyond providing amusement and advertising. Television is an educational and political medium. It informs and persuades people with a sense of immediacy and involvement. It has many uses and possibilities. Over the last decade people of this country have become increasingly conscious of their cultural and political pluralism. Television has great potential as an outlet for expression of different cultural themes and political viewpoints. Diversity requires access to television by minor and major cultural and political interests. In sum, diversity in television programming "should reflect and enrich this [nation's] cultural pluralism" while serving a varied array of social functions: entertainment, advertising, education, information, business, culture and political expression.\textsuperscript{176}

Additionally, the FCC sees diversification as a means of implementing congressional policy against monopoly. The statutory mandate to promote fair, efficient and equitable distribution is a means "to effectuate the policy against the monopolization of broadcast facilities and the preservation of our broadcasting system on a free competitive basis."\textsuperscript{177} Underlying this objective must be a policy not simply to promote free enterprise, but above all to promote an open exchange of ideas and broad exposure to cultural differences.

The FCC has long promoted UHF as the primary means for increasing diversity.\textsuperscript{178} Unfortunately that effort has been a dismal failure. UHF has lacked attractive programming and until recently many television sets have lacked the necessary equipment to receive UHF signals.\textsuperscript{179} CATV offers a more effective, efficient and potentially more useful alternative for achieving diversity. The FCC has acknowledged that in requiring program origination by CATV it is furthering the statutory mandate to provide larger and more effective use of television in the public interest.\textsuperscript{180} Provisions for leased access, public access and government access channels in the new rules will

\textsuperscript{174} Id.
\textsuperscript{175} See Barrow, supra note 55, at 690-92.
\textsuperscript{176} THE PRESIDENT'S TASK FORCE ON COMMUNICATIONS POLICY, FINAL REPORT, ch. 7, at 2-3 (1968).
\textsuperscript{177} Report and Order, 18 F.C.C. 288, 291 (1953).
\textsuperscript{178} Chazen & Ross, supra note 120, at 1824.
\textsuperscript{179} THE PRESIDENT'S TASK FORCE ON COMMUNICATIONS POLICY, FINAL REPORT, ch. 7, at 15 (1968).
\textsuperscript{180} First Report and Order, 20 F.C.C.2d 201, 208-09 (1969).
serve to make television available to heretofore unseen interests. 181

In upholding FCC jurisdiction to require program origination, the Supreme Court in United States v. Midwest Video Corp. declared that FCC jurisdiction over CATV, ancillary to its statutory authority over broadcasting, was "not merely to protect [broadcasting] but to promote the objectives for which the Commission had been assigned jurisdiction over broadcasting." 182 The Court went on to say that required program origination had the effect of assuring "that in the retransmission of broadcast signals viewers are provided suitably diversified programming," 183 suggesting that this objective gave the FCC jurisdiction to require origination. This judicial sanction of diversification as a regulatory objective also should apply to distant signal regulation and promotion. Limitations on distant signal carriage and mandatory compliance with exclusivity contracts protect broadcasting. Allowing a minimum of distant signal importation promotes an objective for which the commission was assigned jurisdiction over broadcasting, diversity of service. The FCC has acknowledged as much. 184

Distant signals offer diversification through wider access to a larger number of broadcast channels. Teleprompter argued that of the 3,000 CATV systems, approximately 50 percent depend on distant signals to provide their subscribers with full network service, at least three stations each affiliated with one of the three major networks, broadcasting the full complement of network programs. 185 It is this failure of the broadcast industry to fulfill the public demand for a diversity of program services that has encouraged the growth of the cable industry. Yet, the ultimate hope of CATV is not simply more channels for more viewers, but rather a whole system of broadband communications including access channels, program origination and eventually a capability for two-way communication. This panoply of services must await the growth of CATV as a viable industry capable of attracting the requisite investment capital. Currently, the major incentive to subscribe to CATV is the availability of imported signals. 186 Thus for CATV to become a whole new telecommunications system, it must be allowed to provide the diversity of broadcast channels which the public demands and the FCC desires.

