Notes

Cable Television and Copyright Royalties

In *Columbia Broadcasting System v. Teleprompter*[1] the Court of Appeals for the Second Circuit held that CATV[2] owners who imported "distant signals"[3] infringed the copyright of copyrighted material on those signals. In reaching this judgment the court distinguished *Fortnightly v. United Artists*,[4] which held that the CATV services there involved did not infringe copyright. Both courts, however, relied on a similar judicial approach: In finding an infringement the *Teleprompter* court appropriated the "functionalist"[5] test of the *Fortnightly* decision.

Arguably, the outcomes of the two cases are not inconsistent and *Fortnightly* should be distinguished as that case had itself distinguished seemingly forceful precedents. This Note presents another view: that the *Teleprompter* outcome represents an anomaly, bred by a series of awkward results, themselves the result of inappropriate judicial methodology.

I. CATV and Copyright

The common industry practice of selling programs to the largest, most lucrative markets and only later to smaller, outlying communi-

1. Columbia Broadcasting System, Inc. v. Teleprompter Corp., 476 F.2d 338 (2d Cir. 1973), *aff'g in part and rev'g and remanding in part* 355 F. Supp. 618 (S.D.N.Y. 1972), *cert. granted*, 42 U.S.L.W. 3194 (U.S. Oct. 9, 1973) (Sup. Ct. docket no. 72-1628 and no. 72-1633, cases consolidated for argument).

2. CATV is the acronym for Community Antenna Television. The literature on CATV systems is extensive. The Office of Telecommunications Policy has prepared a lengthy bibliography. Executive Office of the President, Cable Television Bibliography, Feb. 1972. Noteworthy are the FINAL REPORT of President Johnson's TASK FORCE ON COMMUNICATIONS POLICY (1968) and R. SMITH, THE WIRED NATION (1972).

3. The term "distant signals" has 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 (1972). Since television transmission travels only on line of sight, topographical conditions will affect the Grade B contour. When not set apart by quotation marks, the term distant signals is used in this Note in a nontechnical sense to mean signals from a distant place.

4. Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968), *rev'g* 377 F.2d 872 (2d Cir. 1967), *and* 255 F. Supp. 177 (S.D.N.Y. 1966).

5. *See* p. 561 *infra*. In *Fortnightly* the Court compared the functions of CATV systems with those of broadcasters ("performers") and viewers ("nonperformers").

ties depends on the present scarcity of television distribution. The plaintiffs in *Fortnightly* and *Teleprompter* challenged the right of cable owners to deliver by wire, without private licenses, broadcast copyrighted material. They claimed that since cable enlarged the present distributive market, it restricted the potential future market, thereby denying copyright owners future syndication sales to areas that, absent CATV, would be unable to receive the broadcast programs.[6] Beyond loss of royalties, the CATV copyright litigation evidences the challenge CATV technology represents to the economic hegemony of the networks. Network television's economic interest in a limited number of channels conflicts with the development of the CATV industry.[7] This more general controversy has been fought on many fronts and in many forums;[8] the copyright cases in the courts are part of this larger struggle.

6. United Artists Television, Inc. v. Fortnightly Corp., 255 F. Supp. at 180-81; Columbia Broadcasting System, Inc. v. Teleprompter Corp., 355 F. Supp. at 620.

7. Comments of the U.S. Dept. of Justice before the FCC, Dkt. No. 18,397, at 21 n.11 (1969) (investigation of ownership of CATV by broadcasters and other media interests).

8. Congress has not spoken directly to the controversy created by transmission by cable systems of broadcast materials which have been copyrighted. In 1968 the Supreme Court noted:

> A revision of the 1909 Act was begun in 1955 when Congress authorized a program of studies by the Copyright Office. Progress has not been rapid. The Copyright Office issued its report in 1961. Register of Copyrights, Report on the General Revision of the U.S. Copyright Law, House Judiciary Committee Print, 87th Cong., 1st Sess. (1961). Revision bills were introduced in the House in the Eighty-eighth Congress and in both the House and the Senate in the Eighty-ninth Congress. See H.R. 11947, 88th Cong., 2d Sess.; Hearings on H.R. 4347, 5680, 6835 before Subcommittee No. 3 of the House Judiciary Committee, 89th Cong., 1st Sess. (1965); Hearings on S. 1006 before the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Judiciary Committee, 89th Cong., 2d Sess. (1966). H.R. 4347 was reported favorably by the House Judiciary Committee, H.R. Rep. No. 2237, 89th Cong., 2d Sess. (1966), but not enacted. In the Ninetieth Congress revision bills were again introduced in both the House (H.R. 2512) and the Senate (S. 597). The House bill was again reported favorably, H.R. Rep. No. 83, 90th Cong., 1st Sess. (1967), and this time, after amendment, passed by the full House. 113 Cong. Rec. 9021. The bill as reported contained a provision dealing with CATV, but the provision was struck from the bill on the House floor prior to enactment. The House and Senate bills are currently pending before the Senate Subcommittee on Patents, Trademarks, and Copyrights.

Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 396 n.17 (1968). Since that time no revision containing language relevant to CATV has been successfully reported to the floor.

Federal Communication Commission (FCC) support of CATV has been tepid. In December 1968, it lifted a previous ban on distant signal importation in the largest 100 markets for CATV owners who obtained retransmission consent from the holders of program copyrights. Second Report and Order on Community Antenna Systems, 2 F.C.C. 2d 725 (1966). "[B]ecause of the fees set by copyright owners, for which cable systems were not otherwise liable, and because of alleged difficulties of obtaining permissions, the practical impact of these rules was to freeze signal importation at existing levels." Comanor & Mitchell, *The Costs of Planning: The FCC and Cable Television*, 15 J. LAW & ECON. 177, 183 (1972).

In 1970, the FCC proposed new rules for CATV. Cable systems were permitted to import signals from distant stations into the largest 100 markets; those systems with more than 3500 subscribers were required to originate programming, the amount to

Some commentators[9] have seen the issue more starkly: CATV, by making money transmitting signals broadcast by others, is getting a "free ride" if not held accountable for royalties.[10] The controversy might also be seen as one of regulation, since the copyright determination will structure industry-wide practices. In either case an approach which involves an extensive analysis of the economics of CATV operations is required.[11]

A. *Community Antenna Television*

Cable technology, like boosters[12] and translators,[13] originated to serve communities that could not receive adequate television service because of topographical features and economic conditions. Contemporary cable technology, advanced by one significant technical innovation, still serves this initial purpose. The CATV owner builds an antenna closer to the major market or on top of the intervening mountain and amplifies the strength of the signal received to send it by wire to subscribers. The cable technology revolution which permitted the efficient provision of such service was the use of microwave links to relay signals from the cable antenna, enabling even the most isolated areas to receive network broadcasts.

Roughly contemporaneous with this technological advance came a newer role for CATV. Scarcity of channels restricted not only delivery but also programming; the economics of production and advertising precluded programming diversity in most markets. Cable technology

be determined by the size of the subscription audience. Memorandum Opinion & Order, 23 F.C.C. 2d 825 (1970).

In August 1971 the FCC filed a Letter of Intent (Cable Television Proposals) with Congress, revising the 1970 rules. 31 F.C.C. 2d 115 (1971). CATV systems in the largest 100 markets were to be restricted to importing two distant stations. The final rules required origination of local programming, Cable Television Report and Order, 36 F.C.C. 2d 141 (1972) [hereinafter cited as Order]; included a provision (the obligation of carriage rule) requiring compulsory carriage of local stations, including those beyond the Grade B contour where the Commission found that the signals were "significantly viewed," Order, ¶ 74, at 170-71; as later amended, limited distant signal importation into small markets, Memorandum Opinion and Order on Reconsideration, 36 F.C.C. 2d 326, ¶ 41, at 342 (1972); and restricted CATV systems from importing signals that would conflict with local exclusivity agreements.

The FCC has, at present, no stated policy on whether CATV systems should be held liable for copyright licensing fees.

9. *See, e.g.*, THE REPORT OF THE SLOAN COMMISSION ON CABLE COMMUNICATIONS, ON THE CABLE: THE TELEVISION OF ABUNDANCE chs. 5, 7 (1971).

10. Plaintiffs need not prove that defendants actually profited in order to collect damages for an infringement. *See* F.W. Woolworth Co. v. Contemporary Arts, Inc., 344 U.S. 228 (1952); M. NIMMER, COPYRIGHT § 154.13 (1973) [hereinafter cited as NIMMER].

11. See § III *infra* for examples of analysis that determines (a) whether markets are in fact diminished, and (b) whether the impact of an adverse decision on CATV would greatly limit the dissemination of copyrighted material.

