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# Cable, Copyright, Communications: Controversy

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# *Cable, Copyright, Communications: Controversy*

IN *Teleprompter Corp. v. Columbia Broadcasting System*[1] THE SUPREME COURT HELD that cable television[2] systems do not violate federal copyright law when they receive and retransmit TV signals from distant[3] markets. Plaintiffs, Columbia Broadcasting System, has contended that a 'distance' test, such as that adhered to by the lower court,[4] should be applied to the Teleprompter situation, and that the ability of the subscriber to receive distant signals distinguished this case from the 1968 Court decision of *Fortnightly Corp. v. United Artists Television, Inc.*[5] The Court, however, determined that regardless of the distance of the signal imported, cable systems executed a viewer's function.

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[1] 415 U.S. 394 (1974).

[2] Hereinafter referred to as "cable." Cable television is known by many other names — CATV, an acronym for Community Antenna Television is often used, but many cable authorities contend this is a misnomer because it is no longer a "cottage industry" which serves only rural communities as the name implies. *See,* United Artists Television, Inc. v. Fortnightly, 255 F. Supp. 177, 180 (S.D.N.Y. 1966), *aff'd* 377 F.2d 872 (2d Cir. 1967), *rev'd,* 392 U.S. 390 (1968). It is also known as broadband distribution networks, coaxial communications, wired television, and by various other names. A CATV system as defined by the FCC is as follows:

> Any facility that, in whole or in part, received directly, or indirectly over the air, and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television or radio stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such term shall not include 1) any such facility that serves fewer than 50 subscribers, or 2) any such facility that serves only the residents of one or more dwellings under common ownership, control, or management and commercial establishments located on the premises of such an apartment house. 47 C.F.R. § 76.5(a) (1972).

[3] These "distant signals" have been defined in at least three ways: "a signal rebroadcast without relay which cannot be clearly received; a signal whose pickup does not add appreciably to the size of the broadcast advertising market; and a signal received beyond the Grade B contour. The Grade B contour of a television station is the boundary of a hypothetical area at whose outer limits television reception of 'a quality acceptable to the median observer' is expected to be available at least 90 percent of the time at the best 50 percent of the receiver locations, based on expected field intensities and certain assumptions as to the nature and height of the receiving antenna and the capabilities of the television set. 47 C.F.R. § 73.684(c) (1973). Since television transmission travels only on line of sight, topographical conditions will affect the Grade B Contour." Note, *Cable Television and Copyright Royalties,* 83 Yale L. J. 554 n. 3 (1974).

The Court of Appeals in *Teleprompter* found instead that "it is easier to state what is not a distant signal than to state what is a distant signal. Accordingly, we have concluded that any signal capable of projecting, without relay or retransmittal an acceptable image that a CATV system receives off-the-air during a substantial portion of the time by means of an antenna erected in or adjacent to the CATV community is not a distant signal." Columbia Broadcasting Sys., Inc. v. Teleprompter Corp., 476 F.2d 338, 351 (2d Cir. 1973) *modified,* 415 U.S. 394 (1974).

[4] Columbia Broadcasting Sys., Inc. v. Teleprompter Corp., 476 F.2d 338 (2d Cir. 1973), *modified,* 415 U.S. 394 (1974).

[5] 392 U.S. 390 (1968), *rev'g* 377 F.2d 872 (2d Cir. 1967), *and* 255 F. Supp. 177 (S.D. N.Y. 1966).

The responsibility for deciding copyright problems in broadcast television and in community antenna television lies with Congress,[6] but in the absence of legislative action the courts have had to deal with the problem as best they could. This Note will examine the efforts of the courts, the legislature, and the Federal Communications Commission (FCC) to apply the Copyright Act of 1909 to the technological developments of the twentieth century. It is submitted that the significance of *Teleprompter* lies not in the Court's determination that there was no copyright infringement — for that finding will soon be negated by upcoming copyright law revision — but in the inability of the Court to discard past inflexible and unrealistic approaches to the 1909 Copyright Act. Offered is a different method of viewing cable communications in terms of the Copyright Act, which recognizes that black and white categorizations are inappropriate and hopefully accommodates the perplexing characteristics of the cable industry.

## Cable Television: An Overview

### *What is it?*

Cable television began in this country as a technical conduit bringing a clearer television picture over hills and mountains and other natural or man-made barriers. The first systems[7] in the late 1940's were prompted by demand for increased and improved television service in small, rural communities. From its nascent stages cable has served two functions: (1) supplementing broadcasting by improving reception of local stations in adjacent areas in which such reception would not otherwise be possible; and (2) transmitting the signals of distant stations entirely beyond the range of local antennae.[8]

Although still involved with television retransmission, cable has the "technical potential to become a communications medium of abundant capacity, with an almost limitless number of channels capable of carrying virtually any kind of communications."[9] As noted in *Tele-*

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[6] Teleprompter Corp. v. Columbia Broadcasting Sys., Inc., 415 U.S. 394, 414 (1974).

[7] While there is some dispute in the industry concerning who built the first cable system in the United States, L. E. (Ed) Parsons has the best documented claim to having done so, at Astoria, Oregon, in 1949. Smith, *The Emergence of CATV: A Look at the Evolution of a Revolution,* 58 PROCEEDINGS OF THE IEEE 967, 968 (1970). However, many industry spokesmen maintain that Robert J. Tarlton of Lansford, Pa. built the first system known as the Panther Valley Television Company. *See* R. SMITH, THE WIRED NATION 3 (1972). Still others, among them the National Association of Broadcasters, claim the originator to have been John Walson. *See* 86 BROADCASTING, May 27, 1974 at 95. For a further discussion of the history of CATV see M. ALICE & M. PHILLIPS, CATV, A HISTORY OF COMMUNITY ANTENNA TELEVISION (1972).

[8] United States v. Southwestern Cable Co., 392 U.S. 157, 163 (1968). This separation of functions has no significance for copyright purposes; rather it is related only to the issue of the regulatory authority of the FCC over the cable industry. Teleprompter Corp. v. Columbia Broadcasting Sys., Inc. 415 U.S. 394, 406 (1974).

[9] CABINET COMMITTEE ON CABLE COMMUNICATIONS, CABLE REPORT TO THE PRESIDENT 4 (1974). This report, issued on January 14, 1974, was the product of a special commit-

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*prompter*, cable no longer is characterized by the passivity of merely retransmitting signals; program origination,[10] sale of commercials, interconnection,[11] and two-way communications are all developments

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tee formed by the President in June, 1971. Working under the aegis of the President's Office of Telecommunications Policy, the Committee called for: (1) the development of cable systems as "common carriers" by separating the hardware from the programming function — local franchise holders would be distributors separated from control of programming; and (2) a gradual federal de-regulation of cable operations over the next decade, with emphasis on the roles of private industry and local governments.

[10] The court in Teleprompter Corp. v. Columbia Broadcasting Sys., Inc., 415 U.S. 394, 404 n. 8 (1974), explained:

> *Program origination initially consisted of simple arrangements on spare channels* using automated cameras providing time, weather, news ticker or stock ticker information, and aural systems with music or news announcements. The function has been explained to include coverage of sports and other live events, news services, moving picture films, and specially created dramatic and non-dramatic programs.

This program origination is also termed by the FCC as "cablecasting" of which there are two types: 1) origination and 2) access. Origination cablecasting is controlled by the cable operator while access cablecasting is presented on public access channels and is controlled by the person(s) who produce the program. FCC rules require that a system with more than 3,500 subscribers have non-automated program origination. The following table indicated the extent of program origination in the U.S. as of June, 1973:

| | | |
|---|---|---|
| Systems with automatic originations | | 1,664 |
| Systems with automatic originations only | | 996 |
| Time & weather | 1,597 | |
| News ticker | 288 | |
| Stock ticker | 124 | |
| Sports ticker | 42 | |
| Message wheel | 189 | |
| Music | 62 | |
| Emergency alert | 20 | |
| Advertising | 322 | |
| Other | 58 | |
| Systems with non-automatic originations | | 768 |
| Local live | 587 | |
| CATV network | 40 | |
| Film | 181 | |
| Tape | 288 | |
| Advertising | 233 | |
| Other | 130 | |
| Systems with no originations | | 1,114 |
| TOTAL SYSTEMS ORIGINATING | | 1,764 |
| Planned | | |
| Systems planning automatic originations | 148 | |
| Systems planning local originations | 177 | |
| TOTAL SYSTEMS PLANNING | | 154 |

43 TELEVISION FACTBOOK SERVICES VOLUME 84-a (1973) [hereinafter referred to as TELEVISION FACTBOOK].

[11] Interconnection occurs by linking the headends of different cable systems, usually with microwave, as a means of distributing programming regionally or nationally. However, until the penetration of cable increases, the total interconnection would probably not be large enough to be economically viable. The more promising form of interconnection is with satellites.

> [T]elevision signals would be radiated into space from any one of dozens of earth stations, then radiated back to earth stations capable of covering the entire continental United States and of distributing the signals at low cost to individual cable system head-ends.

SLOAN COMMISSION ON CABLE COMMUNICATIONS, ON THE CABLE: THE TELEVISION OF ABUNDANCE 40 (1971) [hereinafter referred to as THE SLOAN COMMISSION].

of the cable system that make it more than a mere extension of broadcast television.

Unlike broadcast television which transmits signals over-the-air and is limited by the scarcity of channel space within the electromagnetic spectrum, cable, by means of a network of coaxial cable,[12] allows the utilization of adjacent channels without the usually resultant signal interference. The cable network connects the headend,[13] or electronic control system with receiving antennas, and the terminal,[14] normally the home television set. The cable, either underground or attached to telephone utility poles, is connected with feeder lines from which drop lines fan out and connect with the home terminal. In order to maintain the strength of the signal throughout the trunk line, amplifiers are placed about every two thousand feet.

While in 1952 there were 70 cable systems in the nation serving 14,000 subscribers, by 1970 there were 2,350 systems with 4,500,000 subscribers.[15] Cable's explosive[16] growth saw an increase in channel capacity to 20 channels,[17] importation of distant signals via microwave links, and the emergence of multiple system operators (MSO's) who bought out small cable operators and merged cable systems. In

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[12] Coaxial cable consists of copper wire surrounded by an insulating layer of plastic foam which in turn is covered by a thin sheath of knitted aluminum. The cable is encased in an outer protective skin. The wire and the shielding interact creating an electromagnetic field between them. Bell Laboratories developed the first coaxial cable, which was then used during World War II for military communications. CABLE TELEVISION INFORMATION CENTER, CABLE DATA 6 (1972).

[13] The headend is usually located at the antenna site of a cable system and consists of equipment which amplifies, filters, and converts broadcast television signals and sends them down the cable. *See* R. SMITH, THE WIRED NATION, 4 (1972).

[14] In addition to the connectors that connect the TV set with the cable, a terminal may also have converters where more than twelve channels are relayed on a single cable. The converter extends the capacity of the home set beyond the 12 standard VHF channels, and prevents against the interference of strong local over-the-air signals. In the future a terminal may also include videotape recorders, keyboards and computers.

[15] Smith, *The Emergence of CATV, supra* note 7, at 970, *citing* TELEVISION FACTBOOK, *supra* note 10. The year 1952 was the first one in which reliable statistics on cable TV were assembled.

[16] The cable industry's growth has been characterized as "explosive" by the FCC. Second Report and Order, 2 F.C.C. 2d 725, 738 (1966).

[17] In 1953, the cable industry introduced 12 channel capacity. The average channel capacity for all systems in 1972 was 10.34. The FCC requires all new systems in the 100 largest television markets to carry a minimum of 20 channels. The following chart indicates the channel capacity of cable systems as of June, 1973:

| | |
|---|---|
| Over 20 | 207 |
| 13-20 | 262 |
| 6-12 | 2,181 |
| 5 only | 287 |
| Sub-5 | 49 |
| Not available | 46 |
| Total | 3,032 |
| Two-Way | |
| Systems operating | 63 |
| Systems planning | 153 |

TELEVISION FACTBOOK, *supra* note 10.