Imposition of full copyright liability would have effectively throttled CATV's ability to achieve its potential. If copyright interests

181. See Cable Television Report and Order, supra note 33, at 189-98.
183. Id. at 669.
184. Cable Television Report and Order, supra note 33, at 177.
were allowed to control distant signal carriage, they would have controlled CATV growth as well. This raises the issue of whether CATV's exploitation of copyright owners' creative efforts runs contrary to the goals of copyright law. If so, perhaps an argument can be made that despite the great potential of CATV as a new communications system, the interests of program owners in protecting their work ought to be allowed to inhibit development of that system.

CATV and Policy Underpinnings of Copyright Law

The authority to enact copyright legislation is derived from one of the enumerated powers vested in the federal government by the Constitution. Congress has the power

[To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.]

The introductory phrase suggests the purpose of and a limitation on the grant of a copyright monopoly. Primarily copyright is to secure "the general benefits derived by the public from the labors of authors." The copyright law, like the patent statutes, makes reward to the owner a secondary consideration. The promotion of creative effort by personal gain through copyright monopoly is believed to be the "best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'" This purpose suggests that the right of the copyright owner to be compensated for his creative efforts is limited by the degree to which his gain promotes the public welfare. Under this view, a claim that mere use of a copyrighted work entitles the owner to compensation is unjustified absent some demonstrable public benefit.

Copyright interests argue that the addition of a new source of income to program producers from CATV would provide funds to stimulate additional diversified programming. The impetus to beneficial program diversity would seem limited, however, where CATV is paying copyright fees for reception of broadcast programs. The initial sale of programs to broadcasters will still be based on the gain from the use of television as a mass marketing device. Such a utilization of television in the past has led to programming of uniform content and theme which appeals to the more primitive human emo-

188. Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932).
191. See Statement of Jack Valenti, President of the Motion Picture Ass'n of America, Inc. in Hearings on S. 1361, supra note 117, at 305-06.
tions and desires, thus attracting a wider audience. Only when CATV becomes a substantial source of copyright revenues for original program distribution unconnected with advertising revenue, will there be an encouragement to beneficially diverse program production.

Despite the apparent restriction on the copyright monopoly that it must benefit the public through promotion of the arts, it is doubtful whether in practice such a consideration has limited the granting of a copyright beyond the requirement of originality. Professor Nimmer has questioned "whether the monopoly inherent in copyright requires any greater justification in terms of public welfare than does the monopoly which is an essential concomitant of any form of private property." He goes on to argue that the framers "regarded the system of private property per se as in the public interest," and that copyright was merely an extension of this principle into a new area. The copyright holder would then be entitled to compensation for any use solely on the basis of his proprietary interest much as the landowner is compensated for erection of an advertising sign on his property. Senator McClellan, chairman of the Senate subcommittee considering copyright legislation, believes that in regard to CATV carriage, copyright owners have a proprietary interest for which they are entitled to compensation. Certain CATV owners have acknowledged that in view of the impact of distant signal importation on copyright property rights, copyright fees should be payable on distant signal programs.

In practice, copyright has "more to do today with mobilizing the profit-propelled apparatus of dissemination—publication and distribution—than with calling the [works] into first unpublished existence . . . ." A television program creator is not rewarded in anticipation of or even on account of his creativity, but rather to the extent that his efforts have successfully mass-marketed a product and expanded the audience for a television station. CATV has grown through exploitation of a demand for copyrighted works. Fairness and a proprietary theory of copyright seems to require that CATV compensate copyright holders at least to the extent they are not otherwise compensated by broadcasting stations.

Compensation and monopoly rights should not be unlimited however. Professor Kaplan argues that copyright affords a "headstart" to

192. See Barrow, supra note 55, at 691-92 nn.39-41.
193. NIMMER, supra note 6, § 3.1, at 4.
194. Id. at 5.
196. See, e.g., Statement of George Barco, General Counsel of the Pennsylvania Cable Television Association, in Hearings on S. 1361, supra note 117, at 404.
197. B. KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 75 (1967).
certain original signals "so easy of replication that incentive to produce would be quashed by the prospect of rampant reproduction by freeloaders." But, the headstart must be qualified in time and exclusivity. An extended monopoly dangerously and unnecessarily hinders the reception and enjoyment of copyrighted works. If a major purpose of copyright is to benefit public welfare through promotion of the arts, the public must have access. The copyright holder with complete monopoly rights of a work in great demand can limit access by increasing its cost.

