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## FIVE CONFLICTS OVER INCOME DISTRIBUTION IN THE MOTION PICTURE-TELEVISION INDUSTRY

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### I. INTRODUCTION

**I**N THE MOTION PICTURE-TELEVISION (VIDEO-FILM) INDUSTRY,<sup>1</sup> there are five related conflicts over income distribution. These conflicts, involving millions of dollars, have been fought for over a decade before the courts in antitrust cases,<sup>2</sup> before the Federal Communications Commission (FCC)<sup>3</sup> and courts reviewing the FCC's regulatory decisions,<sup>4</sup> and before Congress in debates over the

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1. For the purposes of this article, the video-film industry is defined to consist of the showing for profit of motion picture films or video tapes in theaters, on cable television, or on broadcast television.

The term "video-film" includes all motion pictures distributed to theaters, all motion pictures shown on television—whether or not produced originally for that medium—as well as programs and series developed solely for television.

2. See, e.g., *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979) (issuance to television network by societies of composers and lyricists of blanket licenses to copyrighted musical compositions at negotiated fees does not constitute price fixing illegal per se under the antitrust laws); *Bernstein v. Universal Pictures, Inc.*, 517 F.2d 976 (2d Cir. 1975) (refusal of motion picture and television producers to contract for composers' services, except on certain standard terms, reserving to the producers the copyright and other ownership rights in the compositions, constitutes a violation of the antitrust laws). For a discussion of *Broadcast Music, Inc.*, see notes 211-25 and accompanying text *infra*. For a discussion of *Bernstein*, see notes 192-97 and accompanying text *infra*.

3. See, e.g., *Inquiry into Policies and Practices Concerning the Exclusive Purchase of Television Program Product and Ability of Conventional Television Stations, Subscription Television Stations, Cable Television Systems, and Subscription Cable Television Operations to Obtain Programming*, 41 RAD. REG. 2d (P-H) 839 (1977) (report and order of termination of inquiry), *aff'd*, *Home Box Office, Inc. v. FCC*, 587 F.2d 1248 (D.C. Cir. 1978); *Cable Television Report and Order*, 36 F.C.C.2d 143, 24 RAD. REG. 2d (P-H) 1501 (1972) (discussing and adopting new rules regulating cable television).

4. See, e.g., *FCC v. Midwest Video Corp.*, 440 U.S. 689, 696 (1979) (holding that the FCC lacks authority to promulgate rules requiring cable television systems to act as common carriers by providing public access channels); *United States v. Midwest Video Corp.*, 406 U.S. 649, 663 (1972) (holding that the FCC has authority to require cable television systems to operate to a significant extent as a local outlet and to have production facilities available for local programs); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (holding that the FCC has jurisdiction to regulate the cable television industry if the regulations are reasonably ancillary to effective performance of the FCC's responsibilities for the regulation of television

Copyright Act of 1976<sup>5</sup> and the proposed Communications Act of 1979.<sup>6</sup> Indeed, the battle has recently spread to the state legislatures.<sup>7</sup> The parties to the conflicts are either those who have property rights in the films and tapes, or those who exhibit them for profit—*i.e.*, owners of music copyrights,<sup>8</sup> video-film producers,<sup>9</sup> motion picture exhibitors,<sup>10</sup> television networks,<sup>11</sup> and cable telecasters.<sup>12</sup>

The five conflicts surface in disputes concerning the rules<sup>13</sup> governing the vertical relationships<sup>14</sup> in this industry. It should be noted

broadcasting); *Home Box Office, Inc. v. FCC*, 587 F.2d 1248, 1256 (D.C. Cir. 1978) (affirming the order of the FCC terminating its inquiry into contracts granting television networks exclusive exhibition rights of certain programs); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 60 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977) (holding that the FCC is without authority to promulgate rules for cable television systems which 1) limit the amount of programming time devoted to feature films and sports events, 2) regulate the type of feature films and sports events which can be shown, or 3) prohibit commercial advertising on pay cable television systems); *Treasure Valley CATV Comm. v. United States*, 562 F.2d 1182, 1188 (9th Cir. 1977) (upholding FCC decision limiting importation of network signals by a particular cable television service).