12. *See* 47 C.F.R. § 74.801(a) (1972).

13. *See* 47 C.F.R. § 74.701(a) (1972).

permitted delivery to smaller markets of programming financed by mass advertising in the major markets.

Both broader delivery and program diversity, however, depend on the importation of distant signals.[14] Microwave relay of distant signals, which until recently was prohibited by the FCC,[15] is a necessity if a greater number of programs is to be brought to any but the largest markets. As Professors Noll, Peck, and McGowan concluded, "Cable holds the promise of all but eliminating the scarcity of channels that accounts for so many of the problems of television—restricted program choice, limited diversity, and highly concentrated control. . . . Carrying distant signals is a necessary condition for nationwide cable."[16] Indeed, about half of the 650 CATV systems providing full network services for 2.3 million persons are dependent on distant signals.[17]

B. *The Copyright Act*

The primary policy of the Copyright Act is to give the public maximum access to the author's work; a secondary purpose is to remunerate

14. This, at least, is the present state of affairs. It is possible that mass subscriptions, combined with the sale of advertising, would allow profitable CATV production origination. The data, however, indicate that achieving a large subscription audience initially may depend on signal importation. *See* R. NOLL, M. PECK & J. MCGOWAN, ECONOMIC ASPECTS OF TELEVISION REGULATION 155 (1973) [hereinafter cited as TELEVISION REGULATION].

15. The new rules which took effect March 31, 1972, permit CATV to carry two distant signals into most of the largest 100 markets. 37 Fed. Reg. 3252 (Feb. 12, 1972). *See* Memorandum Opinion and Order on Reconsideration, *supra* note 8. Previously such signal importation was effectively barred. *See generally* Park, *Cable Television, UHF Broadcasting, and FCC Regulatory Policy*, 15 J. LAW & ECON. 207 (1972).

16. TELEVISION REGULATION, *supra* note 14, at 151. This excellent work is one of a number of papers treating the issue of signal importation from policy perspectives supplemented by economic analysis. RAND Corporation has sponsored a series of such studies: L. JOHNSON, THE FUTURE OF CABLE TELEVISION: SOME PROBLEMS OF FEDERAL REGULATION (1970); L. JOHNSON, CABLE TELEVISION AND THE QUESTION OF PROTECTING LOCAL BROADCASTING (1970); R. PARK, POTENTIAL IMPACT OF CABLE GROWTH ON TELEVISION BROADCASTING (1970); R. PARK, CABLE TELEVISION AND UHF BROADCASTING (1971); R. PARK, PROSPECTS FOR CABLE IN THE 100 LARGEST TELEVISION MARKETS (1971). *See* Barnett & Greenberg, *Regulating CATV Systems: An Analysis of FCC Policy and an Alternative*, 34 LAW & CONTEMP. PROB. 562 (1969); Barnett & Greenberg, *On the Economics of Wired City Television*, 58 AM. ECON. REV. 503 (1968); Barnett & Greenberg, *A Proposal for Wired City Television*, 1968 WASH. U. L.Q. 1; Barnett, *Cable Television and Media Concentration, Part I: Control of Cable Systems By Local Broadcasters*, 22 STAN. L. REV. 721 (1970); Comanor & Mitchell, *Cable Television and the Impact of Regulation*, 2 BELL J. ECON. & MANAGEMENT SCI. 154 (1971); Fisher, *Community Antenna Television Systems and the Regulation of Television Broadcasting*, 56 AM. ECON. REV. 320 (1966); Fisher & Ferrall, *Community Antenna Television Systems and Local Television Station Audience*, 80 Q.J. ECON. 227 (1966).

17. 42 TELEVISION FACTBOOK, SERVICES VOLUME 75(a), 363(a), *analyzed in* Brief for Petitioner at 6, Teleprompter Corp. v. Columbia Broadcasting System, *cert. granted*, 42 U.S.L.W. 3173 (U.S. Oct. 9, 1973) (Sup. Ct. docket no. 72-1628). If the Second Circuit's definition of "distant signal" in *Teleprompter* (*see* pp. 563-64 *infra*) is correct, the number may be considerably larger, because the figures given in the text do not include those systems which do not use microwave relay but may have antennas outside the CATV community. There is, however, no industry-wide data available on antenna location.

the copyright owner.[18] The Act therefore does not grant a general copyright monopoly but instead confers specific rights[19] and, by inference, delineates specific infringements.[20] Unrevised since 1909, the section of the Act relevant to the question of potential infringement by CATV grants copyright owners the exclusive right, among others, to "perform" the copyrighted material.[21] All the decisions in the *Fortnightly*

18. *See, e.g.*, Mazer v. Stein, 347 U.S. 201, 219 (1954); United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948); Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932) (The primary purpose of copyright is not to reward the author, but is rather to secure "the general benefits derived by the public from the labors of authors.").

19. The Copyright Act provides in pertinent part:

> Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:
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> (a) To print, reprint, publish, copy, and vend the copyrighted work;
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> (b) To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a nondramatic work; to convert it into a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art;
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> (c) To deliver, authorize the delivery of, read, or present the copyrighted work in public for profit if it be a lecture, sermon, address or similar production, or other nondramatic literary work; to make or procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, delivered, presented, produced, or reproduced; and to play or perform it in public for profit, and to exhibit, represent, produce, or reproduce it in any manner or by any method whatsoever. The damages for the infringement by broadcast of any work referred to in this subsection shall not exceed the sum of $100 where the infringing broadcaster shows that he was not aware that he was infringing and that such infringement could not have been reasonably foreseen; and
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> (d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever; and
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> (e) To perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit, and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced . . . .

17 U.S.C. § 1 (1970).

20. *See* NIMMER, *supra* note 10, § 100.

21. *See* 17 U.S.C. §§ 1(c)-(d) (1970); note 19 *supra*. It would have been difficult to regard CATV systems as "broadcasting" within § 1(c) of the Copyright Act because that term is explicitly defined by the Communications Act of 1934 as "the dissemination of radio communications intended to be received by the public . . . ." 47 U.S.C. § 153(o) (1970). CATV systems were held not to be broadcasters in Cable Vision, Inc. v. KUTV Inc., 211 F. Supp. 47 (S.D. Idaho 1962), *vacated on other grounds*, 335 F.2d 348 (9th Cir. 1964).

Plaintiff copyright owners therefore turned to a series of cases, codified by § 1(c) (a 1954 amendment), which held that broadcast of copyrighted material constituted a performance within the meaning of the Copyright Act. Jerome H. Remick & Co. v. American Automobile Accessories Co., 5 F.2d 411 (6th Cir. 1925) (radio broadcast); Associated Music Publishers v. Debs Memorial Radio Fund, 141 F.2d 852 (2d Cir. 1944) (broadcast of a recorded program); Select Theatres Corp. v. Ronzoni Macaroni Co., 59 U.S.P.Q. 288 (S.D.N.Y. 1943) (broadcast of program received from network).

and *Teleprompter* litigations have turned on whether CATV owners were doing things which could be analogized to the activities of "performers."

II. CATV-Copyright Litigation

A. *The Pre-*Fortnightly *Precedents*

The paradigm for "performance" is a stage play production[22] and the precedents for CATV copyright litigation are cases that compare early broadcast and reception activities with theatrical performances. Each case has moved the analogy further and a reading of the precedents prior to *Fortnightly* is something of a study in the imperceptible drift from statutory language to incongruous result. This movement culminates in *Fortnightly,* which found the Court's majority unwilling to apply or overrule a compelling precedent.[23]

Herbert v. Shanley,[24] though not a broadcast delivery case, set the mold for copyright cases dealing with performance. In *Herbert* a hotel operator employed an orchestra to provide free entertainment to dining customers. The Supreme Court held that royalties must be paid to the holder of the copyright. Following *Herbert,* a circuit court then ruled, in *Jerome H. Remick & Co. v. American Automobile Accessories Co.*[25] that the unauthorized *broadcast* of a copyrighted song was a "performance" within the meaning of the Copyright Act.