Cable television, as was discussed in the previous section, has great potential for broad exposure of copyrighted material. Access is not inhibited by the technological limitations of broadcasting. Direct payments by the subscriber enables CATV to distribute works which have narrower appeal than those financed by television advertising. If exploitation of broadcast programming is to be the means for effectuating the FCC goal of diversity and the larger benefits of CATV as a communications system, the proprietary rights of the copyright holder must suffer some restraint. The headstart must afford the copyright owner the benefit of a reward while not allowing him to determine what the public shall receive merely in accordance with his pecuniary interest.

The dual copyright theories of benefiting the public and protecting property rights and the telecommunications goal of diversity can be accommodated through some scheme of limited compensation for regulated CATV activity. Full liability irresponsibly elevates property rights above these two other goals.

An alternative to full liability which seeks to reconcile the copyright and telecommunications policies in a manner acceptable to all parties has been proposed. The possibility for a rational scheme for the growth of CATV and an end to the legal warfare of Teleprompter and Fortnightly will turn on the viability of that compromise.

The Consensus Agreement: Coordinated Regulation and Copyright Legislation

As discussed above FCC regulatory policy and copyright legislation affecting CATV have mutually inhibited each other over the last decade. The commission's experiments at regulation after its reluctant assertion of jurisdiction over CATV served to impede CATV growth rather than encourage it. Over the years copyright bills have been introduced in almost every Congress; none achieved final pas-

198. Id. at 74.
199. See text accompanying notes 169-70 supra.
Representatives of broadcast and cable interests undertook a series of negotiations designed to produce a set of legislative principles for submission to the FCC and Congress. Final agreement was never reached. Shortly after *Fortnightly* and in recognition of the broad economic and telecommunications issues raised but unresolved by that decision, the FCC undertook an extensive inquiry into the long range development of CATV designed to culminate in a comprehensive regulatory scheme. The commission presented its proposals in a letter to Congress in August, 1971. Before they could be put into effect, a new series of negotiations between representatives of the industries principally involved was initiated by Dean Burch, then chairman of the FCC, and Clay T. Whitehead, Director of the Office of Telecommunications Policy. These negotiations led to concurrence in a “consensus agreement” in November, 1971. The agreement included proposals for FCC regulation and copyright legislation. In February, 1972, the FCC issued its new rules incorporating those in the agreement. Copyright legislation now pending before Congress should, after amendment, incorporate much of what was agreed to by the parties.

Though the agreement fulfills the hopes of both the FCC and Congress that a comprehensive regulatory and legislative scheme could be achieved with the support of those interested, its formation and adoption in part by the FCC has not gone without harsh criticism from outsiders, and grumbling by some of the parties. The most serious criticism is that it was formulated without participation of the public which is to be affected and without consultation with members of Congress who are to consider and supposedly adopt the proposals for copyright legislation. The CATV interests while supporting what they regard as the basic intent of the agreement, have spoken of “extraordinary pressures” placed upon them by the administration to accept

202. These Proposals are contained in a Letter from Dean Burch, FCC Chairman to the Senate Communications Subcommittee, August 5, 1971, in Cable Television Proposals, 31 F.C.C.2d 115 (1971).
203. 37 Fed. Reg. 3260-61, 3341 (1972). The agreement was accepted and signed by the National Cable Television Association, Inc., the National Association of Broadcasters and the Committee of Copyright Owners composed of certain independent suppliers of copyrighted programs. Statement of Jack Valenti, President of the Motion Picture Association of America, Inc., in *Hearings on S. 1361*, *supra* note 117, at 293, 295-96.
the agreement or face the alternatives of an indefinite extension of the FCC freeze on CATV or protracted congressional hearings. In all fairness, one suspects the broadcast and copyright interests felt similar pressures. In its letter of August 5, 1971, the FCC proposed to open the major markets to limited distant signal importation. Copyright legislation did not seem to be forthcoming and a district court decision in *Teleprompter* was not to be rendered until May, 1972. The broadcasters and copyright holders must have feared that decision might go against them in accordance with *Fortnightly* and that they would be in a weakened bargaining position for copyright legislation after adoption of proposed FCC rules.