5. 17 U.S.C. §§ 101-810 (Supp. 1978). *See, e.g.*, H.R. REP. NO. 1476, 94th Cong., 2d Sess. *passim*, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5659 *passim*; H.R. CONF. REP. NO. 1738, 94th Cong., 2d Sess. 69-82 *passim*, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5810-23 *passim*; *Copyright Law Revision: Hearings on H.R. 2223 Before The Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 36 *passim* (1975); 122 CONG. REC. 3821-28, 3831-41, 31977-2016 (1976) (debate on Copyright Act of 1976).

6. H.R. 3333, 96th Cong., 1st Sess. (1979). *See, e.g.*, *Cable Television Regulation Oversight: Hearings Before Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 2d Sess. 119-20 (1976). *See generally* Besen, *The Economics of the Cable Television "Consensus"*, 17 J.L. & Econ. 39 (1974).

7. *See* Harnetz, *Blind Bidding for Films on Trial*, N.Y. Times, July 10, 1979, § C, at 7, col. 4. For a further discussion of state blind bidding laws, *see* notes 145-65 and accompanying text *infra*.

8. *See, e.g.*, *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 4-5 (1979). For further discussion of *Broadcast Music, Inc.*, *see* notes 211-25 and accompanying text *infra*.

9. *See, e.g.*, *Bernstein v. Universal Pictures, Inc.*, 517 F.2d 976, 978 (2d Cir. 1975). For further discussion of *Bernstein*, *see* notes 192-97 and accompanying text *infra*.

10. *See, e.g.*, *M. Witmark & Sons v. Jensen*, 80 F. Supp. 843 (D. Minn. 1948), *appeal dismissed mem. sub nom. M. Witmark & Sons v. Berger Amusement Co.*, 177 F.2d 515 (8th Cir. 1949); *Alden-Rochelle, Inc. v. American Soc'y of Composers, Authors and Publishers*, 80 F. Supp. 888 (S.D.N.Y.), *modified*, 80 F. Supp. 900 (S.D.N.Y. 1948). For further discussion of *Alden-Rochelle*, *see* notes 185-87 and accompanying text *infra*.

11. *See, e.g.*, *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979); *United States v. NBC* [1978] 1 Trade Cas.

61,842, at 73,503 (C.D. Cal.), *approving consent decree entered in* [1978] 1 Trade Cas. ¶ 61,855, at 73,580 (C.D. Cal.).

12. *See, e.g.*, *Teleprompter Corp. v. CBS*, 415 U.S. 394 (1974); *Cable Television Report and Order*, 36 F.C.C.2d 143 (1972).

13. *See* note 4 *supra*.

14. Vertical relationships are to be distinguished from horizontal relationships. Firms are related horizontally if they are side-by-side competitors in a market. *See* C. WILCOX & W. SHEPHERD, *PUBLIC POLICIES TOWARD BUSINESS* 227 (5th ed. 1975). An example of horizontal integration is a merger between two steel-making firms. A vertical relationship exists between two firms which are both in the same chain of production but which are not side-by-side competitors. *Id.* A firm which produces video tapes is vertically related to television networks which broadcast them. An example of vertical integration is a merger which links a video tape supplier with one or more of its buyers. *See also* J. KOCH, *INDUSTRIAL ORGANIZATION AND PRICES* 205 (1974); Coarse, *The Nature Of The Firm*, 4 *ECONOMICA* 386, 386-90 (1937).

at the outset that the direct impact on consumers of a change in these rules is often hard to perceive. In the absence of consumer protection policy considerations, the conflicts are sometimes tantamount to naked battles over the distribution of income.<sup>15</sup> On the other hand, the rules imposed by government to resolve these five vertical conflicts often significantly affect consumer welfare because of their influence on horizontal competition among motion picture theaters, cable telecasters, and television broadcasting networks.<sup>16</sup>

The five conflicts are as follows. First, as between the television networks and the video-film producers, should the networks be allowed to demand long term exclusive exhibition rights with respect to programs produced by video-film producers and, if so, should any time limit be placed on such exclusive exhibition rights?<sup>17</sup> Second, as between film producers and motion picture theater owners, should the producers be allowed a) to require the theater owners to bid blind — that is, to require them to bid for the right to exhibit a film without being given a chance to view it prior to bidding — and b) to demand nonrefundable guarantees from theater owners for such exhibition?<sup>18</sup> Third, as between composers and video-film producers, should composers have the copyright and other ownership rights in words and music composed for video-films rather than be forced to surrender them to the producers; if so, should composers have the