1973 almost eight million households were served by approximately 3,000 systems, and the industry is now growing at a rate of more than ten per cent per year.[18] The systems range in size from under fifty to over 50,000 subscribers, the average size being about 2,150 subscribers.[19]

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[18] CABLE REPORT TO THE PRESIDENT, *supra* note 9, at 4. The following table indicates the growth of the cable industry from 1952-73:

| Year | Operating Systems | Total Subscribers |
|---|---|---|
| 1952 | 70 | 14,000 |
| 1953 | 150 | 30,000 |
| 1954 | 300 | 65,000 |
| 1955 | 400 | 150,000 |
| 1956 | 450 | 300,000 |
| 1957 | 500 | 350,000 |
| 1958 | 525 | 450,000 |
| 1959 | 560 | 550,000 |
| 1960 | 640 | 650,000 |
| 1961 | 700 | 725,000 |
| 1962 | 800 | 850,000 |
| 1963 | 1,000 | 950,000 |
| 1964 | 1,200 | 1,085,000 |
| 1965 | 1,325 | 1,275,000 |
| 1966 | 1,570 | 1,575,000 |
| 1967 | 1,770 | 2,100,000 |
| 1968 | 2,000 | 2,800,000 |
| 1969 | 2,260 | 3,600,000 |
| 1970 | 2,490 | 4,500,000 |
| 1971 | 2,639 | 5,300,000 |
| 1972 | 2,841 | 6,000,000 |
| 1973 | 2,991 | 7,300,000 |

TELEVISION FACTBOOK, *supra* note 10.

[19] CABLE TELEVISION INFORMATION CENTER, CABLE DATA 5 (1972). The following chart shows U.S. cable systems by subscriber size as of June, 1973:

| Size by Subscribers | Systems |
|---|---|
| 20,000 & over | 31 |
| 10,000-19,999 | 119 |
| 5,000-9,999 | 252 |
| 3,500-4,999 | 176 |
| 2,000-3,499 | 417 |
| 1,000-1,999 | 545 |
| 500-999 | 587 |
| 50-499 | 810 |
| 49 & under | 42 |
| Not Available | 53 |
| Total | 3,032 |

TELEVISION FACTBOOK, *supra* note 10.

The ten largest systems as of June, 1973 are:

| System | Subscriber |
|---|---|
| San Diego, Cal. (Mission Table TV Inc.) | 75,000 |
| New York, N. Y. (Sterling Manhattan Cable TV) | 57,500 |
| New York, N. Y. (TelePrompTer) | 52,174 |
| Allentown, Pa. | 52,000 |
| Northampton, Pa. (Twin County Trans-Video Inc.) | 50,000 |
| Suffolk County, N. Y. | 40,000 |
| Wilmington, Del. | 36,127 |
| San Rafael, Cal. | 34,000 |
| Los Angeles, Cal. (Theta Cable of Cal.) | 33,673 |
| Santa Barbara, Cal. | 33,186 |

*Id.* at 83-a.

*Future Potential*

The principal factor prompting the evolution of cable has been the lack of program diversity of broadcast television.[20] The element of choice is spread over a national audience and most programs are therefore geared to the lowest common denominator of viewer's interest.[21] Cable television with its virtually unlimited channel capacity[22] promises to end this economy of scarcity[23] and offer more diversified programming. Cable's greater number of channels will allow advertisers to target their products to specific audiences with the correlative lower cost to the advertiser who avoids paying for exposure to audiences he has no interest in reaching. Because general-appeal entertainment programs are likely to continue to be watched on broadcast television,[24] cable will be able to devote its time to programs of special interest; it will not only expand consumer choice but also provide additional sources of revenue for the performing arts, public and private education, and for the television program production industry.[25]

As the awareness of its expansive potential as a communications network or "information utility"[26] expands, cable is likened less to broadcast television and more to the press media. Two-way communications may end the need for geographical proximity in communica-

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[20] Smith, *The Emergence of CATV*, *supra* note 7, at 971.

[21] CABLE REPORT TO THE PRESIDENT, *supra* note 9, at 12.

[22] With existing technology a single coaxial cable can carry 28-35 channels, plus the entire AM and FM radio bands. Nathaniel Feldman, a Rand Corporation engineer, predicts that in 10-20 years a four-cable system will have a capacity of 400 channels of television. R. SMITH, THE WIRED NATION 7 (1972).

[23] In many instances, the viewer in prime time may choose from among only three network programs, one educational television program, and perhaps one more program, which may well be a network rerun, offered by a local station not affiliated with a network.

CABLE REPORT TO THE PRESIDENT, *supra* note 9, at 12. Television is limited by the general scarcity of space within the electromagnetic spectrum and is constrained further by the lack of space for VHF (Very High Frequency), which is the band best suited for television. The VHF band runs from about 50$MH_2$ (million cycles per second) to about 200 $MH_2$ and within the space FM radio uses the frequencies between 88 $MH_2$ and 108 $MH_2$, and aircraft navigation occupies the 108-120 $MH_2$ band. VHF is left with space for only twelve television channels between 54-88 $MH_2$ and between 174-216 $MH_2$. Above the VHF band is the Ultra High Frequency (UHF) band with space for seventy channels, but the higher in the electromagnetic spectrum, the less range of the signals, making UHF less desirable for television. THE SLOAN COMMISSION, *supra* note 11 at 16-22.

[24] This contention has been disputed by broadcast television interests who maintain that pay cable, so labelled because each subscriber must pay for what the cable transmits, should not be allowed to "siphon" from "free" television. A pamphlet issued by CBS entitled DOES THE AMERICAN FAMILY NEED ANOTHER MOUTH TO FEED? maintains that in rural communities where it is uneconomic for cable systems to be built, families would be denied many of television's popular attractions if they were siphoned off to pay cable television.

[25] CABLE REPORT TO THE PRESIDENT, *supra* note 9, at 13.

[26] Parker and Dunn, *Information Technology: Its Social Potential*, 176 SCIENCE 1392 (1972).

tions, business, and education; merchants will advertise goods via cable and shopping will be done without leaving home.[27] The uses of cable communications become endless.[28]

Cable is still a relatively small industry, although the Sloan Commission predicts that cable will reach a market penetration of between 40-60% by 1980 (even higher in metropolitan areas) if it continues to grow at the same rate that it has in the 1960's.[29] More pessimistic observers predict only 15% penetration by 1975.[30]

*Regulation of Cable*

The rate of growth of cable has been and will continue to be largely responsive to the extent of local, state, and federal regulation. Local governments, filling the void of indifference left by state and federal authorities, became the first regulators of the industry and gave permission to use public property and rights of way. For these benefits cities have demanded a share of the system's profits, often amounting to three or four per cent of the total gross subscriber receipts.[31] Despite the requirement of a fee, however, franchises were often granted without any consideration as to the system's timetable for construction or operating requirements such as channel capacity. Also, in some cities operators bypassed poor neighborhoods and wired only the more affluent sections. To help curb these undesirable results, franchise awards are now granted with greater care and more deliberation, with the process often taking a year or longer. Despite increased federal regulation over the years, local franchising authori-

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[27] Barrow, *OTP and FCC: Role of the Presidency and the Independent Agency in Communications,* 43 U. CIN. L. REV. 291, 299 (1974).

[28] Barry Head, in *Voices on the Cable,* HARPERS March, 1973, at 28-9, lists various uses to which cable communication can be put:

1. Provide new access to decision-makers.
2. Give us a survival kit for the disadvantaged by bringing them essential information on employment, housing, health, nutrition, day care, etc.
3. Significantly raise the level of public education.
4. Provide means to monitor and combat environmental deterioration.
5. Permit the population of our overcrowded cities to disperse, and enable those who remain to form cohesive communities with easy access to each other.
6. Enable minority interest groups to reach their members, each other and the rest of us.
7. Bring new methods to bear on crime prevention and control.
8. Carry family-planning information beyond the reach of field workers to those who most need it.
9. Make many business trips unnecessary by making two-way video communication, data transmission, and facsimile printouts possible.

[29] THE SLOAN COMMISSION, *supra* note 11, at 173.

[30] Donnelly, *The Dimmer View,* BARRON'S July 10, 1972, at 5.

[31] The fee, or license tax, is based on the municipality's right to tax cable systems for the privilege of using the streets. The charge must bear a reasonable relationship to the service to the cable system. *See* Chicago Heights v. Public Serv. Co., 408 Ill. 604, 97 N.E.2d 807 (1951); Lombard v. Illinois Bell Tel. Co., 405 Ill. 209, 90 N.E.2d 105 (1950); Panther Valley Tel. Co. v. Summit Hall, 376 Pa. 375, 102 A.2d 699 (1954).

ties still determine initially who will build a cable system; regulate subscriber rates and the operation of municipal channels; and monitor the system's performance and compliance.[32] In addition state regulation, long dormant, is developing with a view towards treating cable as a public utility[33] and may eventually reach the proportions of local and federal control.

Federal regulation of cable has evolved from an initial phase of "indifference to one of hostility to one of mild encouragement."[34] The federal regulation of cable is presently based on the Communications Act of 1934[35] but despite its grant of broad regulatory powers over radio and television[36] the FCC was initially reluctant to exercise jurisdiction over the activities of cable TV. But pressure for federal regulation was exerted by the broadcasting industry, which had initially favored cable but now feared that cable was fragmenting its audience size and advertising revenues.[37] Nonetheless, as late as 1959, the FCC ruled that it had no jurisdiction over cable TV.[38]

The Commission, perhaps disconcerted over its failure to find a jurisdictional basis in the 1959 Report and Order and the subsequent proliferation of unregulated CATV systems, modified its position taken regarding cable's use of microwave common carrier systems. In the 1959 Report, the Commission had refused to impose regulations over microwave common carriers, with the suggested alternative method being a denial of a license for expansion when the purpose was to supply CATV systems which adversely affected the public interest by its impact on local stations. The Commission had ruled

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[32] CABLE REPORT TO THE PRESIDENT, *supra* note 9, at 23.

[33] The United States Supreme Court, in Pix TV, Inc. v. Taylor, 396 U.S. 556 (1970) (per curiam), upheld the principle of state regulation of CATV, when it affirmed the constitutionality of NEV. REV. STAT. Ch. 711 (1973). M. SEIDEN, CABLE TELEVISION U.S.A. 79 (1972).

[34] The Sloan Commission, *supra* note 11, at 152.

[35] 47 U.S.C. §§ 151-609 (1970).

[36] *Id.* at §§ 303, 307, 309.

[37] In 1958 the Senate Commerce Committee held the first hearings on the proposed regulation of cable. The complainants, the television broadcasters, and the National Community Television Association presented their views, but Congress took no action. It was also contended publicly for the first time that cable systems were involved in unfair competition with local broadcast stations because cable operators did not pay copyright royalties. Smith, *supra* note 7, at 972. This issue was litigated in Cable Vision, Inc. v. UTV, 335 F.2d 348 (9th Cir. 1964), *cert. denied*, 379 U.S. 989 (1964), rejecting the right of a broadcaster to restrict CATV carriage on the basis of exclusive contract. This decision prompted the beginnings of the *Fortnightly* case in 1960.

[38] In 1959 the Federal Communications Commission initiated a study, CATV and TV Repeater Services, designed to examine the services affecting the television broadcasting industry. Central to this study was a close scrutiny of CATV and what, if any. grounds for regulatory power existed. Report and Order, 26 F.C.C. 403 (1959). Under Title 2 of the Communications Act of 1934, 47 U.S.C.A. § 151 *et. seq.* (1962), the Commission was authorized to regulate communications common carriers by supervising industry rates and

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that imposition of the regulations would result in determining the validity of different microwave uses, a function they considered outside their power. Three months later, however, a "procedural" rule was instituted permitting the Commission to regulate microwave carriers primarily serving CATV systems. The rule required that a microwave system applying for renewal of a station license demonstrate that during the previous licensing period at least 50 per cent of total service hours and 50 per cent of the radio channels had been used by subscribers "not directly controlling or controlled by, or under direct or indirect common control with, the applicant."[39] Thus microwave carriers, which were often either the parent or subsidiary companies of CATV systems, were placed in a position of either seeking out public receivers of their services or switching to frequencies reserved for public service.

*Carter Mountain Transmission Corp.*[40] marked the complete reversal of the FCC's position on regulating CATV through microwave carrier systems. Carter Mountain, which supplied services to several CATV systems in Wyoming, applied for a license to expand its facilities and thus provide better service. Denying the license, the Commission concluded that the local station KWRB-TV, already in financial difficulty as a result of CATV competition, would be forced out of business if the CATV systems were improved. As a result, the public interest would be affected detrimentally if the local station were allowed to close. Carter Mountain, however, was given leave to reapply when it could show that the CATV system involved would not duplicate the local station's programming when so requested and would carry the local station on the CATV cable. With this ruling, the FCC thus protected VHF and UHF broadcasters from economic competition.