Against this background the Supreme Court considered *Buck v. Jewell-LaSalle Realty Co.*[26] In *Jewell-LaSalle,* a hotel proprietor had wired his dining room to receive radio programs without authorization by the local broadcaster. Relying on *Herbert* and *Remick,* Justice Brandeis wrote, "There is no difference in substance between the case where a hotel engaged an orchestra to furnish the music and that where, by means of the radio set and loud-speakers here employed, it furnishes the same music for the same purpose."[27]

To these cases was then added *Society of European Stage Authors and Composers (SESAC) v. New York Hotel Statler Co.,*[28] in which it was held that a hotel infringed a copyright by providing radio receivers

22. The legislative history of the 1909 Act indicates that a stage play, transcribed by a member of the audience and then produced, is the paradigm of "performance." H.R. Rep. No. 2222, 60th Cong., 2d Sess. 4 (1909).
23. 392 U.S. at 396 n.18; *cf. id.* at 407 n.5 (Fortas, J., dissenting).
24. 242 U.S. 591 (1917).
25. 5 F.2d 411 (6th Cir. 1925).
26. 283 U.S. 191 (1931).
27. *Id.* at 201.
28. 19 F. Supp. 1 (S.D.N.Y. 1937).

in the guests' rooms. The district judge reviewed the above cases and concluded, "I find that when 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 . . . ."[29] The logical outcome of this process would be to extend the copyright monopoly not only to bars and restaurants in which television sets are featured,[30] but also to display windows, hotels, car rental agencies—any of the many businesses which attract or entertain customers, if only incidentally, with radio or television.

B. Fortnightly *and* Teleprompter

Fortnightly was the first case to test the applicability of the Copyright Act to CATV. The Fortnightly company wired homes in Clarksburg and Fairmount, West Virginia, to receive television signals which the mountainous terrain blocked.[31] The district court, after an exhaustive review of cable technology and its relation to the term "perform," held that there was an infringement.[32] Rejecting the view of CATV as an antenna system, the court noted that home sets (and antennas) do not create "new carriers for transmissions."[33] Citing *SESAC,* the court found great significance in the many technological activities of cable[34] which, in its view, rendered the delivered image "not the same" as those broadcast. It therefore concluded that a "performance" had taken place.

The Second Circuit, affirming, rejected a conclusion of "performance" based on an examination of cable technology and echoed the language of *SESAC*: "This, we think, is the nub of *Jewell-LaSalle* and

29. *Id.* at 4-5.

30. The two major performing rights societies (the American Society of Composers, Authors, and Publishers, and Broadcast Music, Inc.), however, have not chosen to force the *Jewell-LaSalle* doctrine to its logical extreme by demanding performing licenses from commercial establishments, such as bars and restaurants, which operate radio or television sets for the amusement of their customers. *See* NIMMER, *supra* note 10, § 107.41 n.204.

31. 392 U.S. at 392 n.4.

32. 255 F. Supp. 177 (S.D.N.Y. 1966).

> The District Court's decision was based in large part upon its analysis of the technical aspects of the petitioner's systems. The systems have contained at one time or another sophisticated equipment to amplify, modulate, and convert to different frequencies the signals received—operations which all require the introduction of local energy into the system. The court concluded that the signal delivered to subscribers was not the same signal as that initially received off the air. 255 F. Supp. at 190-195.

392 U.S. at 399 n.27. This "technical" approach is contrasted with the circuit court's "quantitative" approach ("how much did the CATV systems do?") and the Supreme Court's "functionalist" approach to determine what constitutes "performing."

33. 255 F. Supp. at 180, 197.

34. "[They] process, receive, electronically reproduce and amplify, relay, transmit and distribute [signals]." *Id.* at 180.

SESAC: how much did the defendant do to bring about the viewing and hearing of a copyrighted work?"[35]

The Supreme Court reversed, rejecting both the district court's technological approach and the circuit court's "mere quantitative" approach for a "functional" examination.[36] The question asked was not "Did CATV perform the same kind of electronic activities as broadcasters?"[37] nor "Did CATV do as much as broadcasters do?"[38] but "Did CATV provide the same kind of service, fill the same kind of role as broadcasters?"[39] The Court found that Fortnightly's CATV systems functioned more like a passive viewer who erects his own antenna system and less like an "active" broadcaster.[40]

Teleprompter was filed the same day as *Fortnightly,* but efforts to join the suits were unsuccessful and the former was stayed pending resolution of the *Fortnightly* litigation. Plaintiffs' charges of damages were essentially the same in both suits—that they were deprived of licensing fees for future rebroadcasts.[41] Although the infringement theory was modified in light of the decision in *Fortnightly,* the suit was clearly pursued as an effort to limit the *Fortnightly* holding.

In view of the majority's approach in *Fortnightly,* plaintiffs, the Columbia Broadcasting System and three production companies,[42] now alleged that the Teleprompter CATV systems, by virtue of activities more diverse and sophisticated than Fortnightly's, had become more "like" broadcasters and therefore more "like" performers.[43]

35. 377 F.2d at 877. The district court, however, found its "technological" test implicit in *SESAC,* where the "quantitative" test originated. The district court concluded that "when a CATV system, for profit, plays so substantial a part . . . [,] the CATV system must be said to have ['performed']." 255 F. Supp. at 214.

36. 392 U.S. at 396, 397.

37. *See* United Artists Television, Inc. v. Fortnightly Corp., 255 F. Supp. 177, 214 (S.D.N.Y. 1966) ("The court holds that . . . the CATV system must be said to have infringed upon the exclusive right to 'perform' which Congress has bestowed upon the copyright proprietor . . . .").

38. *See* United Artists Television, Inc. v. Fortnightly Corp., 377 F.2d 872, 879 (2d Cir. 1967) ("Thus we conclude that defendant's CATV systems did more to bring about the viewing . . . of plaintiff's copyrighted motion pictures than the hotels which were held to have performed copyrighted musical compositions in *Jewell-LaSalle* and *SESAC* did to bring music to their guests . . . ").

39. The Court also contrasted CATV systems with viewers, a class previously held not to "perform" copyrighted works. Buck v. DeBaum, 40 F.2d 734 (S.D. Cal. 1929). (Cafe owner could not be enjoined from "picking up," over-the-air, "Indian Love Call"; *Jewell-LaSalle,* then on appeal, was distinguished but the ground of decision seems to have been the court's view of the cafe owner as primarily a "listener.")

40. "Essentially a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals; it provides a well-located antenna with an efficient connection to the viewer's set." 392 U.S. at 399.

41. 476 F.2d at 342 n.2.

42. The three production companies were Calvada Productions, Jack Chertok Television, Inc., and Dena Pictures, Inc.

43. Specifically, the plaintiffs alleged that program origination, the importation of distant signals, the selection of programs, microwave transmission, interconnection with other CATV systems, advertising, and the sale of commercials, taken together,

Teleprompter's five challenged systems were chosen as representative of its nationwide CATV operations; each system typified the CATV response to different geographical, topographical, and economic situations, and each exemplified various levels of technological sophistication.[44]

Rejecting most of Teleprompter's innovations as not involving plaintiff's copyright, the district court turned to the issue of distant signal importation. Plaintiffs had urged that the Fortnightly CATV had merely "enhanced" the viewer's picture but the court noted that distance had been a factor in the Fortnightly systems; some of them brought in signals otherwise unreceivable. Rejecting plaintiff's argument that Teleprompter was doing something different in kind from Fortnightly, the court reminded the parties that the Supreme Court had distinguished CATV systems from broadcasters on the ground that the former " 'receive programs that have been released to the public and carry them by private channels to *additional* viewers.' "[45] Thus while the Farmington station in *Teleprompter* was importing signals from many miles away[46] and thereby enlarging the distant market, so too, prior to Fortnightly's systems, the neighboring Wheeling stations could not include Clarksburg or Fairmount in their markets. The district court noted the refusal of the Supreme Court to distinguish between CATV activity within and beyond the Grade B contour[47] and

transformed the antenna systems into broadcasters. 355 F. Supp. at 620. The Supreme Court has granted petitions for certiorari both to Teleprompter on the "distant signal" issue and to CBS on the expanded services issues. *See* note 1 *supra.*

The logic of the expanded services issue is interesting: CBS does not contend that the Teleprompter systems sell advertising on its programs, originate programs containing its material, or in any way broadcast the copyrighted material. That case would surely invoke liability. Rather it argues that the use of material, even licensed material, in broadcasting activities changes the character of the entire CATV system, even with respect to material not carried as a result of the expanded services.

44. The five challenged systems were: (a) Elmira, New York, a ten channel system; although it imported at least two signals by microwave, the system served a community adjacent to larger markets (Buffalo, Syracuse) which were blocked by topographical features; (b) New York City, a system required by the terms of its franchise to carry the eleven city stations; while using microwave links between subsidiary channels, this system did not import signals, offering instead clearer local signals usually obscured by the height and density of buildings; (c) Great Falls, Montana, which could not otherwise receive seven of the channels offered by the CATV system because of distance and mountainous terrain; antennas were located well outside the town and relayed the received signals by microwave; (d) Rawlins, Wyoming, a system receiving Denver stations by microwave relay from a cable antenna; topographical features required an antenna system even for nearby Casper signals; (e) Farmington, New Mexico, a nine channel system; none of the stations offered could be received off the air by Farmington residents, though some of the signals (from Albuquerque) were amplified by translators; a relay system was thus not essential.