15. *See, e.g.*, United States v. NBC, [1978] 1 Trade Cas. ¶ 61,842 at 73,503, 73,517-18 (C.D. Cal.), *approving consent decree entered in United States v. NBC*, [1978] 1 Trade Cas. ¶ 61,855, at 73,580 (C.D. Cal.). In *NBC*, the government sued a television network, alleging that provisions in network contracts with program producers violated the antitrust laws. *Id.* at 73,504-06. In approving a consent decree, the court recognized that the conflict was almost entirely over income distribution and had little direct impact on competition or consumers:

The actions against the three television networks never were instituted for the purpose of breaking up the oligopolistic control of the television industry or for the purpose of fostering competition among the three of them. The government's case has been predicated on the recognition that each of the networks possesses enormous market power, and that this power is being used to place independent program producers and suppliers ... at a distinct competitive disadvantage. From the outset the government has sought to improve the lot of the independent producers and suppliers and enhance competition in the buying and selling of television programming by imposing on the networks restrictions on the terms and conditions governing their contracts with the independent suppliers. ... The remedy ... is to limit the benefits and financial rewards that otherwise would flow from an exercise of this power.

*Id.* at 73,517-18 (footnote omitted). *See also id.* at 73,511-12. The preceding assertion assumes that the networks are already exploiting their monopoly power over advertisers to the fullest and therefore cannot charge advertisers higher rates in order to recoup losses incurred by having to pay more to program producers. If the networks raised their advertising rates as a consequence of paying video-film producers more, much of this increase would be passed on to consumers, in which case there would be an effect on resource allocation as well as an effect on income distribution.

16. For example, decisions whether and on what terms cable telecasters importing distant television signals must pay copyright royalties will substantially affect competition between broadcast and cable television. *See* notes 231-56 and accompanying text *infra*.

17. For a discussion of these issues, *see* notes 106-44 and accompanying text *infra*.

18. For a discussion of these issues, *see* notes 106-13 & 145-65 and accompanying text *infra*.

right to renegotiate their share in the profits from the continuing exhibition of such video-films; if so again, should composers be permitted to bargain collectively for such fees in musical performing rights societies?<sup>19</sup> Fourth, as between composers and television networks, should composers similarly have the copyright and other ownership rights to words and music used by the networks; if so, should composers also have the right to periodically renegotiate performance fees with the networks through collective bargaining societies?<sup>20</sup> Fifth, as between cable telecasters and television networks (or the owner of the performance rights in a copyrighted work), should cable telecasters have copyright liability for programs which they import from distances greater than television broadcast signals are normally carried; if so, to whom and upon what terms?<sup>21</sup>

Commentary on these conflicts has suffered from two inadequacies. First, it has tended to be narrow, focusing on each bilateral conflict rather than viewing the problem as industrywide. Thus, commentators have simply concerned themselves with the conflicts between broadcasters and cable telecasters,<sup>22</sup> between musical copyright holders and the television networks,<sup>23</sup> or between program producers and the networks.<sup>24</sup>

Second, commentators have tended to engage in either a political-legal analysis of the conflicts among interest groups,<sup>25</sup> or an economic analysis which does not directly focus on the reasons for the conflicts.<sup>26</sup> A political-legal analysis does have the virtue of dealing

19. For a discussion of these issues, see notes 166-208 and accompanying text *infra*.

20. For a discussion of these issues, see notes 166-88 & 209-30 and accompanying text *infra*.

21. For a discussion of these issues, see notes 231-56 and accompanying text *infra*.

22. See, e.g., Besen, *supra* note 6; Lapierre, *Cable Television and the Promise of Programming Diversity*, 42 *FORDHAM L. REV.* 25 (1973); Long, *Antitrust and the Television Networks: Restructuring Via Cable TV*, 6 *ANTITRUST L. & ECON. REV.*, No. 4, at 99 (1973); Park, *Cable Television, UHF Broadcasting, and FCC Regulatory Policy*, 15 *J.L. & ECON.* 207 (1972); Pearson, *Cable: The Thread by Which Television Competition Hangs*, 27 *RUTGERS L. REV.* 800 (1974); Note, *Pay Television: The Pendulum Swings Toward Deregulation*, 18 *WASHBURN L.J.* 86 (1978).