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practices. Title 3 of the Act gave the Commission the broad power to regulate uses of the radio spectrum in order to insure the value of the services provided by the public. Three bases suggested for asserting jurisdiction under the Communications Act, Sections 325(A) and 312(B) were rejected by the Commission. In consideration of the issue of whether CATV was to be regulated as a common carrier, the Commission found that CATV did not fall within the legislative intent of the Act in its definition of common carrier. *Id.* at 429. Next the Commission ruled that CATV did not reside within the Act's definitions of "broadcasting," "broadcast station," or "instrumentality engaged in broadcasting," as CATV transmits by wire rather than by air. *Id.* Finally, the Commission declined to find that regulation of CATV came within the scope of its plenary power over the broadcasting industry, claiming it lacked power "to regulate any and all enterprises which to be connected with one of the many aspects of communications." *Id.* Implicit in this position was the rejection of the claim that CATV had an adverse effect on the broadcasting market. While recognizing that undoubtedly there was an effect, "in what situations this impact becomes serious enough to threaten a station's continued existence or serious degradation of the quality of its service . . . we cannot tell from the data before us." *Id.* at 423.

[39] In the Matter of Amendment of Part 21 of the Commission's Rules to Add a New Section 21.709 — Domestic Public Radio Services (Other than Maritime Mobile), Order FCC 59-762, July 24, 1959, 47 C.F.R. § 21.709 (Supp. 1963).

[40] Carter Mountain Transm'n Corp. v. Federal Commun. Comm'n 321 F.2d 359 (D.C. Cir.), *cert. denied,* 375 U.S. 951 (1963). *See generally* Note, *Community Antenna Television: Survey of a Regulatory Problem,* 52 GEO. L. J. 136 (1972).

In 1965 the FCC issued the First Report and Order[41] by which the Commission asserted jurisdiction over microwave-linked cable systems.[42] The report set forth carriage and non-duplication rules emphasizing CATV's role as a supplement, not a replacement to broadcasting,[43] thus delving further into the fields of economic protectionism and "unfair competition."[44] The FCC's Second Report and Order[45] was issued in March, 1966, less than eleven months after the issuance of the first cable rules, and broadened FCC jurisdiction to include all cable systems whether or not microwave-served. The FCC was also aware of the competitive edge cable had in not having to pay, as broadcasters did, for the programs they televised. The Commission dulled this edge by prohibiting cable systems in the top 100 markets from importing distant signals, and thus retarding cable's expansion into urban areas.[46]

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[41] 38 F.C.C. 683 (1965).

[42] The Court of Appeals in *Teleprompter* described the differences between point-to-point microwave transmission and broadcasting:

> A microwave link involves the transmission of signals through the air. However, microwave, transmission in itself is not broadcasting. A broadcast signal, according to 47 U.S.C. 153(o), is transmitted by a broadcaster for "[reception] by the public." In the case of microwave, the signal is focused and transmitted in a narrow beam aimed with precision at the receiving points. Thus microwave transmission is point-to-point communication. The receiving antenna must be in the path of the signal beam. If the transmission must cover a considerable distance, the microwave signal is transmitted to the first receiving point from which it is transmitted to another receiving point, and this process is repeated until the signal reaches the point from which it is distributed by cable to subscribers. 476 F.2d 338, 343 n. 6 (2d Cir. 1973).

[43] The Commission held that a CATV system must, within the limits of its channel capacity, carry the signals of stations that place signals over the community served by the system. In addition, CATV systems were forbidden to duplicate the programming of such local stations for periods of 15 days before and after a local broadcast. *See generally,* F.C.C. Order *supra* note 41, at 699-702, 716-730.

[44] The report asserted that a CATV's duplication of local programming by importing distant signals is unfair competition because broadcasters and CATV systems do not compete for programming on an equal footing. The FCC recommended "a reasonable measure of exclusivity" to protect the program suppliers and the stations. M. ALICE & M. PHILLIPS, CATV, A HISTORY OF COMMUNITY ANTENNA TELEVISION 71 (1972).

[45] 2 F.C.C.2d 725 (1966).

[46] A cable system that could convince the FCC that importation of distant signals into a major market area would not have an adverse economic impact on local broadcasters was permitted to have an evidentiary hearing, but the burden of proof was on the cable system. Aside from protecting local independent stations and the still infant UHF stations, the time-consuming evidentiary hearings adopted were intended to supply the Commission with further data, knowledge and experience concerning the effects of CATV penetration into major markets. "As we gain more knowledge in this important area," the Commission declared ". . . we shall revise or terminate the procedure, as the experience indicates." 2 F.C.C.2d 725, 786 (1966).

Cable operators feared that in major markets it would be too difficult to attract customers without being able to import distant signals, because the cities were already well-served by local broadcast signals. *See* 2 F.C.C.2d 725 (1966).

In 1968 the Supreme Court, noting that the FCC had gradually assumed jurisdiction over cable systems through *Carter Mountain* and the First and Second Report and Order, finally upheld the Commission's power to regulate cable television.[47]

One week later came the decision in *Fortnightly Corporation v. United Artists Television, Inc.*[48] Classifying the CATV system as a passive beneficiary rather than an active performer, the Court found the systems not liable for infringing the rights of the copyright holders under the Copyright Act of 1909.

Armed with these decisions and what information the FCC had gathered from the evidentiary hearings conducted the previous two and one half years, the Commission issued on December 12, 1968 a *Notice of Proposed Rulemaking and Inquiry.*[49] The information derived from the past hearings had served as warning to the Commission that, if left unchecked, cable systems providing distant signals would penetrate major market areas to the extent of nearly 50 per cent.[50] This degree of penetration coupled with the unfair competitive advantage that the Commission regarded CATV as possessing would, it was concluded, significantly disrupt the development or healthy maintenance of television broadcast service.

Since copyright revision bills had floundered in Congress for nearly five years, the ostensible role of the proposed rules was to bridge the gap in communications and copyright policy created by the absence of Congressional action. To replace the distant signal importation restrictions of the Second Report the requirement was proposed that retransmission consent must be obtained from the broadcasting station prior to retransmitting the broadcast signal.[51] Further, besides obtaining consent, the cable operators would be required to pay a royalty to the consenting station. The Commission envisioned the proposal would serve the needs of all concerned parties:

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[47] Southwestern Cable Company v. United States, 392 U.S. 157 (1968). In this case, Midwest Television Inc., a San Diego television broadcaster, sought relief from Southwestern Cable Co., an importer of distinct television signals from Los Angeles into the San Diego area under the FCC's Second Report and Order rules regarding distant signal importation. The Ninth Circuit Court of Appeals on petition for review, held that the FCC lacked the authority, under the Communications Act of 1934, to issue the orders. 378 F.2d 118 (9th Cir. 1967). On certiorari the Supreme Court held that the Commission's authority extended to those operations "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." 392 U.S. at 178. The Court further concluded that the specific regulations in question were within the scope of the Commission's authority. Thus the jurisdiction that the FCC had slowly and hesitantly assumed over cable operations was given full affirmance.

[48] 392 U.S. 390 (1968).

[49] Matter of Amendment of Pt. 74, Subpart K, of the Comm'n's Rules and Regs. Relative to CATV Systems, 15 F.C.C.2d 417 (1968).

[50] *Id.* at 431, ¶ 36.

[51] *Id.* at 432, ¶ 38.

cable systems would be granted the right to retransmit distant signals into major viewing markets; local broadcasters would indirectly be relieved of the unfair competitive edge through the royalties paid broadcasters by CATV systems; and, adding the final ingredient, copyright holders could demand additional remuneration from the broadcasters because of the increased royalties.

What the Commissioners overlooked, and the flaw of the proposal, was that contracts between broadcast stations and copyright holders frequently include covenants prohibiting the broadcaster from granting CATV the necessary retransmission consent. As a result, the cable operator was forced to seek consent from the copyright holder to retransmit material which *Fortnightly* had ruled was his for the taking.[52] By way of agency regulation, and under the guise of communications policy, the FCC thus attempted to imposed restrictions upon cable systems which the Copyright Act of 1909, as interpreted by the Supreme Court, did not permit.

Nearly three years later, and perhaps by then doubtful of the proposed rules' efficacy, Dean Burch, Chairman of the FCC, and Dr. Clay T. Whitehead, Director of the Office of Telecommunications (OTP), sponsored negotiations between representatives of the industries principally involved in the controversy; *i.e.*, the cable industry, which felt that its expansion was unduly limited by the FCC's restrictions on the importation of distant signals; broadcasters, who felt that it was unfair to permit cable systems to carry the same programs as they did without bearing the burdens of bargaining or paying for them; and the copyright owners, who wanted to halt the use of their product unless royalties were received. The deadlock was broken by all parties' consenting to the "Consensus Agreement of November, 1971."[53] This Consensus Agreement was accepted and signed by the National Cable Television Association (NCTA), the National Association of Broadcasters (NAB), and the Committee of Copyright Owners (CCO).

The Consensus Agreement was endorsed by the FCC in their Cable Television Report and Order, effective March 31, 1972.[54] In the same report the Commission expressly rejected the retransmission consent theory proposed in the winter of 1968, commenting that

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[52] *See,* Lipper, *The Congress, the Court, and the Commissions: A Legacy of Fortnightly,* 44 N.Y.U. L. REV. 521 (1965).

[53] Statement of Jack Valenti, President of the Motion Picture Association of America, Inc., and of the Association of Motion Picture and Television Producers, Inc., accompanied by Gerald Meyer, counsel. *Hearings on S. 1361 before the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary,* 93rd Cong., 1st session, July 31 and August 1, 1973. (Hereinafter referred to as *Hearings*).

[54] CABLE TELEVISION REPORT AND ORDER, F.C.C. 72-103, 36 F.C.C.2d 143 (1972). This report is often referred to as the Third Report and Order.

> [e]xperience has indicated that it simply will not achieve our basic objectives . . . . the prospect is not promising because of the necessity for close cooperation of all the parties — and such cooperation, as the comments indicate, is highly unlikely."[55]

The approach adopted in place of the retransmission consent theory extends exclusivity rules to cover non-network as well as network programming. In addition, most of the distant signal carriage restrictions imposed by the FCC, which had effectively frozen cable industry development, were lifted. Distant signal importation was permitted, subject to limitations depending on the size of the market into which the importation was to take place.[56]

One controversy not resolved by the Consensus Agreement centered around the fees to be paid to the copyright holders for the retransmission of broadcasts. Despite extended discussion between concerned parties, the participants reached no compromise, the result being a provision in the Consensus Agreement that, should further talks produce no acceptable rate, the matter would be decided by arbitration.[57]

After further conferences between CCO and NCTA no agreement was reached as to the rate of fee payments which would provide reasonable and just compensation to copyright holders for the use of their works and yet not exceed the point at which the burden would significantly discourage capital investment in CATV systems. The failure to reach an agreement prompted CATV to reject arbitration, despite its consent in the Consensus Agreement to such a procedure, and instead, to choose to support the rate scales contained in Section 111 of S. 1361 then under consideration by the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Judiciary Committee.[58] Soon afterward studies were published describing the feasibility of Section 111's rates, the proposed rates, and the arbitration process. To date, this issue remains the stumbling block of effective cable regulation.

Concurrent with much of the debate stemming from the 1971 Consensus Agreement was the FCC's entry into its third and present phase of cable regulation. The Supreme Court, in *United States v. Midwest Video Corp.*,[59] held that the FCC had authority to require

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[55] *Id.* at 165.

[56] *Id.* at 165, 181.

[57] *Id.* at 165. *See also id.* at Appendix D, Copyright Legislation § D.

[58] *Hearings, supra* note 53.

[59] 406 U.S. 649 (1972).

cable operators to originate programming. This case marked the beginning of a new attitude of the Commission which accepted the use of cable to originate programming in exchange for cable's promoting and developing new public interest services.