45. 355 F. Supp. at 624-25 (emphasis added) (citing the Supreme Court's opinion in *Fortnightly*).

46. They were importing signals from Los Angeles stations 600 miles distant.

47. In an amicus curiae brief to the Supreme Court in *Fortnightly,* the Solicitor General had urged a finding that the copyright owners were estopped with respect to over the air signals within the Grade B contour by a "license implied in law."

concluded that Teleprompter's systems were simply better located and more efficient than Fortnightly's.[48]

The Second Circuit, Judge Lumbard writing for the court as in *Fortnightly,* reversed.[49] The court began by noting that the cable technology of Teleprompter was distinct from that of Fortnightly. It rejected as not determinative, however, each of the technological innovations[50] except one: the importation of distant signals. Judge Lumbard quoted a footnote from the Supreme Court's opinion in *United States v. Southwestern Cable Co.,*[51] as authority for the finding that the importation of distant signals was a technique designed to serve a different purpose than that served by the Fortnightly system. Speaking in a different context, Mr. Justice Harlan had written,

> CATV systems perform either or both of two functions. First, they may supplement broadcasting by facilitating satisfactory reception of local stations in adjacent areas in which such reception would not otherwise be possible; and second, they may transmit to subscribers the signals of distant stations entirely beyond the range of local antennae.[52]

When a copyright owner releases his product over the air, anyone with an antenna or receiver may pick it up without paying a fee; they are impliedly licensed to do so by the release through broadcasting. The difficulty with this view is that markets for advertisers are not determined by line of sight. The Solicitor General's plan would thus not satisfy the equitable considerations discussed at pp. 568-69 *infra.* The Court in any event rejected the Solicitor General's suggestion. 390 U.S. at 401 n.32.

48. If a viewer erected an antenna on a hill, the Court said, he would not be performing the programs he received. [*Fortnightly*] at 400. Nor, it would seem, would a viewer be "performing" if he set up a strategically-placed antenna miles from his home and brought in signals from that antenna. The fact that the same operation is conducted here as a commercial enterprise by a viewing innovator does not change its function—which is to "enhance the viewer's capacity to receive the broadcaster's signals." We therefore find that Teleprompter's importation of distant signals does not cause it to function as a broadcaster.

355 F. Supp. at 628.

49. 476 F.2d 338 (2d Cir. 1973).

50. *See* note 43 *supra.* Program origination is required under the FCC rules (47 C.F.R. § 74.1111 (1972)). Interconnection and importation of "distant signals" may also be required, for the obligation of the carriage rule, *see* note 8 *supra,* arises "even though a viewable off-the-air picture is not available in any part of the community." Order, *supra* note 8, ¶ 42, at 159.

51. 392 U.S. 157, 161 (1968).

52. *Id.* at 163. The point being made in the Harlan opinion, however, is that this second purpose "promise[s] . . . to provide a national communications system" and therefore should be within the purview of the FCC. The Court's relevant remark as to this second purpose came not from the *Southwestern* majority, but from the Fortas dissent in *Fortnightly.* Arguing that a geographical distinction as to the origin of the off-the-air signal should have been made, Justice Fortas wrote:

> It may be, indeed, that insofar as CATV operations are limited to the geographical area which the licensed broadcaster (whose signals the CATV has picked up and carried) has the power to cover, a CATV is little more than a "cooperative antenna" employed in order to ameliorate the image on television screens at home or to bring the image to homes which, because of obstacles other than mere distance, could not receive them. But such a description will not suffice for the case in which a CATV has picked up the signals of a licensed broadcaster and carried them beyond the area—however that area be defined—which the broadcaster normally serves.

392 U.S. at 407.

The court concluded, "When a CATV system is performing this second function of distributing signals that are beyond the range of local antennas, we believe that, to this extent, it is functionally equivalent to a broadcaster and thus should be deemed to perform the programming distributed."[53] The court therefore held that the three systems which placed antennas several miles away from the communities they served and relayed the signals had infringed the copyright.[54]

III. Judicial Method in the CATV-Copyright Controversy

Although five different courts have reached three different conclusions regarding CATV copyright infringement, all have approached the problem in the same manner—analogizing cable activity to recognized instances of performance. Each has renounced any effort to take a broader, policy-oriented approach. Each has felt that a policy determination is for Congress to make.[55] It is, of course, always risky to infer anything from congressional inaction, but it would seem that Congress' continuing refusal to alter the Copyright Act to address the CATV issue should prompt the Court to take a broader view; otherwise the relevant economic and policy inquiries will never be made. If Congress had passed a statute saying "CATV systems must pay copyright fees," of course, there would be little inquiry required of the courts. When the statute speaks vaguely and broadly, however, courts should take a carefully informed view of the case to which the statute is to be applied.[56] Only contemporary legislation that itself reflected such inquiry should preclude a policy-oriented view.

53. 476 F.2d at 349.

54. The court remanded in the case of Farmington, *see* note 44 *supra*, for a determination of whether pickup was possible without relay. 476 F.2d at 353. The court added the caveat that, if authorized translators could bring the "distant signal" into the community without relay, transmission even by relay-CATV would not amount to an infringement. *Id.* at 350 n.17.

It is unclear how the presence of translators would alter the "function" of a CATV system or remunerate copyright owners. The translator exception seems more suited to a license in law theory, since the broadcaster-licensee has made the material available over the air, but this theory was expressly rejected by the court. *Id.* at 352 n.18.

55. In the *Fortnightly* litigation, *see* 390 U.S. at 401 ("We decline the invitation [to take a broader policy view]"); 377 F.2d at 885 ("We agree that it is evident that CATV raises many serious problems of public policy, which are not adequately illumined by the record before us. . . . We must, however, decide the issue before us . . . ."); 255 F. Supp. at 215 ("The Court notes in passing that, despite the fact that exemptions from inclusion within the copyright proprietor's performance monopoly may arguably be desirable in certain instances purely on policy grounds, such desiderata are for Congress and not the courts.").

In the *Teleprompter* litigation, *see* 476 F.2d at 354 ("[C]omplex problems not readily amenable to judicial resolution [are presented] . . . . We hope that Congress [will act.]"); 355 F. Supp. at 630 ("Perhaps the time has come to cease piling analogy on analogy and to await word from Congress.").

56. *See* Chrysler v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973), discussed in note 83 *infra;* note 77 *infra.*

At any rate the courts have little choice. It will be shown that the present analogical approach to this legislation, which involves comparing the disputed activity to those either contemplated by the legislature or held by the courts to have come within the statute, is inadequate to the problem and logically unsatisfying.

A. *Some Difficulties of Analogical Statutory Construction*

Jewell-LaSalle greatly influenced the decisions in the district and circuit court considerations of *Fortnightly*. It was distinguished by the *Fortnightly* Court as "limited to its own facts."[57] In an analogical approach, however, a court may hardly say that a relevant previous decision is limited to its particular fact situation; indeed, the whole point of an analogy is to release a precedent from its historical setting and apply similar reasoning to a dissimilar set of facts. As Justice Fortas wrote in his dissent in *Fortnightly*, "If a CATV system performs a function 'little different from that served by the equipment generally furnished by a television viewer' [quoting the majority] and if that is to be the test, then it seems to me that [the Jewell-LaSalle] master radio set attached by wire to numerous other sets in various hotel rooms cannot be distinguished."[58] Justice Fortas was surely right. A statement that the use of mechanical "equipment to extend a broadcast to a significantly wider public than the broadcast would otherwise enjoy constitutes a performance" is an example of an analogical, "functionalist" approach.[59]

Furthermore, the majority effort to discredit *Jewell-LaSalle* by intimating that the Court would not have found a "performance" if the broadcast in that case had been authorized not only ignores *SESAC*;[60] it also ignores the more compelling point that "the interpretation of the term 'perform' cannot logically turn on the question of whether the material that is used is licensed or not licensed."[61] Each of the "infringement" judges was quite correct in his final analogy; under this approach, it was not only consistent but necessary that a cable operation be a "performance." The operation resembled nothing so much as a master radio set wiring rented rooms.