The consensus agreement covers the distant and local signal carriage, exclusivity and leapfrogging rules described previously. The distant signal carriage rules are those originally proposed in the August 5, 1971, letter. There, the FCC stated it would study the issue of exclusivity, but when the parties agreed to exclusivity the commission adopted the exclusivity provisions.

Provisions for separate CATV copyright legislation to which the parties lent support rounds out the package comprised in the agreement. These provisions provide for copyright liability, including the obligation to respect exclusivity agreements, for CATV carriage of all radio and television signals except carriage by independently owned systems of less than 3,500 subscribers. Compulsory copyright licenses would be granted for all local and distant signals authorized under the FCC’s initial package and those grandfathered when the rules went into effect. While the FCC would retain power to authorize additional distant signals, no compulsory copyright license would be granted for such signals and CATV would be subject to full copyright liability for their carriage. Additionally, while as against distant signals subject to compulsory license, no greater exclusivity could be contracted for than the commission would allow, the FCC could not limit the scope of exclusivity agreements against subsequently authorized signals beyond limits applicable to copyright holder-broadcaster agreements. Broadcasters and copyright holders would be able to en-

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207. Letter from David H. Foster, President of the National Cable Television Association to Senator John L. McClellan in *Hearings on S. 1361*, supra note 117, at 639-40.
209. See text accompanying notes 140-48 supra.
212. *Id.*
213. See text accompanying note 138 *supra.*
force exclusivity rules through court actions for injunctions or damages. Finally, the agreement provides that if copyright owners and CATV owners cannot agree on a schedule of fees for the compulsory licenses, then arbitration is mandated.

Acceptance of Compulsory Licensing

The acceptance of compulsory licensing by the broadcasters and copyright interests is a concession to preserve, in so far as possible, the principle of exclusivity. Chazen and Ross argued that long-term exclusive sales of programming creates a substantial barrier to entry of CATV into the program market.\(^{214}\) They proposed two ways of bringing CATV into the program market, compulsory licensing or elimination of exclusives.\(^{215}\) The copyright interests apparently felt the former was less disruptive of their present market relationships. CATV interests accepted this, recognizing the difficulties of ascertaining and negotiating with the different copyright owners.\(^{216}\) If the conclusions of the Rand report discussed previously\(^{217}\) are correct, that exclusivity as provided for will limit CATV carriage in major markets where broadcasting requires less protection and limit it only slightly in the smaller less profitable markets, this compromise may prove inappropriate at least for copyright interests.

Compulsory licensing at least insures that copyright interests will not be able to thwart the decision of the FCC to allow distant signal importation in a limited fashion. It was probably agreed to by program owners under pressure of imminent rulemaking to allow greater distant signal carriage. It is probably the best accommodation of the competing telecommunications policy of diversity and the copyright claim of property rights. It marks a final rejection of any free market for television programming and a recognition that government regulation is in the best interest of both parties.

Suggested Changes in Proposed CATV Copyright Legislation

For any additional imported signals authorized in the future by the FCC, the copyright interests have demanded both the benefit of exclusivity and full copyright liability. If incorporated into copyright law,\(^{218}\) this provision could seriously impair FCC flexibility to change

\(^{214}\) See Chazen & Ross, supra note 120, at 1828. See text accompanying note 135 supra.

\(^{215}\) Chazen & Ross, supra note 120, at 1830-41.

\(^{216}\) See text accompanying note 136 supra.

\(^{217}\) See text accompanying note 151 supra.