This *quid pro quo* approach was the basis for the Third Report and Order issued in 1972. The report maintains that cable systems should provide the most services where broadcast television is strongest, *i.e.* the major television markets.[60] For the major market systems the FCC rules require a capacity for the following "designated" services: (1) Retransmission service — mandatory carriage of local broadcast television stations and permissible carriage of distant broadcast stations up to defined limits (usually one or two); (2) Local origination service — at least one channel, under the control of the cable operator, devoted to local, non-automated programming; (3) Public access service — one free channel for the use of the general public on a non-discriminatory, first-come, first-served basis; (4) Educational access service — one channel, free for at least five years, reserved for use by local educational authorities; (5) Government access service — one channel, free for at least five years, reserved for government uses; (6) Leased access service — a number of channels available for lease to others who wish to provide new "undesignated" services via cable.[61]

The rules also require a 20 channel minimum capacity and a two-way capability which entails having the capacity not only to send signals to a subscriber but also to return non-voice signals from the subscriber back to the cable control center.

**The Law of Copyright**

A copyright holder is given a limited monopoly on the dissemination of his own work primarily in order to secure "the general benefits derived by the public from the labors of authors",[62] and secondarily in order to remunerate the author in recognition of his inherent right to the fruits of his own labor; both encourage further creative activity. It is in light of this underlying purpose of both the copyright clause of the Constitution and the Copyright Act of 1909 that the liability of cable television for copyright infringement must be considered. An understanding of the development of copyright law in this country, with emphasis upon the legislative intent of the 1909 Act, is crucial towards determining the statute's[63] capacity to deal with the innovation of cable television.

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[60] Third Report and Order, *supra*, note 54.

[61] CABLE REPORT TO THE PRESIDENT, *supra*, note 9 at 23.

[62] Fox Film Corp. v. Doyal 286 U.S. 123, 127 (1932).

[63] By the act of July 30, 1946 (61 Stat. 642), the Copyright Act of 1909, as amended, was codified and enacted into positive law as title 17 of the U.S. Code.

The first federal copyright statute,[64] largely an inheritance from England,[65] was passed in 1790 and gave the federal government statutory authority[66] to administer copyrights. The statute thereby implemented[67] the copyright clause of the Constitution which reads as follows:

> The Congress shall have 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.[68]

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[64] The first state statute originated in the Connecticut legislature of 1783 at the soliciation of Noah Webster, who wanted copyright protection for his spelling book. Delaware was the only state of the original thirteen not to pass a copyright statute. H.R. REP. NO. 2222, 60th Cong., 2d Sess. 2 (1909).

[65] The 1790 Federal copyright statute was modelled on the 1710 English Statute Anne. The Statute of Anne was "the first law ever enacted for the protection of literary property [and] is the parent of all copyright legislation." R. DEWOLF, OUTLINE OF COPYRIGHT LAW 7 (1925). The principle of copyright, however, antedates the Statute of Anne. The Republic of Venice granted to John Speyer in 1469 the exclusive right of printing the letters of Cicero and of Pliny for a total of five years. "This is the earliest 'copyright' of which we know." *Id.* at 2.

[66] The English case of Donaldson v. Beckett, 4 Burr 2408, 98 Eng. Rep. 257 (1744), which upheld the Statute of Anne, outlined the two types of copyrights, statutory and common law. "Common law copyright is a claim to literary or artistic property which is automatic and which lasts indefinitely until publication." H. NELSON & D. TEETER, LAW OF MASS COMMUNICATIONS 241 (1973). Upon publication, the author's exclusive rights are determined by statutory authority. Under the 1909 Copyright Act the initial copyright period is 28 years with an optional renewal period of another 28 years. The American counterpart to *Donaldson v. Beckett* is Wheaton v. Peters, 33 U.S. (8 Peters) 591, 656 (1834), which held that there was no common law right of copyright after publication:

> That an author, at common law, has a property in his manuscript, and may obtain redress against anyone who deprives him of it, or by improperly obtaining a copy endeavors to realize a profit by its publication, cannot be doubted; but this is a very different right from that which asserts a perpetual and exclusive property in the future publication of the work, after the author shall have published it to the world.

The 1909 Copyright Act, as codified, expressly preserves the common law right to unpublished works:

> Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished works without his consent, and to obtain damages therefor. 17 U.S.C.A. § 2 (1964).

According to one author, a common law copyright action might be used to impose liability, but he warns that "[s]ince the very nature of the broadcasting industry is to achieve the widest possible dissemination of telecast works, it is unlikely that an action under the common law would be successful; indeed, no case can be found which recognized common law relief for infringed telecommunicated works." Comment, *The Cable Compromise: Integration of Federal Copyright and Telecommunications Policies,* 17 ST. LOUIS U.L.J. 340, 341-42 (1973).

[67] "The Constitution does not establish copyrights, but provides that Congress shall have the power to grant such rights if it thinks best." H.R. REP. NO. 2222, 60th Cong., 2d Sess. 7 (1909).

[68] U.S. Const., art. I, § 8. Some courts have held that the test for receiving copyright protection is whether or not a work promotes "progress of science and useful arts." One commentator has noted, however, that it is quite conceivable that the drafters of the clause never intended such a subjective determination as to a particular work's value, but rather they "may have felt and provided that the system of protecting authors would promote progress even if works of doubtful value were included." H. HOWELL, COPYRIGHT LAW 12 (A. Latman ed. 1962). The "limited times" provision has been viewed as an attempt

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Congress and the courts have rejected a literal reading of the word "writings" in favor of a liberal construction[69] that does not restrict copyright legislation to the printed word. Indeed, although there is little historical[70] guidance as to the intended scope of the word "writings," "a literal reading of the clause in the Constitution would invalidate part of every copyright law passed since 1790 . . .",[71] and radio and television would be far beyond the bounds of the clause's reach. As Judge Learned Hand asserted, the Constitution was not meant to embalm "inflexibly the habits of 1789,"[72] and, thus, Congress and the courts have expanded copyright to include those words which warrant protection for the progress of copyright development.

Despite revision of the copyright law in 1831 and 1870, the copyright laws were criticized by President Roosevelt in his message to Congress in December, 1905, for omitting provisions "for many articles which, under modern reproductive processes, are entitled to protection, . . ."[73] The Presidential message prompted, in 1906, the initiation of congressional hearings[74] on a new copyright bill which culminated in the passage of an act in March, 1909. The 1909 Copy-

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to strike a balance between two competing interests: the interest of authors in the fruits of their labor on the one hand, and on the other, the interest of the public in ultimately claiming free access to the materials essential to the development of society. M. NIMMER, COPYRIGHT §5.4 (1973).

[69] Mazer v. Stein, 347 U.S. 201, 210 and n. 15 (1954).

[70] The sessions of the Constitutional Convention were held in secret and therefor there is no direct evidence concerning the intended scope of the word "writings." However, it appears that that word was arrived at after some deliberation because four clauses other than the one finally adopted were proposed to the Convention, none of which contained the word "writings." COPYRIGHT LAW REVISION, STUDY NO. 3, 86TH CONG., 1ST SESS., 70 (1960).

[71] *Id.* at 67. From the first Federal statute in 1790 to today, the copyright enactments have gone beyond a narrow definition of writings. The 1790 act gave protection to books, maps, and charts by authors who were citizens or residents of the United States. In 1884 the Supreme Court, in Burrow-Oiles-Lithograph Co. v. Sarony, 111 U.S. 53, 59 (1884), held that photographs were protected by the Act of 1802:

> The construction placed upon the Constitution by the first act of 1790 and the act of 1802 by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight, and when it is remembered that the rights thus established have not been disputed during a period of nearly a century it is almost conclusive.

The Court in rejecting a literal interpretation of writings declared that they include "all forms of writing . . . by which ideas are given visible expression." *Id.* at 58.

[72] Reiss v. National Quotation Bur., Inc., 276 F. 717, 719 (S.D.N.Y. 1921).

[73] H.R. REP. NO. 2222, *supra* note 67, at 2.

[74] The Librarian of Congress invited various interest groups to attend conferences in 1905-06 for the purpose of discussing a new copyright bill. As a result of these conferences the Register of Copyrights drafted a bill and it was introduced on May 31, 1906 at H.R. 19853 and S. 6330 in the 59th Congress. Hearings were held before a joint committee of members of the House and Senate Committees on Patents on June 6-9, and December 7, 8, 10 and 11, of 1906. A revised bill was introduced on January 29, 1907 as H.R. 25133 and S. 8190. These bills were reported favorably by the committees on January 30, 1907 (H. Rept. No. 7083, S. Rept. No. 6187, 59th Congress). No further action on the bills was

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right Act despite its significant improvements over the years,[75] in attempting to adapt its terms to techniques of visual and aural recording that have developed since 1909, has faced many of the same problems the earlier enactments encountered.

To qualify for protection under the federal copyright statute a work must fit into one of thirteen specific categories of works.[76] Class (c) "lectures, sermons, addresses (prepared for oral delivery)" is limited to the unpublished scripts of nondramatic works. It includes educational, news, or variety programs prepared for radio or tele-

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taken in the 59th Congress. In the 60th Congress, the bills favorably reported in the 59th Congress were reintroduced in the House on December 2, 1907 (H.R. 243) and in the Senate on December 16, 1907 (S. 2499). Hearings were held by the two committees meeting jointly on March 26, 27 and 28 of 1908. On February 22, 1907 the House committee reported favorably (H.R. Rep. No. 2222) Representative Currier's bill H.R. 28192 and the same day Senator Smoot introduced a companion bill S. 9440 which the Senate committee reported favorably on March 1, 1909 (No. 1108, 60th Congress). The Committee of the Whole House agreed to certain amendments of the Currier bill, H.R. 28192, on March 2, 1909, and the bill as so amended was passed by the House on March 3 and by the Senate on March 4, the last day of the 60th Congress. It was approved by the President on March 4, and became Public Law 349, the Copyright Act of 1909. By the act of July 30, 1947 (61 Stat. 652), the Copyright Act of 1909, as amended, was codified and enacted into positive law as title 17 of the U.S. Code. COPYRIGHT LAW REVISION, STUDY NO. 1, 86th Cong., 1st Sess. 3-4 (1960).

[75] Improvements achieved in 1909 include:

1) Making the subject matter of copyright include "all the writings of an author."

2) Exempting books of foreign origin in foreign languages from the need of being reprinted in the United States (this being the greatest advance from the international standpoint).

3) In the case of published works, making copyright date from publication with the notice, instead of from the date of filing the title, which often took place long before the work was ready for publication.

4) Making statutory copyright available for unpublished works designed for exhibition, performance or oral delivery.

5) Extending the renewal term of protection by 14 years, to bring possible maximum term of protection up to 56 years.

6) Making the certificate of registration prima facie evidence of the facts recorded in relation to any work.

H. HOWELL, *supra* note 68, at 8.

[76] Copyright Act, 17 U.S.C. § 5 (1971). The application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:

a) Books, including composite and cyclopedic works, directories, gazetters, and other compilations.
b) Periodicals, including newspapers.
c) Lectures, sermons, addresses (prepared for oral delivery).
d) Dramatic or dramatico — musical compositions.
e) Musical compositions.
f) Maps.
g) Works of art; models or designs for works of art.
h) Reproductions of a work of art.
i) Drawings or plastic works of a scientific or technical character.
j) Photographs.
k) Prints and pictorial illustrations including prints or labels used for articles of merchandise.

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vision, but not formats, outlines or general descriptions of programs.[77] Class (d) "Dramatic or dramatico musical compositions" includes "the acting version of plays for the stage, motion pictures, radio, television . . ."[78] Class (l) "Motion pictures photoplays," and Class (m) "Motion pictures other than photoplays" include dramatic and nondramatic television films. These four classes include most of the copyrighted material that cable television retransmits to its subscribers.

The Act, however, does not protect the copyright holder against all uses of his work, as exemplified in *Fortnightly* and *Teleprompter* where cable television systems used copyrighted material without infringement, but it does reserve exclusive rights[79] to the copyright holder in the categories of publishing, adaptation, performing and recording.

The two theories under the 1909 Act by which cable television can be said to be liable retransmitting copyrighted programming are "copying," (which is included under the exclusive right of publishing) and "performing." However, despite the broad scope of the term "copying,"[80] it is difficult to impute liability through infringement of this concept in light of its prior judicial and statutory treatment. The Supreme Court in *White-Smith Publishing Co. v. Apollo Co.*,[81] by holding that a player-piano roll did not "copy" the musical composition which it played, indicated that a "copy" must be a tangible repro-

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l) Motion picture photoplays.

m) Motion pictures other than photoplays.