23. See, e.g., Cirace, *CBS v. ASCAP: An Economic Analysis of a Political Problem*, 47 *FORDHAM L. REV.* 277 (1978); Garner, *United States v. ASCAP: The Licensing Provisions of the Amended Final Judgment of 1950*, 23 *BULL. COPYRIGHT SOC'Y* 119 (1976); Note, *The Middleman as Price Fixer: Columbia Broadcasting System, Inc. v. American Society of Composers, Authors, & Publishers*, 91 *HARV. L. REV.* 488 (1977) [hereinafter cited as *The Middleman as Price Fixer*]. Note, *CBS v. ASCAP: Performing Rights Societies and the Per Se Rule*, 87 *YALE L.J.* 783 (1978) [hereinafter cited as *Performing Rights Societies*].

24. See, e.g., Fastow, *Competition, Competitors and the Government's Suit Against the Television Networks*, 22 *ANTITRUST BULL.* 517 (1977).

25. See, e.g., Krasnow & Quale, *Developing Legal Issues in Cable Communications*, 24 *CATH. U.L. REV.* 677 (1975); Lapierre, *supra* note 22; Pearson, *supra* note 22; Simon, *Local Television versus Cable: A Copyright-Theory of Protection*, 31 *FED. COM. B.J.* 51 (1978); Note, *Cable Television and Content Regulation: The First Amendment and the Electronic Newspaper*, 51 *N.Y.U.L. REV.* 133 (1976); Note, *supra* note 22.

26. See notes 27-30 and accompanying text *infra*.

directly with a conflict, but can not reveal its underlying structure. The economic analyses have not attempted to explain the conflicts, but have focused instead on a) how competition and viewer welfare will be affected if cable television is allowed to compete with broadcast television;<sup>27</sup> b) whether transaction costs of individual contractual agreements among the various copyright, producer, and exhibitor groups make collective bargaining necessary;<sup>28</sup> c) econometric speculation on the impact of cable television on broadcasting;<sup>29</sup> and/or d) whether the networks' financial interests in programs affects their decisions concerning which programs to retain.<sup>30</sup>

The analysis contained in this article is based upon the peculiar characteristics of video-films<sup>31</sup> and the market structures at the various vertical levels.<sup>32</sup> It also highlights the effect of governmental intervention on the conflicts described above. Part II contains a theoretical analysis of the income distribution problem in the video-film industry.<sup>33</sup> In Part III, that analysis is used to show that the five conflicts stated above are different manifestations of the same problem.<sup>34</sup> Finally, Part IV suggests means for more effectively balancing the competing interests.<sup>35</sup>

## II. THE INCOME DISTRIBUTION PROBLEM IN THE VIDEO-FILM INDUSTRY

Four characteristics of video-films and the video-film industry in general combine to cause the income distribution problem in this in-

27. See, e.g., STAFF OF SENATE COMM. ON GOVERNMENT AFFAIRS, 95TH CONG., 2D SESS., STUDY ON FEDERAL REGULATION app. (Comm. Print 1978); [hereinafter cited as GOVERNMENT AFFAIRS STUDY]; R. NOLL, M. PECK & J. MCGOWAN, ECONOMIC ASPECTS OF TELEVISION REGULATION 20-57, 151-82 (1978) [hereinafter cited as NOLL]; Park, *supra* note 22.

28. See, e.g., *The Middleman as Price Fixer*, *supra* note 23; *Performing Rights Societies*, *supra* note 23.

29. See, e.g., NOLL, *supra* note 27, at 151-82; Comanor & Mitchell, *Cable Television and the Impact of Regulation*, 2 BELL J. ECON. & MANAGEMENT SCI. 154 (1971); Fisher & Ferrall, *Community Antenna Television Systems and Local Television Station Audience*, 80 Q.J. ECON. 227 (1966); Mitchell & Smiley, *Cable, Cities and Copyrights*, 5 BELL J. ECON. & MANAGEMENT SCI. 235 (1974); Park, *Prospects for Cable in the 100 Largest Television Markets*, 3 BELL J. ECON. & MANAGEMENT SCI. 130 (1972).