\(^{218}\) The pending copyright revision bill allows the FCC to increase the number of signals subject to compulsory license. S. 1361, 93d Cong., 1st Sess. § 111(e)(2)(B) (1973).
their rules and to authorize additional distant signals if in their studied judgment such a change would not adversely impact upon broadcasting. The FCC has argued that despite the limitations in the consensus agreement, it retains sufficient flexibility "to keep pace with the future of this dynamic area of communications technology," through its control over details of network and syndicated programming exclusivity protection, leapfrogging and the definition of signals that must be carried.210 Under the special relief section220 of the new rules, the FCC does retain flexibility to contract authorized CATV activity so as to ameliorate destructive impact on broadcasting.221 Nevertheless, the imposition of full liability for additionally authorized signals and limitations on exclusivity regulation under the consensus agreement deprives the FCC of the ability to expand CATV carriage. The commission could authorize signals through a rule change, but for that to be effective the copyright holder would have to agree to license the programs to be carried. The parties would thus be thrust back into the morass of arguments over economic impact presented in Teleprompter and Fortnightly. The result would be a modest expansion of CATV carriage followed by an indefinite freeze on further expansion similar to that of the late 1960's when distant carriage was prohibited into the major markets.222 The freeze could only be lifted by congressional amendment of the copyright law, and in light of the incredible difficulty in passing CATV copyright legislation in the past, such amendment also would be difficult, if not impossible.

The copyright interests have argued that the limitations on extending compulsory licenses is not a regulatory matter and that the FCC should not be able to "change the copyright law and thereby . . . take private property from one party and give it to another party simply through administrative fiat."223 This argument is specious. If Congress provides for compulsory licensing for any signals carried, then the FCC is not changing law; it is simply allowing CATV to carry more of the signals subject to the license. Nevertheless, this argument is an interesting reflection on the continuing attitude of copyright owners. It restates the copyright owners' belief in the primacy of their

220. 47 C.F.R. § 76.7 (1973).
221. Memorandum of the General Counsel of the Federal Communications Commission with Respect to the Commission's Ability to Deal with Destructive Competitive Injury to Television Broadcast Service from Cable Television Systems Carrying Distant Signals and the Commission's Power to Deal with Obscene Transmissions by Cable Systems in Hearings before the Subcomm. on Communications of the Senate Comm. on Commerce, 92d Cong., 2d Sess., ser. 92-54, at 133-36 (1972).
223. Statement of Jack Valenti, President of the Motion Picture Association of America, Inc., in Hearings on S. 1361, supra note 117, at 301.
proprietary rights and suggests that the consensus agreement was not a compromise of the whole problem, but rather a temporary pragmatic concession. It also demonstrates a distrust of the FCC and its regulation of the field according to a public interest standard which in practice is quite protective of broadcasting. It is this public interest standard for the determination of signal carriage which recommends FCC regulation over full liability. It also allows for necessary flexibility in a time of rapid technological change, a factor sorely lacking over the past years of argument.

The other major difficulty with the consensus agreement is the lack of adequate guidelines for arbitrators to use in setting copyright fees in the absence of agreement among the parties. Such agreement has not been forthcoming in the negotiations over fees subsequent to the consensus agreement. Assuming no future agreement, the copyright holders have taken the position that copyright legislation should provide for compulsory arbitration of fees, as was agreed to, without an initial schedule of fees. The bill now under consideration by Congress includes an initial schedule which was originally inserted in a committee print of a predecessor bill. Copyright interests have argued that this schedule is grossly inadequate and that their studies show cable systems could afford to pay more than 15 percent of their gross revenues for copyright fees and still have profits sufficient to attract investment capital. The National Cable Television Association has countered that the parties were unable to arrive at an agreement on an initial schedule because of the present lack of factual data to provide a basis for negotiation. Arguing that such a lack of data prevents immediate equitable arbitration, the association repudiated the specific language of the consensus agreement calling for compulsory arbitration and advocated adoption of the schedule in Senate Bill 1361 with its provision for adjustment arbitration three years after