The enumeration . . . is primarily an administrfative provision to enable the Copyright Office to perform its task in an orderly fashion, including the publication of a Catalog of Copyright Entries in conformity with the classes mentioned. Hence this section very properly closes with a proviso that these specifications shall not be held to limit the subject matter of copyright . . . .

H. HOWELL, *supra* note 68, at 22.

[77] 37 C.F.R. § 202.6 (1974).

[78] 37 C.F.R. § 202.7 (1974).

[79] An 'exclusive right' in a copyrighted work is "the right to exploit the work in a particular way and to prevent others from exploiting the work in that way without first obtaining permission." B. RINGER & P. GITLIN, COPYRIGHTS 20 (Revised ed. 1965). Note, however, that a work independently created is not an infringing use because technically it is not a use at all. Nonetheless, a resemblance may raise a presumption of copying and resultant infringement, capable, of course, of rebuttal. *Id.* at 20-21.

> In a broad sense substantially all of the enumerated rights under section one of the Copyright Act are merely specific methods of copying, so that a copyright law which proscribed only a copying would, if broadly construed, achieve the same protection as is offered under the section one enumeration. . . . For instance, a performance of a musical work is in a broad sense a copying of the work, and might constitute an act of infringement under a copyright law which granted only the exclusive right to copy.

[80] Nimmer, *The Nature of the Rights Protected by Copyright*, 10 U.C.L.A. L. REV. 60, 62 (1962).

[81] 209 U.S. 1 (1908).

duction. The Court defined "copy" as used in the statute as "a written or printed record of . . . intelligible notation."[82] "In order to have a copy, one had to have something which could have served as one of the copies required to be deposited with the Copyright Office."[83]

The fact that *White-Smith* was decided at a time when means for making nontangible images through television or motion pictures was in an embryonic stage of development is persuasive that the tangibility requirement is outmoded, or at least that tangibility should include the modern concept of evanescent copies. A TV image, although fleeting and evanescent, is arguably tangible, just as "writing in the sand is tangible in form even if the next wave will erase it forever."[84] However, not only may evanescence preclude the capability of copies being deposited in the Copyright Office, but this theory of liability also encounters the problem of subsequent statutory interpretation which has retained the tangibility requirement. Rather than redefining "copy," the specific problem of mechanical reproduction of musical works by piano rolls was dealt with by adding a new section, Section 1(e) to the Act.[85] The courts have continued until the present to utilize the tangibility requirement,[86] "so it seems unlikely that a court would ignore this history by finding that a TV image is a copy."[87]

The second theory of liability appears to be more usable and was relied upon, albeit unsuccessfully, by the plaintiffs in *Fortnightly* and *Teleprompter* — that cable television "performs" the copyrighted material when it rebroadcasts the work to the home sets of its subscribers. Thus, the section of the Act most relevant to cable television grants copyright holders the exclusive right to "perform" the copyrighted material. Section 1(c)[88] grants the exclusive right to perform nondramatic literary works, Section (d)[89] grants such right to dramatic works, and Section (e)[90] grants the same right with respect to

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[82] *Id.*

[83] Note, *CATV and Copyright Liability*, 80 HARV. L. REV. 1514, 1515 (1967).

[84] M. NIMMER, COPYRIGHT § 101.4 (1973). This is an expansion on the theory of Patterson v. Century Productions, Inc. 93 F.2d 489 (2d Cir. 1937), where it was held that the act of projecting motion picture film on a screen creates a copy and thereby infringes under Sec. 1 (2) of the Act.

[85] 80 HARV. L. REV., *supra* note 83, at 1516.

[86] *See, e.g.*, Mura v. Columbia Broadcasting Sys., Inc., 245 F. Supp. 587 (S.D.N.Y. 1965); Tiffany Productions Inc. v. Dewing, 50 F.2d 211 (D.C. Md. 1932).

[87] 80 HARV. L. REV., *supra* note 83, at 1516.

[88] Copyright Act, 17 U.S.C. § 1 (1971):
> c) To deliver, authorize the deliver of . . . the copyrighted work in public for profit if it be a . . . nondramatic literary work . . . and to play or perform it in public for profit . . . in any manner or by any method whatsoever.

[89] Copyright Act, 17 U.S.C. § 1 (1971):
> d) To perform . . . the copyrighted work publicly if it be a drama . . . and to exhibit, produce, perform, represent, or reproduce it in any manner or by any method whatsoever. . . .

[90] Copyright Act, 17 U.S.C. § 1 (1971):
> e) To perform the copyrighted work publicly for profit if it be a musical composition

musical compositions. Only "public" performances are included in the performance rights provided by the copyright statute.[91] The two types of performing rights are: (1) *Public performance,* the right to control any public performance is given only to the "dramas"; and (2) *Public performance for profit.* In the cases of "non-dramatic literary works" and musical compositions, the copyright holder can control only those public performances that are given "for profit."[92]

For purposes of the Act, it appears certain that cable television is "public" even absent the fact that the audience need not be assembled. *Jerome H. Remick & Co. v. American Auto Accessories Co.*[93] held that where the listeners are unable to communicate with each other and receive the broadcast in the privacy of their homes, the performance is nevertheless "public."

Cable television is also a "profit"-making venture for purposes of the Act because cable operators charge subscribers a periodic fee for service. All that is required is that the performance be given with the expectation of direct or indirect pecuniary benefit; it is not necessary that a direct payment be made.[94]

However, whether or not cable systems "perform" within the meaning of the Act is not so clear. The linguistic, technological, and economic factors involved in applying the 1909 Copyright Act to cable television interact in such a way as to allow conflicting conclusions regarding cable's liability for copyright infringement.

The linguistic realities of the situation are such that "in interpreting a statutory provision the court must attribute to the operative word used that one of its meanings which accords most closely with the intention of the enacting legislature and with the underlying purpose which led the legislators to choose that particular word."[95] The

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[91] The author's public performing rights were first included in statutory copyrights re: dramatic works by the Act of August 18, 1856, ch. 169, 11 Stat. 138. In the act of January 6, 1897, ch. 4, 29 Stat. 481, the public performing rights were extended to musical works. The Act of March 4, 1909 ch. 320, § 5(b), 35 Stat. 1075, further extended the public performing rights to works prepared for oral delivery. The Act also imposed the "for profit" limitation on the performing rights in works prepared for oral delivery and musical works but not on the performing rights in dramatic works. *Id.* § 1. By the Act of July 17, 1952, ch. 923, 66 Stat. 752, the author's public performing rights were extended to non-dramatic literary works, subject to the "for profit" limitation. B. Varmer, *Limitations on Performing Rights,* COPYRIGHT LAW REVISION STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS, 86th Cong., 1st Sess. 107 (1960), *in* 2 STUDIES ON COPYRIGHT 835 (A. Fisher mem. ed. 1963).

[92] B. RINGER & P. GITLIN *supra* note 79, at 6.

[93] 5 F.2d 411, (6th Cir. 1925).

[94] *See,* Herbert v. Shanley Co., 242 U.S. 591 (1917), holding that music performed for customers in a restaurant was for profit even though the customers were not charged additionally for the music.

[95] United Artists Telev'n, Inc. v. Fortnightly Corp., 255 F. Supp. 177, 202 (S.D.N.Y. 1966), reversed, 392 U.S. 390 (1968).

1909 Congress could not have had any specific intent to include cable in the Copyright Act of the same year, for in 1909 radio was in its very earliest stages of growth and television had not yet been invented.[96] The development of radio broadcasting presented the first real challenge to the 1909 Act's ability to adapt to later technological developments. The radio broadcast itself was held to constitute a public performance within the meaning of the Copyright Act,[97] but this left unresolved the question of whether one who received the radio broadcast and transmitted it to others was also "performing."[98]

The legislative history of the 1909 Copyright Act reveals that Sections 1(c) and (d) of the Act were originally directed to the type of situation in which the dialogue of a stage performance was transcribed by a member of the audience who "would then turn the manuscript over to some one who had hired him to do the work or sell to outside parties. This manuscript would then be duplicated and sold to persons, who, without any authority whatever from the author, would give public performances of the work."[99] The paradigm of "performance" then was the classical conception of the performer before an immediate audience,[100] as differentiated from the modern conception of performance, which includes an unassembled audience "viewing" from the privacy of their own homes via radio or television. The situation today with cable is thus one in which there is a ". . . physical separation of the audience from the original or primary performance."[101] But the district court in *Fortnightly* treated the modern situation as if it were a classical performance and attached to it the same consequences that would result from an unauthorized primary performance in 1909. The Second Circuit Court of Appeals, in Teleprompter, noted that the Supreme Court, in reaching its decision in *Fortnightly*, had piled "analogy on analogy."[102] In other words, the Court had analogized the concept of actor-theatre audience to that of broadcaster-listener/viewer and had applied the same set

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[96] The pioneer commercial radio broadcasting station was erected in 1920. The first commercial television license was granted in 1941. 255 F. Supp. at 202 n. 12.

[97] M. Witmark & Sons v. L. Bamberger & Co., 291 F. 776 (D.N.J. 1923).

[98] *See* 47 U.S.C.A § 605 (1968), which specifies the prohibitions against unauthorized publication or use of communications.

[99] H.R. REP. NO. 2222, *supra* note 67, at 5.

[100] The *Fortnightly* district court described the classic conception of the word performance as "when Sir Laurence Olivier delivers Hamlet's soliloquy from the state of a theatre at which there is an audience in attendance," and defined the classic elements of such performance as "(1) an actor; (2) a work to be acted; and (3) an audience present to immediately see and hear the actor." 255 F. Supp. 177, 203 (S.D.N.Y. 1966). The modern elements of the performance described by that court were "(1) the rendition by the actor; (2) the method of communicating the rendition to the audience; and (3) the method by which the audience is enabled to perceive an audible and/or visible reproduction of the original rendition." *Id.* at 203-04.

[101] *Id.* at 204.

[102] 355 F. Supp. 618, 630 (S.D.N.Y. 1972).

of legal principles to each. The Court then proceeded to differentiate a broadcaster from a cable system and accordingly conclude that cable's function was more akin to that of the listener or viewer.

**Case Law**

The courts began to consider the listener-viewer problem in 1925 with the first of the "radio cases." Two types of cases developed: cases dealing with broadcaster liability; and cases dealing with broadcast recipient liability. The first case to extend the classical concept of performance to the modern context was *Jerome H. Remick & Co. v. American Auto Accessories Co.*[103] This case was the principal one in the first category of cases dealing with liability of broadcasters and is most significant for its broad interpretation of the 1909 Act. A copyrighted song was played by a hotel orchestra and was subsequently broadcast, without authority of the copyright holder, over a commercial radio station. The court held that the fact that radio had not been developed before the 1909 Act did not preclude its being fairly within the meaning of the statute. By the process of "semantic extension"[104] the court held that "the statute may be applied to new situations not anticipated by Congress, if, fairly construed, such situations come within its intent and meaning."[105] The court then analogized the radio to the situation to the one where, in both the U.S. and in England prior to the full development of photography, a photograph was held to be an infringement of a copyrighted engraving statute.

> While statutes should not be stretched to apply to new situations not fairly within their scope, they should not be so narrowly construed as to permit their evasion because of changing habits due to new inventions and discoveries.[106]

The first case to deal with "performance" as determining the liability of broadcast recipients was *Buck v. Jewell-LaSalle Realty Co.*[107] *Jewell-LaSalle* held that the copyright law prohibits a hotel from using a master radio receiving set to transmit, without authority, copyrighted works broadcast by a local station into the rooms of the hotel's customers. The Court enunciated the doctrine of multiple

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[103] 5 F.2d 411 (6th Cir. 1925), *cert. denied,* 269 U.S. 556 (1925).

[104] Hunke, *Community Antenna Television Operation as a "Performance": An Application of the Principle of Semantic Extension to the Federal Copyright Act,* 44 N.D. L. REV. 17 (1967). Justice Holmes' quote in Towne v. Eisner, 245 U.S. 418, 425 (1918), is appropriate:

> A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.

[105] 5 F.2d 411 (6th Cir. 1925).

[106] *Id.*

[107] 283 U.S. 191 (1931).

performance in which it recognized that there could be more than one performance of the same work. Noting that although the legislative intent may have been that once a broadcaster performs then one who receives and distributes the transmitted selection cannot also be held to have performed it, the court emphasized that the underlying purpose — full protection to the composer's monopoly of public performance — necessitated liability for infringement. Thus, the acts of the hotel proprietor constituted a performance of the copyrighted musical composition within the meaning of 17 U.S.C. Section 1(e). The Court rejected the hotel's argument that the process of receiving a radio broadcast and translating it into audible sound was no different from merely hearing the original music and upheld the allegation of infringement, stating that the hotel was electronically reproducing the original music and thereby "performing."