30. See Crandall, *The Economic Effect of Television Network Program "Ownership"*, 14 J.L. & ECON. 388 (1971). Although Crandall concluded that network syndication interests or profit sharing did not affect retention decisions, *id.* at 401, a more significant issue is whether such financial interests, or the absence of them, affects the original decision to exhibit a program or series. As to this question, the FCC found a direct relationship between new programs chosen for network schedules and network acquisition of subsidiary rights and interests. See *Mount Mansfield Tel., Inc. v. FCC*, 442 F.2d 470, 485 (2d Cir. 1971).

31. See notes 40-105 and accompanying text *infra*.

32. See notes 106-256 and accompanying text *infra*.

33. See notes 36-105 and accompanying text *infra*.

34. See notes 106-256 and accompanying text *infra*.

35. See notes 258-70 and accompanying text *infra*.

dustry: 1) the uncertainty of demand for the products at the time the decisions are made to invest in them;<sup>36</sup> 2) the character of the products as "public goods";<sup>37</sup> 3) the tendency within the industry toward neutral monopoly or, at least, substantial concentration;<sup>38</sup> and 4) the character of the products as "common products."<sup>39</sup> These characteristics are discussed in the next four sections.

#### A. *The Uncertainty of Demand Characteristic and its Relationship to Market Power*

The same artistic material may be recorded on film, video tape, or disc and may be shown for profit worldwide either in theatres, on cable television, or on broadcast television at different intervals for indefinite periods of time. For a particular video-film, the extent and duration of demand is difficult to foresee prior to exhibition.<sup>40</sup> This uncertainty means that a great deal of the investment in a video-film, which often amounts to millions of dollars, must be undertaken before an accurate estimate of its earning potential exists.<sup>41</sup> Moreover, there are enormous disparities in the financial returns of different video-films.<sup>42</sup>

Since any preexhibition estimate of the value of a particular video-film is uncertain, those who have ownership, financial, or exhibition interests in it, (and who also have monopoly power),<sup>43</sup> can shift the distribution of income in their favor by bargaining for a larger share of financial returns in excess of production costs or by shifting the risk of loss to other members of the chain of production and distribution. Consider the following examples, which will be discussed in detail below: 1) television networks have enough monopoly power to require independent video-film producers to grant them multi-year exclusive exhibition options on video-film series before their exhibition value is known; such options probably allow the networks to appropriate a larger share of the profits from video-films than would be likely in a competitive market;<sup>44</sup> 2) motion picture

36. See notes 40-46 and accompanying text *infra*.

37. See notes 47-70 and accompanying text *infra*.

38. See notes 72-103 and accompanying text *infra*.

39. See notes 104-05 and accompanying text *infra*.

40. See, e.g., G. JOWETT, FILM 434-35 (1976); NOLL, *supra* note 27, at 44-45; R. STANLEY, THE CELLULOID EMPIRE 249, 254 (1978).

41. See T. BALIO, THE AMERICAN FILM INDUSTRY 461-64 (1976).

42. See, e.g., *id.*; NOLL, *supra* note 27, at 44-45; R. STANLEY, *supra* note 40, at 231, 248, 275.

43. "Monopoly power" has been described as the power to control prices or exclude competition. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956). See also E. KINTNER, AN ANTITRUST PRIMER 101 (2d ed. 1973).

44. See notes 106-44 and accompanying text *infra*.

producers have enough monopoly power to shift some of the risk of loss associated with film production to theater exhibitors by requiring them to engage in blind bidding and by requiring nonrefundable guarantees;<sup>45</sup> 3) performing rights societies can compel the renegotiation of their share of the profits in existing video-films to be shown on television by invoking their right to prohibit the exhibition of such films as bargaining leverage; this right permits these societies to exercise monopoly power over the distribution of revenue derived from the exhibition of existing video-films.<sup>46</sup>

### B. *The Public Good Characteristic*

Video-films have the public good characteristic.<sup>47</sup> Public goods are to be distinguished from private goods. A private good is one which, when consumed by A, cannot be consumed by B, C, or D.<sup>48</sup> An apple is an example. Public goods are defined as goods whose consumption by individual A does not preclude consumption by B, C, D, or others.<sup>49</sup> This is another way of saying that the marginal cost of additional consumption is zero.<sup>50</sup> In television broadcasting, the marginal cost of an additional viewer is zero; this is also true of cable television once the original connections are made, and of motion picture exhibitions up to the capacity of the theaters.<sup>51</sup>