224. See text accompanying notes 160-61 supra.
225. See Statement of Jack Valenti, President of the Motion Picture Association of America, Inc., and Testimony of David Foster, President of the National Cable Television Association, in Hearings on S. 1361, supra note 117, at 297-98, 398-99.
226. Statement of Jack Valenti, President of the Motion Picture Association of America, Inc., in id., at 300.
227. S. 1361, 93d Cong., 1st Sess. § 111(d)(2)(B) (1973). This section provides for fees based on the following percentages of gross receipts from subscribers to the cable service for each three month period of service: 1% of receipts up to $40,000; 2% of receipts totalling more than $40,000 up to $80,000; 3% of receipts from $80,000 to $120,000; 4% of receipts from $120,000 to $160,000; 5% of receipts totalling more than $160,000.
229. Statement of Jack Valenti, President of the Motion Picture Association of America, Inc., in Hearings on S. 1361, supra note 117, at 299.
Regardless of whether the final law includes an initial schedule or not, the legislation must provide for guidelines for present or future arbitration. Senate Bill 1361 provides for a Copyright Royalty Tribunal which is “to make determinations concerning the adjustment of the copyright royalty rates specified by section 111 . . . so as to assure that such rates continue to be reasonable . . .” 231 Copyrights interests, believing the initial schedule is not reasonable at all, urge that a guideline for assuring that fees “are just and reasonable” be substituted. 232 They also advocate that fees approximate those which the CATV system would have had to pay had it purchased copyright licenses in a free market without a compulsory license. 233 The shortcoming of such a proposal is that it assumes no other protection for the value of the copyright holders work and further assumes a compulsory license is only an administrative device to eliminate the difficulty of locating copyright owners. Given exclusivity protection and limitations on distant signal importation, a fee based on open market dealings is manifestly unreasonable. Copyright holders already receive, albeit indirectly, a fee for CATV carriage in the form of increased fees from broadcasters where CATV expands audience coverage. 234 The protection of broadcasters through limitations on distant signals and requirements that CATV honor exclusive contracts assumes that copyright holders will obtain the major source of their revenues from broadcasting and that any fees CATV is to pay are in compensation for losses caused by signal importation. Under this view, copyright law should provide that the arbitration tribunal set fees at

230. Testimony of David Foster, President of the National Cable Television Association, in Hearings on S. 1361, supra note 117, at 399. Jack Valenti was very critical of this position, arguing that CATV has received the benefit of the consensus agreement through the implementation of FCC rules opening up the major markets for distant signal importation while copyright interests have as yet received no benefit as no legislation or agreement for the payment of fees has been achieved. He declared that the consensus agreement was a package which must be implemented as a whole and that NCTA’s repudiation of compulsory arbitration undermines the entire agreement. Statement of Jack Valenti, President of the Motion Picture Association of America, Inc., in id., at 298. NCTA also stated that their studies show the schedule of fees should be reduced 50% but they are willing to support the present schedule. Statement of David Foster, President of the National Cable Television Association, id., at 423. This difference of opinion over CATV’s potential to pay copyright fees results from different models of estimated CATV penetration. See note 117 supra.


232. Statement of Jack Valenti, President of the Motion Picture Association of America, Inc., in Hearings on S.1361, supra note 117, at 302.


234. See text accompanying note 122 supra.
a fully compensatory rate—a rate measured in terms of reduced revenues from broadcasters as a result of CATV penetration. Such a standard would avoid the double payment problem where the copyright holder already receives fees from broadcasters for the same audience that CATV covers. A compensatory fee recognizes that as a reception service CATV is an adjunct to the existing broadcast structure and cannot survive without it.

A free-market-based fee assumes CATV is a separate, independent market for programming. That is simply inaccurate in so far as CATV is a reception service. A compensatory fee directly ameliorates the unfair competition where CATV through exploitation of the copyright holders work undermines his reward. Finally, a compensatory fee eliminates the danger of undercompensation to the program owner from arbitrary or statutory fees. Absent such a danger, at least in regard to the program owner, the limitations on the number of distant signals carried are unnecessary because the copyright holder is given full recompense for his losses.

Conclusion

A final resolution of the CATV copyright problem may be at hand. The Supreme Court’s reversal of the appellate court’s decision in Teleprompter is a clear acknowledgment that existing copyright law does not cover CATV. Pressure from broadcasters and copyright holders for legislation will certainly mount. It is hoped that such legislation will in fact be a solution and an end to the uncertainty. The enactment of the provisions of the consensus agreement with the changes recommended in this note would achieve that goal in a manner consistent with both the public and private interests involved.

B. Scott Silverman*

235. CATV and Copyright Liability, supra note 17, at 1522-23.
236. Chazen & Ross, supra note 120, at 1838.
237. An affirmance of the appellate court decision in Teleprompter would have probably inhibited the passage of CATV copyright legislation for some time. See Hearings on S. 1361, supra note 117, at 577, 592.
* Member, Second Year Class.