The next case in this second category of radio cases was *Society of European State Authors and Composers, Inc. v. New York Hotel Statler Co.*,[108] in which, unlike *Jewell-LaSalle* where the guests had no control over the one-channel receiver, the radio system in *SESAC* had two channels and the guests could not only choose between two stations but also had the option of turning the system off.[109] The distinguishing feature of the two cases was the quantum of the rebroadcasters' acts. In *Jewell-LaSalle,* performance occurred when the master radio set received and audibly transmitted the music; in *SESAC,* it was the guest, not the hotel, who performed the last act necessary to audibly reproduce the music by turning on the speaker in his room.

Despite the distinction, however, Judge Woolsey rejected the "last act necessary" principle and looked to the defendant hotel's contribution to the total process.

> [W]hen the owner of a hotel does as much as is done in the Hotel Pennsylvania to promote the reproduction and transmission within its walls of a broadcast program received by it, it must be considered as giving a performance thereof within the principle laid down by the Supreme Court in the LaSalle Hotel case.[110]

The multiple performance doctrine was obscured by the doctrine of implied license which was first applied in *Buck v. DeBaum*[111] and was given additional credence by Mr. Justice Brandeis' footnote in

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[108] 19 F. Supp. 1 (S.D.N.Y. 1937) [hereinafter referred to as SESAC.]

[109] *Id.* at 4.

[110] *Id.* at 4-5.

[111] 40 F.2d 734 (S.D. Cal. 1929). The court held that a restaurant owner who provided entertainment for his customers through a radio receiving set had an implied license to "pick-up" out of the air the broadcast because the copyright holders license the broadcasting station to disseminate the song.

*Jewell-LaSalle.* Brandeis suggested that had the original broadcaster been licensed by the copyright holder, then the hotel would have had an implied license to rebroadcast the radio signals.[112]

In *DeBaum,* the District Court held there was no copyright infringement when a cafe owner made available to his customers broadcast copyrighted works played on a regular radio receiving set. The court noted that when the copyright holders "licensed the broadcasting station to disseminate the . . . [copyrighted song], they impliedly sanctioned and consented to any 'pick up' out of the air that was possible in radio reception."[113]

The subsequent case of *SESAC* brought into light a dichotomy within the doctrine of implied license: license implied-in-law and license implied-in-fact. The license implied-in-law as it existed in *Jewell-LaSalle* comes not out of the express provisions of an agreement between the copyright holder and the radio-station licensee, but rather appears when the court feels that on the basis of public policy there *should* be an implied license to receive and distribute the copyrighted work. *SESAC* can be distinguished from *Jewell-LaSalle* and *DeBaum* in that the licensing agreement in *SESAC* expressly prohibited any sublicensing of the right to perform, and can be further distinguished from *Jewell-LaSalle* by the fact that in *SESAC,* the broadcasting station was licensed by the copyright proprietor to perform the work. The express provision in *SESAC* to not sublicense, of course, negated the court's finding of an implied license-in-fact, for such a license only results when the contracting parties intend that the licensing agreement will extend the right of performance to parties outside the basic agreement. *SESAC,* however, still left open the possibility that an implied-in-law license would be an appropriate defense where public policy overrides the express intentions of the parties.

Indeed, the question of implied license should not be dismissed lightly; when a copyright holder licenses a broadcaster to perform his work, this also licenses the public to receive the work[114] and, by extension, may impliedly license cable television systems to aid the public in its reception. The rationale is consistent with the purposes of the Copyright Act — the primary purpose is achieved by encouraging the dissemination of original works to the public; and the secondary policy of remuneration is satisfied by the license fee paid by the broadcaster to the copyright holder.[115]

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[112] 283 U.S. at 199 n. 5.

[113] 40 F.2d 734, 735 (S.D. Cal. 1929).

[114] Note, *CATV and Copyright Liability,* 80 HARV. L. REV. 1522 (1967).

[115] Note, *Copyright Law — Cable Television and Copyrightability,* 48 ST. JOHN'S L. REV. 322, 328 n. 39 (1973).

Nonetheless, the license implied-in-law theory was expressly rejected by the Second Circuit in *United Artists Television, Inc. v. Fortnightly Corp.*[116]; and since on appeal the Supreme Court held that there had been no performance it became unnecessary to decide the issue of implied license.[117]

*Fortnightly*[118] was the first case to expressly deal with the liability of cable television for copyright infringement as a "performer." The Fortnightly cable system received and transmitted signals to homes in Clarksburg and Fairmount, West Virginia that were broadcast by television stations in three cities ranging from 52 to 82 miles away.[119] The district court, in a detailed technical approach, held that cable delivered a different image from that broadcast and thus infringed by electronically reproducing telecast signals. The Second Circuit, although affirming, used a quantitative approach akin to that used in *Jewell-LaSalle* and *SESAC*: "how much did the defendant do to bring about the viewing and hearing of a copyrighted work?"[120] The court held that the cable system, whose only business was to bring about the viewing and hearing of broadcast television programs, did even more to infringe than did the hotel proprietors in *Jewell-LaSalle* and *SESAC* whose "piping" in of radio programs was only incidental to their hotel business. The Supreme Court reversed, rejecting both the district court's and circuit court's approach for a "functional" standard. The Court noted that were the Second Circuit's quantitative test to be used to determine copyright liability, the apartment house owner, shopkeeper and television set manufacturer would then, by *reductio ad absurdum,* all be liable for copyright infringement by at least indirectly bringing about the "viewing and hearing of a copyrighted work."[121] In discarding the earlier criteria of *Jewell-LaSalle* and the Second Circuit, the Court held that the proper question to be asked was "[d]id CATV provide the same kind of service, fill the same kind of role as broadcast-

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[116] 377 F.2d 872, 880-84 (2d Cir. 1967), *rev'd,* 392 U.S. 390 (1968).

[117] The Court was asked to consider the question of implied license in an amicus curiae brief by the Solicitor General.

> This "implied in law" license would not cover all CATV activity but only those instances in which a CATV system operates within the 'Grade B Contour' of the broadcasting station whose signal it carries. The Grade B contour is a theoretical FCC concept defined as the outer line along which reception of acceptable quality can be expected at least 90% of the time at the best 50% of locations.

392 U.S. 390, 401 n. 32 (1968) (citation omitted).

[118] 255 F. Supp. 177 (S.D.N.Y. 1966), *aff'd,* 377 F.2d 872 (2d Cir. 1967), *rev'd,* 392 U.S. 390 (1968).

[119] The television stations were in Pittsburgh, Pennsylvania, Steubenville, Ohio and Wheeling, West Virginia. Clarksburg is located about 82 miles from Pittsburgh; 57 miles from Wheeling; and 74 miles from Steubenville. Fairmont is located about 67 miles from Pittsburgh; 52 miles from Wheeling; 65 miles from Steubenville. 255 F. Supp. at 185.

[120] 377 F.2d 872 (2d Cir. 1967), *rev'd,* 392 U.S. 390 (1968).

[121] 392 U.S. 390, 397 (1968).

ers?"[122] The underlying premise was that broadcasters perform, and viewers do not.[123] Noting that cable television was "active" only to the extent that it improved reception like an ordinary antenna, the Court held that in the final analysis cable functioned more like a passive viewer than an "active" broadcaster. Holding that cable operators do not "perform," the Court found a clear distinction between broadcasting and cable:

> Broadcasters select the programs to be used; CATV systems simply carry, without editing, whatever programs they receive. Broadcasters procure programs and propagate them to the public; CATV systems receive programs that have been released to the public and carry them by private channels to additional viewers.[124]

Justice Fortas, in his dissent, contended that the doctrine of *Jewell-LaSalle* "stand[s] squarely in the path which the majority today transverses."[125] Applying that holding to *Fortnightly,* Fortas found that cable used mechanical equipment to amplify a copyrighted performance to a wide population. Such a quantitative contribution under the holding of *Jewell-LaSalle* constituted copyright infringement.

Justice Fortas further found the functional test simplistic and unsatisfactory. In refuting this new standard, Fortas issued to the majority a caveat. Although analagous to a conventional rooftop antenna in some instances, the functional test cannot apply to cable stations that retransmit signals from appreciable distances beyond the scope of conventional antennas. Such a situation would cause cable to differ from the passive function of an antenna and accordingly "perform" more like broadcasters. The subsequent case of *Teleprompter* was pursued as an effort to build upon the premise of the Fortas dissent and thereby limit the *Fortnightly* holding.

**Teleprompter Corporation v. Columbia Broadcasting System**

*Teleprompter* was filed the same day as *Fortnightly,* but the former was stayed pending the outcome of the latter. Plaintiff's charges of damages in both suits were that they were deprived of licensing fees for future rebroadcasts. Such a finding would have enabled Columbia Broadcasting System to recover $250 to $5,000 in

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[122] Note, *Cable Television and Copyright Royalties,* 83 YALE L. J. 554, 561 (1974).

[123] Buck v. Debaum, 40 F.2d 734, 735 (S.D. Cal. 1929), held that viewers do not "perform" copyrighted works:

> One who manually or by human agency merely activates electronical instrumentalities, whereby inaudible elements that are omnipresent in the air are made audible to persons who are within hearing, does not "perform" with the meaning of the Copyright Law.

[124] United Artists Telev'n Inc. v. Fortnightly Corp., 392 U.S. 390, 400-1 (1968).

[125] *Id.* at 406-7.

damages[126] as well as whatever net profit the CATV systems had made on the showing of the copyrighted programs.[127] Further, Columbia Broadcasting System might have recovered attorney's fees from the litigation.[128]

Columbia Broadcasting System, Inc. (CBS), had brought suit against five community antenna television services located in representative parts of the country. The systems, located in Elmira, New York; Farmington, New Mexico; Rawlins, Wyoming; Great Falls, Montana; and New York City, received the original broadcasts through special antennae owned by Teleprompter, Inc., and subsequently transmitted the signals by means of cables and/or microwave relay systems to the home of subscribers, where the subscribers' television sets converted the electronic signals into pictures and sounds. Distances varied widely between the CATV stations and the specific broadcasting sites. In some cases, the original broadcast was close enough to the viewer that the viewer could have received the signals with an ordinary rooftop antenna; in other cases, the ultimate viewer was separated from the point of original broadcast by more than 450 miles, a distance so great that, even without obstacles such as mountains in between, the curvature of the earth would have prevented any signal from reaching the viewer, no matter how sophisticated his television reception apparatus. Between these extremes were individuals who could have received the original broadcast with conventional equipment, but only on certain occasions.

Plaintiffs, CBS, creators and producers of several television programs copyrighted under the Copyright Act of 1909, as amended, sought to have defendant, Teleprompter Corporation, found in violation of the provisions of the Act. CBS contended that subsequent developments since *Fortnightly* of community antenna television had altered the similarity of CATV to a simple antenna device. CATV systems, in 1974, not only relay programs already broadcast to their subscribers, but also originate their own productions, actively sell commercial time, and trade programs with other cable networks. These developments, Columbia Broadcasting System contended, converted CATV's function from that of a viewer to a performing broadcaster, and thus made CATV liable for copyright infringement. Additionally, CBS contended that the range, in many cases, of cable

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[126] Copyright Act § 2, 17 U.S.C. § 101(b) (1904).

[127] *Id.*

[128] Id. at § 116. Justice Fortas, in his dissent in *Fortnightly*, noted that *Buck v. Jewell-LaSalle*, despite inadequacies in its reasoning, was nevertheless settled law and the Court's majority had abandoned precedent. Although *Fortnightly's* practical effect may have been to overrule *Jewell-LaSalle*, the Court never expressly did so and thus presented a problem in squaring *Jewell-LaSalle* with the decision in *Fortnightly* and the subsequent decision of *Teleprompter*.

television transmissions was beyond that of conventional television antennae, thus differentiating the situation in *Fortnightly* where the maximum range was about 82 miles.

The Court, had it found that CATV systems were infringing on the copyrights of the plaintiffs, could have forced an entire restructuring of the current system of compensation for sales of television broadcasting rights to copyrighted material, and, of course, the FCC had acknowledged that it would have to revise its rules if the copyright suits were decided adversely to CATV.[129] There is even the possibility that CATV would have been forced to revise its entire financial structure,[130] had the decision been contra.