According to the theory of perfect competition, a product's price is "efficient" if it equals the cost of producing an additional unit — *i.e.*, if price equals marginal cost.<sup>52</sup> Under this theory, it is difficult to determine an efficient price for public goods including such public goods as musical compositions, motion picture films, and television programs which, once created and exhibited, are nearly costless to supply to an additional viewer.<sup>53</sup> Some economists believe that deci-

45. See Harmetz, *supra* note 7; notes 145-65 and accompanying text *infra*.

46. See notes 209-22 and accompanying text *infra*.

47. See B. OWEN, J. BEEBE & W. MANNING, TELEVISION ECONOMICS 15-16 (1974) [hereinafter cited as OWEN]. For an examination of the theory of public goods, see generally Samuelson, *Aspects of Public Expenditure Theories*, 40 REV. ECON. & STATISTICS 332 (1958); Samuelson, *Diagrammatic Exposition of a Theory of Public Expenditure*, 37 REV. ECON. & STATISTICS 350 (1955); Samuelson, *The Pure Theory of Public Expenditures*, 36 REV. ECON. & STATISTICS 387 (1954).

48. See OWEN, *supra* note 47, at 15.

49. C. FERGUSON & S. MAURICE, ECONOMIC ANALYSIS 494 (3d ed. 1974). See generally J. BUCHANAN, THE DEMAND AND SUPPLY OF PUBLIC GOODS (1968); Bator, *The Anatomy of a Market Failure*, 72 Q.J. ECON. 351, 369-71 (1958); Head & Shoup, *Public Goods and Ambiguous Goods*, 79 ECON. J. 567 (1969).

50. OWEN, *supra* note 47, at 15. The marginal cost of consumption by an additional viewer is to be distinguished from the production costs of attracting an additional viewer. See notes 78-85 and accompanying text *infra*.

51. OWEN, *supra* note 47, at 15.

52. See NOLL, *supra* note 27, at 28; W. VICKREY, MICROSTATISTICS 209 (1964).

53. OWEN, *supra* note 47, at 15-16.



sions concerning how many public goods to produce, and who should produce them, are best left to the political process.<sup>54</sup> In order to conform to the efficient pricing criterion of perfect competition,<sup>55</sup> these economists suggest that public goods be provided free of charge and in sufficient quantity to satisfy demand at the zero price, that financing be done indirectly through a general increase in taxes, and that such products be produced by publicly owned producers or by private producers who are subsidized by the government.<sup>56</sup> Other economists believe that in this imperfect real world, the less economic activity with which the government is involved, the better.<sup>57</sup> They would sacrifice the efficient pricing requirement of perfect competition and would allow real-world competitive markets to produce such products if at all possible.<sup>58</sup>

In fact, both approaches are being employed. There is some tendency to adopt the public ownership or subsidy approach with respect to a) public goods, such as national defense, which are also

54. See, e.g., D. DEWEY, MICROECONOMICS 216-19 (1975); C. FERGUSON & S. MAURICE, *supra* note 49, at 495; Hotelling, *The Relation of Prices to Marginal Costs in an Optimum System*, 7 ECONOMETRICA 151, 151-55 & 158-60 (1939); Hotelling, *The General Welfare in Relation to Problems of Taxation and of Railway and Utility Rates*, 6 ECONOMETRICA 242 (1938); Oakland, *Public Goods, Perfect Competition, and Underproduction*, 82 J. POL. ECON. 927 (1974).

55. See text accompanying note 52 *supra*.

56. See, e.g., D. DEWEY, *supra* note 54, at 219. The public good concept tends to justify advertiser-supported television since, under that system, it costs an additional viewer nothing more to receive programs (other than the cost of the electricity to operate the television set and the set itself). See NOLL, *supra* note 27, at 28. The analysis, however, is complicated by the nature of television programs as differentiated products rather than homogeneous goods. Advertiser-sponsored television produces programs which will attract the largest audience, but such programming fails to take account of differences in preferences and intensity of demand. In other words, even though a particular television program may attract a smaller audience, that audience may value the program more dearly than the larger audience attracted by a second program. Such variations are not accounted for by advertiser-supported television.