This reasoning would just as logically compel successful infringe-

57. 392 U.S. at 397 n.18.
58. *Id.* at 406.
59. *Id.*, paraphrasing the *Jewell-LaSalle* holding.
60. The broadcast in *SESAC* was authorized. Society of European State Authors & Composers v. New York Hotel Statler Co., 19 F. Supp. 1, 3 (S.D.N.Y. 1937).
61. 392 U.S. at 407 n.5. This assumes a common view of the word perform. Whether a performance or a reproduction has occurred cannot, of course, depend upon whether the material performed, reproduced, or broadcast is licensed.

ment actions against viewers who erected antennas and charged their neighbors to watch football games. Analogies derive from the most recent decisional examples available; they are therefore often far-removed from the original fact situations which gave impetus to the precedents and may thus have unintended economic consequences.

The *Fortnightly* Supreme Court majority was not bound by the logical rigidity of such an analogical approach. Having forsaken strictness by its choice of analytical method, however, its opinion is both unconvincing and confusing.

While one might have hoped that the Court would simply overrule *Jewell-LaSalle* instead of trying to avoid it, the more serious problem of analysis lay in the Court's method for deciding. The "functional" test is not very helpful because it depends on the functions one chooses to consider; these must in turn be compared with "performance." It is assumed at the outset that the function is not itself strictly a performance.

The Court agreed with the assumption; the CATV systems accomplished the same function as the antenna of the individual viewer. Once *Jewell-LaSalle* is dodged, however, a circularity arises.[62] The argument might be better put as a direct admission of reluctance to hold antenna owners liable. The assumption, derived from precedent that "viewers" do not "perform,"[63] is that, with regard to "performing," broadcasters and viewers have mutually exclusive functions. But the cases cited do not hold that viewers cannot perform; they hold only that they do not do so when they are viewing. Therefore the analysis would be more accurate if the courts analyzed the problem in terms of "broadcasting" and "viewing." It would not, however, be very helpful, since when the viewer erects his antenna he is not watching the screen.

If one accepts the problem as one of choice between two exclusive classes, the members of only one of which "perform," *and* if one accepts the choice of classes, the issue still remains undetermined until one chooses the function. If the function is superior reception, the CATV system is like an antenna and there is no infringement; if the function is provision of more programs, CATV is like a distributor and there is infringement. Most important, as CATV systems add new functions, the issue must be re-litigated.[64] In a new industry the very

62. If the Court, freed from past analogies, may choose its own direction, then the analogy is not helpful but redundant. Its very choice begs the question: If CATV is to be compared to any antenna, the decision as to liability has been made.

63. *See, e.g.*, Buck v. DeBaum, 40 F.2d 734 (S.D. Cal. 1929).

64. It has been suggested that if *Teleprompter* had preceded *Fortnightly* through the courts, further litigation would have been unnecessary, for Teleprompter's systems were more sophisticated than Fortnightly's. Given the slipperiness of the "distant

raison d'etre of which is expanding technology, the likelihood of expanded services poses a real difficulty. Indeed, it is the issue of expanded service that brought Teleprompter to court.

It is not ironic, but in a way foreseeable, that the same court that was overruled in *Fortnightly* used the Supreme Court's functionalist test to reach the opposite outcome in *Teleprompter.* Chastened, the court rejected its own quantitative approach, only to reach the same conclusion.

The court distinguished *Fortnightly* in this way: The Supreme Court's functionalist test compared the services provided by cable to those provided by a home antenna; "distant" signals are those which an antenna cannot pick up without some relay assistance; therefore, with regard to distant signal importation, CATV systems are serving a different function and the *Fortnightly* analogy to viewers no longer applies.[65]

It is remarkable how, in the end, the functionalist-comparative approach resembles the rejected quantitative approach.[66] Might not the Second Circuit just as easily have stated that, by the added use of microwave links, CATV was doing "as much" as a broadcaster?[67] How would one determine when a system is doing better, more, or both so as to be doing something different?

Perhaps the worst aspect of the decision, however, was not the mixed logic but the holding. Henceforth, only those CATV systems that im-

signal" criterion, this is open to doubt. More important, new techniques are going to be developed that may have nothing to do with distant signal importation or may even outmode it. On a "functionalist" theory, each new system will have to be adjudged by the courts.

65. In *Fortnightly,* the CATV system distributed the programs to an audience to which they would not have otherwise been presented. . . . [The Court] reasoned that, since a television viewer was privileged to view whatever programs he could receive using any available antenna, a CATV system should not be deemed a "performer" for copyright purposes. . . . When a distant signal is involved, CATV is again distributing television programming to a new audience that could not otherwise have viewed it. However, in this case the new audience is one that would not have been able to view the programs even if there had been available in its community an advanced antenna such as that used by the CATV system. The added factor . . . is the microwave link. . . . The viewer's ability to receive the signal is no longer a product solely of improved antenna technology; rather it results from the system's importation of the signal into a CATV community from a separate distant community.

476 F.2d at 349-50.

66. The similarity of the various "approaches" is indicated not only in the recurrence of the quantitative theme; the district court in *Fortnightly,* whose "technical" approach was rejected by all, wrote, "The Court is presented with a situation where the copyright proprietor collects royalties when a local broadcaster makes the electromagnetic waves available to the home television set owner but receives nothing when a CATV system *does the same thing.*" 255 F. Supp. at 214 (emphasis added). Is this a functionalist approach? The court thought it was employing a *SESAC*—that is "quantitative"—approach. *Id.* at 209.

67. Microwave relay does involve transmission, but only point-to-point transmission.

port "distant stations" are to be held liable for failing to obtain licenses. The court admitted that a "precise judicial definition of a distant signal is not possible"[68] and was forced to reject the FCC's definition of such signals because it would encompass homeowner antennas.[69] The court concluded that "it is easier to state what is not a distant signal" and defined that as one "already in the community," capable "of projecting, without relay or retransmittal, an acceptable image . . . by means of an antenna erected in or adjacent to the CATV community."[70] The court added, in a footnote, that this definition did not apply to signals "rebroadcast" by translators or boosters since they were "in the community" already without CATV aid. In this instance it presumably would be immaterial whether the CATV system used microwave links to bring in *distant* channels. This emphasizes the point not only that CATV systems are being compared to broadcasters, but also that the comparison may depend on what *viewers* are doing.[71]

This kind of ruling has a number of shortcomings. It is unpredictable, being based on a technological rather than commercial definition of "market" or "community" and applied to an area of rapidly expanding technology.[72] It determines immensely important, previously undecided questions of communications regulation solely on the basis of an interpretation of the word "perform." The decision is thus the culmination of the exegetical approach to CATV copyright litigation: a decision that is both illogical *and* unmanageable.

It may be argued, however, that there was an unstated rationale which guided the court. The court may have felt that what was at stake in the CATV-copyright cases was whether the cable owners should be allowed to "pirate" signals produced by others, without remuneration to them, and profit by such a taking. If so, the outcomes in *Teleprompter* and *Fortnightly* may be plausible. Without market data before it, however, a court would have little evidence to determine such plausibility.

If the desired end is remuneration to the copyright owners, then they

68. 476 F.2d at 350.
69. *Id.*
70. *Id.* at 351.
71. *Id.* at 351 n.17.
72. If the *Teleprompter* court was concerned about the possibility that market size will not keep pace with audience size (and consequently about a lesser return to the copyright owner, *see* 476 F.2d at 342 n.2), then the "distant signal" test should depend on markets, not antennas. Clarksburg, West Virginia, one of the cities wired by Fortnightly, may consider Wheeling its shopping district but the intervening mountains preclude a clear signal.

Furthermore the "distant signal" test is easily outmoded by more sophisticated antennas. If General Electric develops more sensitive antennas or if satellites bounce signals into every village, how would the test be administered?

may have been rewarded in *Fortnightly;* that is, broadcast revenue will presumably increase as the local market grows. The *Teleprompter* court may have felt, however, that the inclusion of more distant markets in the CATV system will not be reflected in rising revenue, certainly not from advertisers appealing to the local audience of the originating station. Therefore, a rough equity would hold distant signal importers liable and others not.

Such a rationale does not preclude the thesis of this Note: that a broader factual and policy inquiry is needed. Indeed this rationale requires such an inquiry, for it is certainly not clear that copyright owners will not be rewarded in the "distant signal" case.[73] Nor has there been the kind of inquiry that would allow a court to balance this hypothetical "equity" rationale[74] against the restriction on the development of the CATV industry and the consequent limitation on its service of the other goal of the Copyright Act: the dissemination of copyrighted material.