Justice Stewart, writing for the majority of the Court, first examined the contention that, regardless of the distance from the broadcasting station, the reception and retransmission by the CATV system was a "performance" of a copyrighted work. CBS also contended that, despite the decision in *Fortnightly,* subsequent technological developments must force the Court to re-examine its simple "function test" from *Fortnightly* that "broadcasters perform, viewers do not perform"[131] and its conclusion that the CATV function was primarily a viewer's function. The basic argument was that the CATV practice of producing and programming some of its own material (undisputedly a "performance"), the sale of commercial air time, and the trading of programs between CATV systems converted the *entire* CATV system into a "broadcast function," and consequently a "performance" under the Copyright Act. Justice Stewart rejected this argument:

> The copyright significance of each of these functions — program origination, sale of commercials, and interconnection — 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. As the Court of Appeals observed with respect to program origination, "[e]ven though the origination service and the reception service are sold as a package to the subscribers, they remain separate and different operations, and we cannot sensibly say that the system becomes a 'performer' of the

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[129] Second Report and Order, 2 F.C.C.2d 725 (1966).

[130] Note, *CATV and Copyright Liability: On a Clear Day You Can See Forever,* 52 VA. L. REV. 1505, 1519 (1966).

[131] United Artists Telev'n Inc. v. Fortnightly Corp., 392 U.S. 390, 398 (1968).

> broadcast programming when it offers both origination and reception services, but remains a non-performer when it offers only the latter."[132]

At the appellate level, the court had borrowed a description from *United States v. Southwestern Cable Co.* to distinguish between signals from nearby stations and signals from distant stations, concluding that where a CATV system supplemented "broadcasting by facilitating satisfactory reception of local stations in adjacent areas in which such reception would not otherwise be possible; . . ." or transmitted "to subscribers the signal of distant stations entirely beyond the range of local antennae . . ."[133] the CATV system was performing a broadcaster's function. The Supreme Court in *Teleprompter* rejected this argument, saying that the distance test was not satisfactory because there was no change, for copyright purposes, in the function CATV performed for its subscribers simply because of a difference in distance. The television broadcaster, from wherever he transmitted a program, made it public — available for everyone who had the means to receive it. The Court then relied on the basic "broadcaster-viewer" test set out in *Fortnightly,* saying that

> [t]he 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.[134]

The Supreme Court then rejected the plaintiff's argument that the editing function, that is, the selection of programs to be shown, of the CATV system placed it within a broadcasting framework. It again relied on *Fortnightly* in concluding that CATV simply carried, without editing, any programs that it chose; and that this was not a creative function at all.[135]

The final argument considered by the Court was the argument of economic impact which the importation of distant signals could have. Plaintiff contended that the importation of a copyrighted work into a market which would not otherwise see the work would destroy or at least greatly diminish the value of the work for "second runs", or later showings within that market. This would mean that the owner of the copyright would not get the full economic benefit of

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[132] Teleprompter Corp. v. Columbia Broadcasting Sys., Inc., 415 U.S. 394, 405 (1974) (citation omitted).

[133] United States v. Southwestern Cable Co., 392 U.S. 157, 163 (1968), *as cited in* Columbia Broadcasting Sys., Inc. v. Teleprompter Corp., 476 F.2d 338, 349 (2d Cir. 1973).

[134] 415 U.S. 394, 408 (1974).

[135] *Id.* at 409-10.

the work in that he would be unable to sell later showings at as great a price as he would have been able to had not CATV brought the work in earlier.

The Court drew a distinction between who paid for the use of the copyright in the case of television (advertisers) and who paid for the use of the copyright in the case of books, plays, etc. (the public). Justice Stewart then concluded that since there was no direct economic relationship between the public and the owner of the copyright, the owner of the copyright would simply have to negotiate a different financial agreement with the broadcaster, taking into consideration that the viewing market, due to CATV systems, may be somewhat larger. He further stated that the shifts in current business and economic relationships due to the CATV influence, while they were important, were not something which could be controlled by means of copyright legislation enacted before either broadcast television or CATV were in existence. Consequently, he believed that any further action in this vein should be left to Congress.

Justice Douglas, in his dissent, relied heavily on the distance test set forth in the appellate court decision.[136] He argued that the natural barrier created by the curvature of the earth forms different regulatory districts, and that any carrying of the signal outside of those natural barriers constituted piracy of copyrighted programs. Using the distance test he concluded that CATV systems, when they operated outside of the narrow exceptions set forth in *Fortnightly*, were broadcasting and thus in violation of the restrictions of the Copyright Act which give the owner of the copyright an "exclusive right" to present a creation "in public for profit" and to control how the creation is "reproduced."[137]

Justice Blackmun filed a separate opinion, dissenting in part, but agreeing with the Court of Appeals in distinguishing the *Teleprompter* case from *Fortnightly* on the basis of the distance test, concluding that the CATV systems should be liable for copyright infringement because they were performing a broadcaster's function and not a viewer's function.[138]

One of the major arguments which CBS advanced in *Teleprompter* was that distant transmissions through CATV would destroy the secondary market for copyrighted material, and as a further consequence, discourage creativity. The Court skirted this issue in its decision. However, it did find a valid manner in which to distinguish the CATV situation from that of a book publisher or other

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[136] *Id.* at 417-18 (dissenting opinion).

[137] *Id.* at 417-18 (dissenting opinion).

[138] *Id.* at 413-15 (dissenting opinion).

areas: the public does not directly compensate the television media for their broadcasting or transmissions as advertisers provide the revenue; in other areas, the public directly provides the compensation.

While the appellate court said that

> no evidence was presented to the court below to show that regional or local advertisers would be willing to pay greater fees because the sponsored program would be exhibited in some distant market, or that additional advertisers would pay more for a relatively minor increase in audience size that CATV carriage would yield for a network program . . .[139]

no evidence apparently was presented to the contrary. In fact, the argument can be made that a cable system expands the local audience, making advertising time worth more, thus justifying a higher charge for copyrighted materials. Further, the only reduction of copyright royalties might occur where the products being advertised were strictly local products. Since the majority of products advertised are nationally used, the benefit should outweigh any negative effect.[140] Therefore, it is difficult to conclude that the instant decision will discourage creativity and be contrary to public interest.

**Analysis and Proposals**

The holding in *Teleprompter* is a sound one, but the Court's reasoning is unsatisfactory in its failure to rely upon or even consider those approaches which take into account the underlying purpose of both federal copyright law and considerations of public policy essential to any question of copyright infringement. The *Teleprompter* Court limited its holding to the question of "whether CATV transmission of 'distant' signals constitutes a 'performance' under the Copyright Act."[141] The better justification, however, for the *Teleprompter* decision lies not with the rejection of cable's rebroadcasts as "performances" in the technical or linguistic sense but rather with the underlying economic purpose of copyright. Copyright, in protecting the economic interests of the copyright holder against competition, is guided by the economic philosophy of copyright law "that encouragement of individual effort by personal gain is the best way to *advance public welfare* [emphasis added] through the talents of authors and inventors in 'science and useful arts.' "[142]

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[139] Columbia Broadcasting Sys., Inc. v. Teleprompter Corp., 476 F.2d 338, 342 (2d Cir. 1973).

[140] 52 VA. L. REV., *supra* note 130, at 1513-5.

[141] 415 U.S. 394, 413 n. 15 (1974).

[142] Mazer vs Stein, 347 U.S. 201, 219 (1954).

In light of the public interest potential inherent in the various functions cable can perform, the decision in *Teleprompter* is consistent with the basic mandate of the 1934 Communications Act, which is the foundation for federal communications policy. The underlying purpose of the Act is "to make available, so far as possible, to all people of the United States, a rapid, efficient nationwide and worldwide wire and radio communication service with adequate facilities at reasonable charges."[143] The increased channel capacity of cable will offer broad public participation and such increased audience access will not only result in a more informed public, but also will increase opportunities for minorities and others previously excluded to gain a foothold in programming.

Nonetheless, the public benefits that CATV can potentially create are not without their limitations. Methods to allocate the most favorable program times need to be formulated. Also, the phrase "public access" is rendered virtually meaningless in practice when the purchase rates soar beyond the means of the local community.[144]

There are three approaches that the Court might have taken which would have been more consistent with the purpose of the law of copyright. They are: (1) an "intermediary zone" theory; (2) the fair use doctrine; and (3) the implied license theory which has already been discussed earlier in this Note.[145]

*Intermediary Zone*

The Court in *Teleprompter* recognized and analyzed two distinct approaches to deal with the copyright-communications problem presented. They are the functional test and the quantitative test. Regardless of the approach utilized, the end result sought was a determination of whether the cable system had acted as a performer and thus broadcast the program or whether the system had merely been a passive receiver, or viewer, of the program.

The difficulty with either approach is that each relies on the assumption that there exists a clear, definable line separating broadcasters and viewers. While such a line may have existed when the Copyright Act of 1909 was enacted, as the stage was then often considered, today that demarcation line's existence is open to question: technological advances of the past 65 years appear to have obliterated it beyond recognition.

The reasons for the "performance" line's disintegration are clearly demonstrated when CATV, a technological child of our day, is analyzed in those terms. Without stretching the meaning of the

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[143] 47 U.S.C.A. 151 (1962).

[144] THE SLOAN COMMISSION, *supra* note 11, at 127.

[145] See generally footnotes 111 through 117.

words "broadcast," "perform" or "viewer" out of recognizable shape, clearly a CATV system cannot be rightfully considered as engaging in any of the three.

No contention is made that the terms of the Act should be restricted to their literal meaning, for this would serve no beneficial purpose. Nor is it sought to limit the application of legislation to new situations not specifically envisioned. But that application has limits and those limits have been demonstrated by the cable industry.

Instead of the "performance line" approach, what has emerged today is a third, intermediary zone. On one side of this zone exists a sector whose residents perform a viewer's function. To the other side there exists the broadcasters or performers. Separating the sides is the intermediary zone where cable television can be found. Since from that perspective the elementary "broadcaster-liability; viewer-no liability test" cannot be applied, the only reasonable alternative is to rest a decision on more expansive considerations of public policy and the economic foundations of the concept of copyright.

Essentially this approach would entail considering the economic ramifications of the decision and the degree to which the public would benefit.[146] Depending on the specific nature of the cable retransmission involved, the court could consider the economic realities of the situation with respect to local broadcasters, the CATV systems, and the copyright holders. Additionally, if the cable operator engaged in distant signal importation the court could consider the extent to which advertisers would be willing to pay additional amounts for the extended broadcast market. Underlying these considerations would be the court's desire to advance the public welfare by making the benefits of the industry available to as many as economically permissible. Clearly such an approach by the court would involve a more appropriate determination of liability than the simple performer-viewer test.

*Fair Use*

If the function test is retained, despite its simplicity, the fair use doctrine[147] may come into play. The doctrine arises where the Court has deemed that cable has "performed" the copyrighted work.

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[146] *See generally,* Note, *Cable Television and Copyright Royalties,* 83YALE L. J. 554 (1974).

[147] "Fair use" has been defined by BALL, THE LAW OF COPYRIGHT AND LITERARY PROPERTY 260 (1944) as

> a privilege in others than the owner of the copyright, to use the copyrighted material in a reasonable manner without his consent; notwithstanding the monopoly granted to the owner by the copyright.

Fair use may be considered either as a de minimum infringement which is excused, or it may be a use beyond that accorded copyright protection and therefore no infringement at all. PFORZHEIMER, HISTORICAL PERSPECTIVE ON COPYRIGHT LAW AND FAIR USE 269 (1964). *See generally,* Williams & Wilkins Co. v. United States, No. 73-68 (Ct. Cl., Nov. 23, 1973).

When a cable system operates as a mere antenna on a hill, as in *Fortnightly,* there is little doubt that it is likened to a viewer's function and is not "performing." In that situation the fair use doctrine would have no relevant application. When a cable system transmits signals beyond the reach of a conventional antenna, on the other hand, the question is not as easily resolved and is shaky ground upon which to determine copyright liability. Given this weak foundation, Justice Douglas' dissent, which maintains that the importation of distant signals is, indeed, a broadcast function, is not difficult to comprehend. The fair use doctrine would apply where cable is held to perform as a broadcaster and operates by relieving cable of any liability for infringement despite the performance.

The judicial doctrine of fair use is a privilege which arises when the copyright holder's limited monopoly conflicts with public policy. In such a case the copyright holder's claim to share in all the profit derived from use of his work must yield to a "reasonable" use of the copyrighted work without infringement. Two of the major factors considered by the courts in applying the doctrine to a particular situation are: (1) the extent to which the use is in competition with the copyright owner and affects his market; and (2) the user's reasons for appropriating the work.[148]

In considering the first factor it is necessary to distinguish between local and distant signal importation. By receiving signals at antenna sites adjacent to the viewing communities the cable, rather than being in competition with local broadcasters, actually increases their viewing audience within the local community and thus aids the copyright owner's market. As noted earlier, when distant signals are imported, the extent to which distant signal importation dilutes and adversely affects the copyright owner's market is open to question, and is more properly adjudged in each particular fact situation.

The other factor is the user's reason for appropriating the work. "There seems to be a tendency in the courts to give the doctrine of fair use a broader scope in fields of learning and a narrower scope where commercial gain is the primary purpose."[149] It is not disputed that cable systems profit by charging periodic subscriber fees, but the technological and social uses of cable are characterized by a

> potential to give the individual the key to the world's storehouse of knowledge. It can provide a complete telecommunications system linking the person in the home with space

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[148] B. RINGER & P. GITLIN, *supra* note 79, at 30-31 (Revised ed. 1965).

[149] Page's Dictionary, *supra* note 147.

> satellites, radios, television sets, facsimile receivers, telephones, teletypes, computers, data storage and retrieval mechanisms, and other communications technology.[150]

As the Sloan Commission and the Cable Report to the President have indicated, the growth of cable is clearly in the public interest, and as such its broadcast dissemination of copyrighted work can be said to be consistent with the primary purpose of copyright — to advance the public welfare.

Whatever approach is taken, the Court would have done better to look not at "what rights copyright protects in the light of history, but what rights it should protect in view of its purpose and function."[151]

**Legislation**

Copyright revision legislation, which will hopefully unravel the copyright communications knot, has long been a subject of Congressional inquiry. In 1955, under Congressional authorization, a copyright revision project was launched with a program of studies inspired by the late Arthur Fisher, then Register of Copyrights.[152] The years from 1955 to 1961 were consumed with thoughtful study and research on the problem of copyright revision. Released at the end of that period was a series of 34 monographs prepared by the staff of the Copyright office and experts outside the staff.[153] The reports focused on the historical aspects of the present law, the issues involved, and the various proposals. Shortly afterwards, in 1961, the Register issued the results of the research committee's work detailing recommendations for an omnibus statute and synthesizing the various viewpoints of the committee's members into a tentative conclusion on each issue. Afterwards followed three years of drafting, debate, and discussion leading to the introduction, in 1964, of a Copyright Revision Bill at the request of the Register of Copyrights.[154] Again at the request of the Register, a second bill containing further changes was introduced into the 89th Congress.[155] Following hearings before Subcommittee No. 3 of the House Judiciary Committee this bill was favorably reported[156] but not enacted. In the Ninetieth

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[150] Barrow, *OTP and FCC: Role of the Presidency and the Independent Agency in Communications*, 43 U. CIN. L. REV. 291, 298 (1974).

[151] L. PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 219 (1968).

[152] Goldman, *The Copyright Law: Nearly Sixty Years Later*, 28 OHIO ST. L. J. 261, 273 (1967).

[153] Kastenmeier, *Revision Revisited*, 16 BULL. CR. SOC. 269, 270 (1969).

[154] H.R. 11947, 88th Cong., 2d Sess. (1964).

[155] H.R. 4347, 89th Cong., 1st Sess. (1965).

[156] H.R. REP. No. 2237, 89th Cong., 2d Sess. (1966).

Congress, revision bills were again introduced in the House[157] and the Senate.[158] The House bill, which included a section covering cable TV operations, was favorably reported to the House.[159] That section, however, was struck from the bill on the floor of the House prior to enactment in order to refer the matter to the Interstate and Foreign Commerce Committee which has jurisdiction over communications.

Recognizing the overlapping nature of legislation which revised copyright laws in light of CATV functions, and the need for such proposals to be jointly considered by the other concerned committees, Congressman Moore, at the time of deletion, remarked:

> [W]hat we seek to do in this legislation is control CATV by copyright. I say that is wrong. I feel if there is to be supervision of this fast-growing area of news media, it should legitimately come to this body from the legislative committee that has direct jurisdiction over the same. "* * * This bill and the devices used to effect communications policy are not the proper functions of copyright * * *."[160]

The following year the same bill was reintroduced into the Senate as S. 543 but no significant action was taken.

In March of 1973, S. 1361[161] was introduced into the Senate. Intended as a major overhaul of copyright laws in light of the changed technology since the 1909 Copyright Act, the bill contains a section proposing to solve the cable system issue,[162] similar in numerous respects to the Consensus Agreement endorsed by the FCC in the Spring of 1972. Provisions are set forth limiting the number of distant channels that, depending on the size of the television market, may be imported.[163] In this way it is hoped that the market receiving the outside signals will not be excessively fractionalized, thus threatening the viability of local stations.

In addition to limiting outside signals, Section 111 also requires that, once again depending on the size of the market, one or more local signals be transmitted on the cable system. The consent to transmit local and distant signals would be granted the cable operators through a system of compulsory licensing.[164]. Essentially this means that stations are to be granted a full blanket license to re-

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[157] H.R. 2512, 90th Cong., 1st Sess. (1967).

[158] S. 597, 90th Cong., 1st Sess. (1967).

[159] H.R. REP. No. 83, 89th Cong., 1st Sess. (1967).

[160] 113 Cong. Rec. 8599. *See generally, id.* at 8598-8601, 8611-8613, 8618-8622, 8990-8992.

[161] S. 1361, 93rd Cong., 1st Sess. (1973).

[162] *Id.* at § 111.

[163] *Id.*

[164] *Id.*

transmit programs to the extent permitted by FCC carriage regulations, in effect, freeing the cable operators from the insurmountable task of attempting to negotiate with broadcast stations for each individual program sought to be retransmitted.

The stumbling block preventing the parties from reaching an agreement, and the subject which consumed a major portion of the subcommittee's hearings,[165] has been the topic of copyright fee payments. When all parties agreed to and signed the Consensus Agreement the conditions agreed upon were that, should the parties fail to adopt a fee schedule which would be fair and reasonable to all parties concerned, the issue would be decided by arbitration. As previously noted nearly 60 hours of negotiations produced no fee agreement, the amounts demanded and being offered remaining widely separated. Subsequently, CATV interests refused to enter into the arbitration hearings and instead backed the fee schedules tentatively contained in S. 1361.

At the legislative hearings some aspects of the refusal to arbitrate were illuminated. Broadcasters and copyright holders consistently maintained that cable television had received all the benefits of the Consensus Agreement — through the lifting of the distant signal importation restrictions which had frozen CATV developments — but now refused to pay the price of these benefits by arbitrating the amounts due for retransmission of broadcasts.[166] Just as consistently, the cable operators contended that they had negotiated faithfully in order to reach a compromise but that they would not permit copyright fee policy to be fixed by arbitration which they maintained could succumb to the more powerful interests *i.e.*, broadcasters and copyright holders.[167] Furthermore, the hearings brought out the fact that cable operators had been presented with much of the Consensus Agreement on a take it or leave it basis. To leave it would mean continuation of the distant signal importation restrictions and the unprofitable investment climate those restrictions created. "Take it" then seemed the only viable alternative.

When the subcommittee convened hearings on the proposed legislation in the summer of 1973 these conflicting accounts of the cable agreement negotiations surfaced in the testimony of and papers submitted by the respective parties. In the environment thus created, broadcasters went on to request that the arbitration initially agreed to be implemented. Specifically sought was a commission that would determine, through independent research, investigation and analysis, where the proper fee rate should be set, with the results binding on

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[165] *Hearings, supra* note 53.

[166] *Id.* at 278, statement of Jack Valenti, President, Motion Picture Association of America, Inc.

[167] *Id.* at 397, statement of David Foster, President, National Cable Television Association.

all parties.[168] Stressing the fact that the tentative fee schedule[169] contained in S. 1361 was written in 1969 and, at the time, was not based on an empirical study, broadcasters urged the subcommittee not to approve the haphazard provision and instead commence a study on the matter.

Opposing this view, cable operators noted that further study on the matter, in light of the previous extended negotiations, would bear no fruit. Describing the probable results of such a study, David Foster, President of the National Cable Association, remarked:

> If that tribunal were to be convened today, it would have the same difficulties that the parties had during the past 2 years trying to conduct negotiations — they would simply be speculating as to the future of this industry, but they wouldn't be dealing with anything except one economist theorizing from one direction and another economist theorizing from the opposite direction. What would come up would be certainly no more valid, and I suspect a lot less valid, than the wisdom of the Senate.
>
> And, therefore, we are supporting the concept of S. 1361 that the fee schedule to be [sic] imposed at this time with arbitration or a statutory tribunal, whichever you want to call it, coming into play at a time when we have evidence to deal with.[170]

When the conclusion of various economic studies on proposed fee schedules are examined, Foster's statement appears all the more accurate. A study undertaken by Bridger M. Mitchell reached the conclusion that

> . . . [t]he proposed statutory fee schedule . . . would generally lower rates of return on total capital a full percentage point for systems in the profitable range, and in an important proportion of the cases its leveraged effect on equity investors would be sufficient to create unprofitable systems.[171]

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[168] *See* note 168 *supra.*

[169] S. 1361 § 111(d)(2)(B), where relevant, provides as follows:

> A total royalty fee for the period covered by the statement, computed on the basis of specified percentages of the gross receipts from subscribers to the cable service during said period . . . as follows:
> (i) 1 percent of any gross receipts up to $40,000;
> (ii) 2 percent of any gross receipts totalling more than $40,000 but not more than $80,000;
> (iii) 3 percent of gross receipts totalling more than $80,000, but not more than $120,000;
> (iv) 4 percent of any gross receipts totalling more than $120,000, but not more than $160,000; and
> (v) 5 percent of any gross receipts totalling more than $160,000.

[170] *See* note 167 *supra.*

[171] Mitchell, *Cable Television Under the 1972 FCC Rules and the Impact of Alternative Copyright Fee Proposals — An Economic Analysis* (1972), in *Hearings supra* note 162, at 426, 466.

A second study, backed by broadcasting and copyright interests, and conducted by Robert W. Crandall and Lionel L. Fray, conflictingly concluded that

> [t]he resulting estimates of cable profitability find medium to large size systems earning in excess of 20 percent on capital in nearly every situation in the absence of copyright payments. These returns are above those deemed necessary to attract investment capital to the industry. Thus, we conclude that substantial copyright fees could be paid without inhibiting the growth of typical cable systems in the country's major markets as they are presently conceived.[172]

The subcommittee appeared anxious to complete the task at hand by setting rate schedules themselves rather than delegating the task, and thus effectively delaying a final result, to an independent committee. Considering this mood it is perhaps not surprising that early in June 1974, the Judiciary Committee, meeting as a whole, voted to halve the royalty rates contained in Section 111. As a result of that action fees now levied on revenues will range from ½ per cent for systems grossing less than $40,000 per year to 2½ per cent for those grossing more than $160,000.[173] Complementary action was taken on the bill's provision which called for a copyright tribunal to convene, and readjust rates if necessary, three years after enactment. As revised, the tribunal is to meet six months after enactment and at five-year intervals thereafter.

These actions signify a clear victory for CATV. Yet this victory remains unique since there exists no genuine loser. Cable industries will benefit from the lower royalty rates imposed by the impending legislation; broadcasters will gain as a result of the carriage restrictions placed on CATV systems; and finally copyright holders will reap the royalty payments which the Copyright Act of 1909, as interpreted in *Teleprompter,* does not permit. But these gains aside, the true victory for all involved clearly depends on the ultimate passage of S. 1361. The stability that it is expected to produce in the fields of copyright and communications can only benefit all concerned. And only in this climate can the interests of the public be given the care and attention they rightfully deserve.

*Lee Fisher*

*Sam Salah*

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[172] Crandall and Fray, *The Profitability of Cable Television Systems and Effects of Copyright Fee Payments* (1973), in *Hearings supra* note 162, at 317, 376.

[173] 86 BROADCASTING, June 17, 1974 at 17.