B. *A Method for Deciding the CATV-Copyright Litigation*[75]

1. *Is there an infringement?*

Had *Teleprompter, Fortnightly,* or even *Jewell-LaSalle* been recognized as inappropriate cases for narrow statutory resolution, a fundamentally different approach might have been adopted—an outcome ap-

73. *See* pp. 573-75 *infra.*

74. In regard to this "equity" issue, which was raised in THE REPORT OF THE SLOAN COMMISSION ON CABLE COMMUNICATIONS, *supra* note 9, at 52-54, Noll, Peck, and McGowan note:

> We have several difficulties with this analysis. First, it holds that "program producers are entitled to a return from performances of their product" (p. 52). One can hardly take issue with the principle, but the analysis ignores the likelihood that the fees of syndication will reflect the advertising value of distant audiences. Second, it argues that copyright payments place distant signals on a parity with local origination, which now requires copyright payments from the cable operators. This ignores the initial payments for broadcast rights made by the originating station, which should reflect the value of distant cable audiences. Third, the commission does recognize our concern that copyright arrangements might inhibit cable development. They state: "Established distributors, in command of desirable product, will inevitably devise inventive ways of denying programming to such small entrants as cable installations and UHF stations as a means of retaining existing profitable arrangements. Effective enforcement of antitrust laws would minimize the damage from such endeavors" (p. 54). While we hesitate to take issue with a commission that includes several distinguished lawyers, we observe that the antitrust laws have done little to improve the access to programming by UHF stations, a record that does not augur well for their effectiveness in helping cable operators obtain access on reasonable terms to distant signals.

TELEVISION REGULATION, *supra* note 14, at 178.

75. For an excellent discussion of the relevance of market data to legal decision-making see R. POSNER, ECONOMIC ANALYSIS OF LAW (1972). For a discussion of outcomes inquiry, see *id.* at 1-8; for a brief review of the CATV-copyright controversy (pre-*Teleprompter)* see *id.* at 161-63.

proach looking to the purposes of the Copyright Act in the light of available market data.[76] The remainder of this Note suggests how such an approach may be structured by examining the precedent for the construction and application of copyright terms in view of public policy, some pertinent questions about the CATV industry and their relevance to a determination of copyright infringement, and judicial decisionmaking procedures which are in harmony with the characterization of the cable-copyright problem as one posing novel considerations of far-reaching economic impact.[77]

The Copyright Act reserves exclusive rights to the copyright holder, *inter alia,* to exhibit, perform, broadcast, produce, and reproduce the privileged material. Under a strict construction of the language, the mere copying of any portion of a copyrighted work constitutes an infringement.[78]

However, to encourage the dissemination of copyrighted material courts have developed the doctrine of fair use: There is no infringement if the public interest is advanced and the copyright owners' expected benefits are substantially intact.[79] It should be emphasized that

76. When a court, to resolve litigation growing out of a new technological or competitive practice, is called upon to apply a statute passed by a legislature which could not have foreseen the disputed practice, the incidental effect of the decision will be to structure industrial practices. Absent agency guidance, the court has two methodological alternatives: an analogical analysis, comparing defendant's activities to those previously held within the statute, and an outcome analysis, applying the purposes of the statute with a view toward the economic impact of the decision. This Note examines one such example of litigation; another example is Gottschalk v. Benson, 409 U.S. 63 (1972). In that case the Court was called upon to determine whether computer programs were patentable. No market material was cited in the decision, which turned instead upon a meticulous consideration of the technology of computer programming and whether it was similar to the sorts of technologies usually held patentable.

77. Antitrust litigation, where courts are rendering regulatory decisions directly rather than incidentally, as in copyright, offers a model for the reading of a vague statute in the light of technological and competitive innovation where the outcome of the litigation will ultimately structure industry practice.

This model speaks to the court's role as well as to a method of judicial decisionmaking. Referring to the Sherman Act, then-Professor Robert Bork said, "A judge who feels compelled to a particular result regardless of the teachings of economic theory deceives himself and abdicates his delegated responsibility. That responsibility is . . . continually creating and recreating the Sherman Act out of his understanding of economics and his conception of the requirements of the judicial process." Bork, *Legislative Intent & the Sherman Act,* 9 J. LAW & ECON. 7, 48 (1966).

With respect to decisionmaking under the Sherman Act, the Attorney General's Antitrust Committee has said,

"[Economic practices] are subject to more extensive market inquiry. . . . This means that their actual or probable market consequences must be determined as part of the test of their legality. Such determination, in turn, involves resort to economic analysis." REPORT OF ATTORNEY GENERAL'S ANTITRUST COMMITTEE 315 (1955), *quoted in* S. OPPENHEIM & G. WESTON, FEDERAL ANTITRUST LAWS 76 (1968).

78. *See* note 19 *supra.*

79. Williams & Wilkins Co. v. United States, 42 U.S.L.W. 2282 (Ct. Cl. Nov. 27, 1973), *rev'g* 40 U.S.L.W. 2550 (Ct. Cl. Feb. 16, 1972). In *Williams,* federal libraries, particularly those at the National Institutes of Health, were alleged to have infringed copyrights by duplicating articles from medical journals and distributing them. Concluding that the "challenged use should be designated 'fair,'" the court stated that,

the purpose of the fair use doctrine is not to protect de minimis infringement, but to promote the distribution of materials.[80] Moreover, the fair use doctrine is entirely judge-made.[81]

To determine whether the fair use doctrine may be successfully invoked, courts will look at a broad range of factual issues—the nature of the work and the effect on the potential market for the copyrighted material, for instance—and apply policy considerations.[82] As a means of interpreting the term "reproduce," the methodological usefulness of this doctrine is obvious. Not only does it avoid unhappy results, but it allows courts to look into a broad array of factors, including the impact of their decisions.[83] This sort of inquiry best serves the purposes of the Copyright Act.

What is needed in the CATV-copyright litigation is an approach similar to that of the fair use doctrine, one which will enable the court to look behind the application of a single term to the policies which will best serve the purposes of the statute. Since the ultimate ruling will have the effect of regulation, this approach is indispensable. It is hardly a coincidence that the fair use doctrine, which applies an outcome analysis usually associated with regulation, has developed in connection with the Copyright Act.

in the face of no prior dispositive decision, it had to weigh a multiplicity of factors. The most important of these were: that there was inadequate reason to believe that the plaintiffs were substantially harmed, that medical research would be injured by holding an infringement, and that there was no legislative guidance in balancing the interests of science with those of authors and publishers.

80. *See* Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303, 307 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967) (no infringement, although biographical material was lifted from copyrighted source). *See also* Williams & Wilkins Co. v. United States, 42 U.S.L.W. 2282 (Ct. Cl. Nov. 27, 1973), *rev'g* 40 U.S.L.W. 2550 (Ct. Cl. Feb. 16, 1972).

81. *See* Clapp, *Library Photocopying & Copyright; Recent Development*, 55 L. LIB. J. 10, 12 (1963):

> Fair use has no statutory basis; it is a doctrine which enables the courts to live with a law . . . that, if interpreted and enforced literally . . . [,] would involve them in absurdities contrary to the public interest.

82. Note, *Infringement by Photocopying*, 51 TEXAS L. REV. 137 (1972), discusses some of the factors courts have considered relevant to fair use claims. For example, courts have considered the public interest in receiving information about celebrated persons, *see* Time, Inc. v. Bernard Geis Associates, 293 F. Supp. 130 (S.D.N.Y. 1968) (films of Kennedy assassination copied); the manner in which the material was copied, *see* Petre, *Statutory Copyright Protection for Books and Magazines Against Machine Copying*, 14 COPYRIGHT L. SYMPOSIUM 180, 202 (1966); and the purpose for which the material is copied, *see* Sampson & Murdock Co. v. Seaver-Radford Co., 140 F. 539, 541 (1st Cir. 1905).

83. A recent example of a court looking to the possible impact of its decision in resolving a problem of statutory construction is Chrysler v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973). In that case the court considered the adverse effects on the automobile industry of the failure of the Administrator of the Environmental Protection Agency to grant a one-year extension of the deadline for meeting air pollution emission standards; such a consideration was not mandated by the statute. Courts resolving controversies involving cable and copyright face a less demanding task, for a determination of the impact on CATV is necessary for the fulfillment of the purposes of the Copyright Act.

In the cable controversy, too, the Court must look at industry practices and the industry's impact and importance if the purpose of the statute is to be carried out.[84] Although the cases extensively review cable technology, none of them contains an overview of the cable industry or its relation to the larger communications field. Nor is mention made (save in Mr. Justice Fortas' dissent in *Fortnightly*) of the potential effects of a decision.[85] No court has yet recognized the litigation as part of a larger, economic competition involving a very successful, entrenched economic power confronted by a new and superior technology. A discussion of some of the factual issues relevant to a determination of copyright infringement in light of the Act's purposes follows.

Dissemination of the author's product. If cable is to provide a means for the broader dissemination of copyrighted works, it must be economically viable. Cost data imply that, to be economically viable, a cable system in a suburb cannot fall very short of 50 subscribers per mile of cable.[86] Penetration data[87] suggest that in areas of median density, this goal cannot be met without the importation of distant signals. Noll, Peck, and McGowan emphasize penetration rates for cable systems offering different viewing combinations and conclude, "[I]n the absence of distant-signal importation or some other major additional stimulant to penetration, no more than ten percent of the television homes in most of the 100 largest markets will subscribe to cable television. . . . [D]istant-signal importation alone is sufficient to change dramatically the likely level of penetration."[88] More important, most communities cannot support a cable system unless there is provision for signal importation.[89] The exclusion of distant signals would thus result not only in a smaller audience, but also in fewer such viable systems.

On the other hand, of course, if signal importation jeopardizes the

84. *See* note 18 *supra.*

85. Under the *Teleprompter* rule, CATV systems which receive "distant signals" have infringed copyrights. A CATV system receives at least 300 telecasts a week on each channel. At least half of the telecasts will involve copyrighted programs. The courts have not ruled on the damages for infringement by CATV, but if the statutory minimum of $250 per infringement were claimed and levied for each copyrighted program, the potential statutory damages could be more than $2 million per year per channel on which "distant signals" were received. An estimated 650 CATV systems with approximately 2.3 million subscribing homes receive "distant signals." Approximately half are dependent on "distant signals" even for network service. Brief for Petitioner at 44, Teleprompter Corp. v. Columbia Broadcasting System, *cert. granted,* 42 U.S.L.W. 3173 (U.S. Oct. 9, 1973) (Sup. Ct. docket no. 72-1628).

86. *See* Comanor & Mitchell, *supra* note 16.

87. The "penetration rate" of a cable system is the percentage of homes in a wired community that subscribe to the cable service.

88. TELEVISION REGULATION, *supra* note 14, at 155.

89. *Id.* at 162.

financial viability of over-the-air broadcasters, a concomitant result might be loss of broadcast markets to copyright owners as well as the dwindling of exposure of the copyrighted material to the public.

There might indeed be some reduction of broadcast audiences:

> The effect of widespread signal importation can be roughly approximated by the existing fragmentary data. Network affiliates might lose 10 to 20 percent of the cable audience to imported independent signals. [With 50 percent penetration] . . . the national loss of network audience and consequently of advertising revenues [would be] between 5 and 10 percent, with a midpoint at approximately 7 percent.[90]

But as far as the copyright owners are concerned, in their role as copyright owners this loss in no way represents a threat to the goals of the Copyright Act. A loss of network listeners simply means an increase in listeners to the imported signals, and, if anything, a net increase in the total audience for copyrighted works.[91] The remuneration to the copyright owner is discussed below but insofar as present marketing arrangements are based on American Research Bureau and Neilsen surveys,[92] the equilibrium of gains and losses reflecting imported signals would not diminish the available breadth of markets or the amounts advertisers, in the aggregate, are willing to pay. Indeed, the opposite effect may ensue.

Rewards for the author.[93] While copyright owners and licensees (the producers) sell programming to both networks and independents, the independents are today primarily a market for reruns. The effect of CATV importation is to shift audiences from the networks to imported

90. TELEVISION REGULATION 165.

91. While the total audience may not be changed by shifts between channels, it would be augmented by the delivery of signals to areas which are inaccessible to broadcasts. Moreover, greater program diversity as a consequence of "distant signal" importation may arguably attract a greater aggregate audience in areas already served by broadcast television.

92. ARB (American Research Bureau) and Neilsen surveys are services used to project audience size and composition. ARB measures the number of homes viewing the stations located in particular cities, the total national figure being derived from local surveys. Neilsen provides national ratings and share-of-audience measures. Both rating systems include CATV subscribers in their measure of total audience.

Insofar as these surveys determine advertising rates (as they must for the national advertiser), CATV's use of off-the-air signals will be reflected in a gain in revenue to the broadcaster. As the local advertiser becomes more sophisticated, however, it is doubtful that he will wish to pay for mere audience size when a segment of that audience cannot respond to his advertising. *But see* p. 574 *infra*.

93. If a patent owner, for example, is once fully compensated, he cannot demand a second royalty. *See* Aro Manufacturing Co. v. Convertible Top Replacement Co., 377 U.S. 476, 498-500 (1964). The Court's argument is roughly parallel to the "license implied in law" argument discussed at note 47 *supra*: that the copyright owner releases his rights in the primary license.

independents.[94] Noll, Peck, and McGowan argue that the loss from "one set of customers—the networks—could be recouped from another set—the independents—by raising fees on the latter in proportion to their gains in audience."[95] This poses the problem squarely: To what extent does the enlargement of a market by an increment which is geographically distant reflect itself in raised revenue to the broadcasting station and, in turn, to the copyright owner?

Economists Chazen and Ross conclude, "To some extent, compensation for [imported signals] already occurs because the cable circulation of the distant signal can serve as a basis for higher advertising charges by the originating station. . . . [S]ome of these additional revenues may find their way back to the copyright owners. [But where the advertiser is local or keyed to regional interests the net effect is that] it is difficult to sell distant circulation of a broadcast station for any price approximating that obtained for the home audience."[96]

The reply to this concern is that a shift in marketing will occur once the practice of signal importation is well established. National advertisers will pay for wider distribution and local advertisers will shift to affiliates. Even if this fails to occur, moreover, the audience shift is estimated to be between five and ten percent; such losses are hardly catastrophic to the program marketer (assuming, as here, that the CATV system does not black out incoming commercials[97]).

An important factor to be considered in this connection is the industry practice of granting geographic "exclusives," agreements which presently prevent a copyright owner from licensing a particular program to more than one station within a market for periods from two to seven years. Unrestricted cable importation would probably undermine this practice.[98] "Exclusives," however, have puzzled economists.[99] As the *Report of the Sloan Commission on Cable Communications* noted:

> It is difficult to see why exclusive agreements are as common as they are. They diminish the opportunity of the copyright owner to maximize his returns; they reduce the flexibility of independent stations. . . . They deprive the viewer of a large degree of choice.

94. TELEVISION REGULATION, *supra* note 14, at 175.
95. *Id.* at 165.
96. Chazen & Ross, *Federal Regulation of Cable Television: The Visible Hand*, 83 HARV. L. REV. 1820, 1838, 1839 (1970) [hereinafter cited as *The Visible Hand*].
97. A CATV system that blacked out incoming commercials could not avail itself of this argument because it would not be increasing anyone's audience for the commercials.
98. TELEVISION REGULATION, *supra* note 14, at 177.
99. *See, e.g., The Visible Hand, supra* note 96, at 1830-35.

> . . . Their survival can be laid in part to inertia, and in part perhaps to the bargaining power of network affiliates and a few powerful local independent VHF stations.[100]

Thus, it would appear that copyright owners would in fact benefit financially if imported signals were permitted and if the geographical restrictions of "exclusives" were eliminated.

2. *If there is an infringement, how should the Court structure its judgment?*

The economic determinations relevant to the CATV-copyright suit discussed above are requisites for an informed decision; further study supporting the data here cited would suggest a reaffirmance rather than a limiting of the *Fortnightly* outcome. If thorough consideration does not support this conclusion, however, either because early factual projections prove inaccurate or because of changing policy judgments, this factual material, and more like it, must be used to structure an acceptable outcome. Whatever the solution, the data cited in this Note are relevant to its shaping. If the Court finds an infringement, it must carefully fashion its remanding order or risk crippling the CATV industry.

One consequence of a holding of infringement might be that the networks would thereafter exercise a right of license. The profitability of cable with and without signal importation is an equally relevant inquiry in this context. If networks owning copyrighted material refused to license it or licensed it only at prohibitive prices, CATV would be virtually eliminated as a competitor to networks. Prohibitive pricing would be uncorrected by market forces since the dual role of the networks (as copyright owners who derive most of their income not from royalties but from advertising revenue) makes it to their advantage not to sell licenses to CATV. Without such copyrighted material, most cable systems would fail.[101]

100. THE REPORT OF THE SLOAN COMMISSION ON CABLE COMMUNICATIONS, *supra* note 9, at 52. "One explanation for the existence of exclusives is that they create a market for old movies and television series reruns. With exclusives limiting access to recently produced programs, stations are forced to dip into [earlier material] to fill their schedules. Since these programs have extremely low residual costs when resyndicated they are very profitable to the packagers." TELEVISION REGULATION, *supra* note 14, at 177 n.33.

But exclusives will not be vitiated by unfettered signal importation if the 1972 Order, *see* note 8 *supra*, remains in effect. There the FCC recommends that no programs recently syndicated under local exclusive contracts should be imported into any of the top 50 markets.

101. "[D]espite the high average profits of cable systems, a nationwide system, involving subscription by more than half the homes, will not develop unless distant signal importation is permitted on a wide scale." TELEVISION REGULATION 161-62.

In view of these circumstances the Court could require copyright owners to license "distant signal" CATV at the same ratio per subscription as the broadcaster pays per capita for its advertising segments. Such a judgment would eliminate the alleged "free ride" problem and compensate the copyright owner in proportion to the economic benefit enjoyed by the CATV operator. Similarly, the FCC, as intervenor,[102] could be ordered to require the original broadcaster to obtain a license for the *viewers* of the copyrighted material and then sublicense the CATV operator at the same rate that he is being charged.[103]

Whether these suggestions would be functional can only be determined after extensive economic analysis. In hearing *Teleprompter,* however, the Supreme Court must contend with an inadequate record which reflects the inappropriate approach taken at every stage of the CATV-copyright litigation. It must contend as well with the FCC's vague policies in this area. Overcoming these obstacles and rendering an informed and just decision will be no mean task.

One procedural device for overcoming them is suggested by Rule 24 (b) (2) of the Federal Rules of Civil Procedure. This rule allows permissive intervention "where a governmental . . . agency wishes to come into a case involving a statute or regulation."[104] The relevant section of Rule 24 was added in 1948. Underlying the amendment is a concern for cases in which a public agency does not have a claim in the strict sense of being able to institute an independent suit, but in which an aspect of public interest with which the agency is officially concerned is involved in the litigation. The federal agency responsible for formulating and administering the regulations in question is given an opportunity to advance its opinions; important questions of public law may thus be settled on the basis of the most informed advice available.[105] This official intervention on behalf of the public interest was also sanctioned by the Supreme Court before the adoption of Rule 24(b)(2) in *Securities and Exchange Commission v. United States Realty and Improvement Co.* There the SEC moved to dismiss a corporate reorganization plan. It was permitted to intervene because it had "a sufficient interest in the maintenance of its statutory au-

102. *See* text accompanying notes 104-05 and p. 577 *infra.*

103. FCC authority for such regulation derives from United States v. Southwestern Cable Co., 392 U.S. 157 (1968), and Midwest Video Corp. v. United States, 406 U.S. 649 (1972).

104. FED. R. CIV. P. 24(b)(2).

105. *See* C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: Civil § 1912, at 547-49 (1972).

thority and the performance of its public duties . . . to prevent reorganizations which would rightly be subjected to its scrutiny."[106]

It is settled law that CATV systems come within the purview of the FCC.[107] Reasoning from the quoted language in *United States Realty,* which is codified by Rule 24(b)(2),[108] the Court could, on its own motion, request the FCC to appear and suggest the correct approach in the CATV-copyright litigation. The factual inquiry makes clear that the outcome of the *Teleprompter* case will have a great impact on FCC concerns.[109] The lower court's ruling would not only conflict with FCC policy requiring cable to carry all signals within the Grade B contour;[110] more important, it would jeopardize the development of an industry to which the FCC has stated a commitment.[111]

If the FCC has not taken the initiative to intervene, the Court should not delay in asking it to present data pertinent to the problem. FCC participation would serve the twofold purpose of ensuring that administrative policies can be effected without unnecessary conflict and making available agency resources and expert staff.

A second procedural alternative is the invocation of the doctrine of primary jurisdiction. The doctrine of primary jurisdiction helps a court in determining whether it should refrain from adjudicating a case until an administrative agency has examined a question arising in connection with the case before the court.[112] Although primary juris-

106. 310 U.S. 434, 460 (1940).

107. *See* note 103 *supra.*

108. *See* C. WRIGHT & A. MILLER, *supra* note 105, Civil § 1912, at 548.

109. Interestingly, the House of Representatives deleted the CATV provision of the proposed revision of the Copyright Act in order to refer the matter to the Interstate and Foreign Commerce Committee which has jurisdiction over communications matters. 113 CONG. REC. 8598-8601, 8611-13, 8618-22, 8990-92 (1967). In urging deletion of the CATV provision, Congressman Moore said, "[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 and communications 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 proper functions of copyright." 113 CONG. REC. 8599 (1967), *quoted at* 392 U.S. 390, 402 n.33 (1968). These remarks indicate a recognition that the problem necessarily involves regulation.

110. *See* note 8 *supra.*

111. If distant signal importation is made expensive, it seems likely that CATV systems will not develop to fulfill "the long-term promise of cable television . . . critical to the public interest judgment we [the FCC] have made." Order, *supra* note 8, at 165.

112. The doctrine of primary jurisdiction . . . applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within a special competence of an administrative body; in such a case, the judicial process is suspended pending referral of such issues to the administrative body for its views.

United States v. Western Pac. R.R., 352 U.S. 59, 63, 64 (1956).

diction arguments have not generally been successful,[113] two recent Supreme Court cases suggest their possible efficacy in the cable litigation.

In *Ricci v. Chicago Mercantile Exchange,*[114] the transfer of an exchange seat was challenged on antitrust grounds. Whether there was a violation of antitrust law depended in part upon a prior determination of whether there had been compliance with exchange rules. The Supreme Court invoked primary jurisdiction because it found the Commodity Exchange Commission better equipped to perform the necessary factfinding;[115] the Commission's decision, said Justice White, would be of "material aid" to the Court.[116]

Relying on *Ricci,* the Supreme Court recently reversed a Seventh Circuit decision, *Deaktor v. L. D. Schreiber & Co.,*[117] and reinforced the view that an agency should be consulted when its competence in the field promises improved factfinding. In *Deaktor* plaintiff alleged a cornering of futures contracts in violation of the Sherman Act and the lower court ruled that no agency policy could insulate such an act. There, as in *Teleprompter,* the issue was not whether the agency should or could determine the ultimate outcome of the litigation, but rather whether the relevant agency can provide the courts with an analysis of the industrial practice disputed.[118] Thus, viewed as an aid in the adjudicatory process, rather than as a matter of jurisdictional confrontation,[119] primary jurisdiction offers another means of allowing the Court to reshape the methods applied to the CATV-copyright litigation.

113. *See* Otter Tail Power Co. v. United States, 410 U.S. 366 (1972). Invocation of the primary jurisdiction doctrine is appropriate not only to preserve the integrity of the regulatory scheme, but also to take advantage of readily available agency expertise. United States v. Philadelphia National Bank, 374 U.S. 321 (1963); Far East Conf. v. United States, 342 U.S. 570 (1952).

114. Ricci v. Chicago Mercantile Exchange, 447 F.2d 713 (7th Cir. 1971), *aff'd,* 409 U.S. 289 (1973).

115. 409 U.S. at 305, 306.

116. *Id.* at 305.

117. 479 F.2d 529 (7th Cir.), *rev'd sub nom.* Chicago Mercantile Exchange v. Deaktor, 42 U.S.L.W. 3326 (U.S. Dec. 4, 1973).

118. Such invocation of primary jurisdiction does not represent any abdication of the court's role; rather it augments the quality and comprehensiveness of the presentation before the court. Courts will still make the ultimate determination.

119. *See Antitrust and Regulated Industries—Clarification or Confusion?,* 628 BNA ANTITRUST & TRADE REG. REP., at B-1 (1973). For further comment on primary jurisdiction, see Jaffe, *Primary Jurisdiction,* 77 HARV. L. REV. 1037 (1964); Kestenbaum, *Primary Jurisdiction to Decide Antitrust Jurisdiction: A Practical Approach to the Allocation of Functions,* 55 GEO. L.J. 812 (1967); Note, *Primary Jurisdiction,* 33 OHIO ST. L.J. 209 (1972).

Conclusion

"Perform" should be considered a term of art; its application in this controversy should turn on an informed judgment of the impact of an assignment of property rights. To hold that CATV has or has not performed copyrighted material is merely to determine whether or not liability should attach to this new industrial practice. If this litigation is not approached with an outcome analysis, important economic decisions will be made without a policy inquiry by any of the decisionmakers. Because the courts have failed to adopt an appropriate methodology in the discussed cases, "common sense" and analogy have determined decisions. *Teleprompter* should not continue this charade.