Nevertheless, these diverse preferences could be taken into account by establishing a price for broadcasts. See Minasian, *Television and the Theory of Public Goods*, 7 J.L. & ECON. 71, 75-76 (1964). But such an approach leads to a dilemma. Efficient resource allocation requires that the price of a product equal its marginal cost, which in the case of an added television viewer is zero. NOLL, *supra* note 27, at 28. See text accompanying note 52 *supra*. On the other hand, a zero price is inconsistent with the efficient allocation of production resources among the various types of programs. Furthermore, establishing a price to take account of preferences and intensity of demand introduces other inefficiencies—e.g., if such a price were to be charged, viewers willing to pay only a lower price would be excluded, even though to include them would impose no cost on anyone else. NOLL, *supra* note 27, at 33; Ohls, *Marginal Cost Pricing, Investment Theory and CATV*, 13 J.L. & ECON. 439 (1970).

57. See generally M. FRIEDMAN, CAPITALISM AND FREEDOM (1962). Friedman would limit the government's role in the economic sphere to providing for "the maintenance of law and order to prevent coercion of one individual by another, the enforcement of contracts voluntarily entered into, the definition of the meaning of property rights, the interpretation and enforcement of such rights, and the provision of a monetary framework." *Id.* at 27.

58. See FRIEDMAN, *supra* note 57, at 7-36; Demsetz, *The Private Production of Public Goods*, 13 J.L. & ECON. 293 (1970); Thompson, *The Perfectly Competitive Production of Public Goods*, 50 REV. ECON. & STATISTICS 1 (1968).

“collective goods”;<sup>59</sup> and b) public goods, such as general education, for which there are significant external economies of production or spillover effects.<sup>60</sup> On the other hand, there is some tendency to rely upon the market when products or services, like musical compositions and video-films, have the public good characteristic, but are neither collective goods nor goods involving large external economies of production.<sup>61</sup> Even in these areas of market reliance, however, there is substantial political involvement, both as to the price of final products and in the distribution of income among those who produce them.<sup>62</sup>

The Copyright Law of 1976,<sup>63</sup> for example, provides in certain circumstances for compulsory licensing of, and regulation of royalties payable for, a) the right to record copyrighted musical compositions on phonorecords,<sup>64</sup> and b) the importation of distant television broad-

59. See Buchanan, *Public Goods in Theory and Practice: A Note on the Minasian-Samuelson Discussion*, 10 J.L. & ECON. 193 (1967); Minasian, *supra* note 26; Mishan, *Joint Products, Collective Goods, and External Effects: Reply*, 79 J. POL. ECON. 1141 (1971); Mishan, *The Relationship between Joint Products, Collective Goods, and External Effects*, 77 J. POL. ECON. 329 (1969); Samuelson, *Public Goods and Subscription TV: Correction of the Record*, 72 J.L. & ECON. 81 (1964). “Collective goods” may be defined as goods which are hard to supply to one person without also supplying to everyone because of the difficulty of excluding “free riders”—i.e., those who do not pay. See C. FERGUSON & S. MAURICE, *supra* note 49, at 494; M. OLSON, *THE LOGIC OF COLLECTIVE ACTION* 14 (1968).

60. See E. MANSFIELD, *MICROECONOMICS* 456-57 (3d ed. 1979).

An external economy occurs when an action taken by an economic unit results in uncompensated benefits to others; when such benefits are due to an increase in a firm's production, they are called external economies of production. The firm may benefit others directly. For example, it may train workers that eventually go to work for other firms that do not have to pay training costs. . . . An external diseconomy occurs when an action taken by an economic unit results in uncompensated costs to others; when such costs are due to increases in a firm's production, they are called external diseconomies of production. For example, a firm may pollute a stream by pumping out waste materials, or it may pollute the air with smoke or materials.

*Id.* See also Bator, *supra* note 49, at 369-71. For a general discussion of external effects, see E. MISHAN, *COST BENEFIT ANALYSIS* 101-80 (2d ed. 1976); Baumol, *On Taxation and “The Control of Externalities,”* 62 AM. ECON. REV. 307 (1972).

61. For a discussion of the terms “collective goods” and “external economies of production,” see notes 59-60 and accompanying text *supra*.

62. See notes 63-67 and accompanying text *infra*.

63. 17 U.S.C. §§ 101-810 (Supp. 1978).

64. See *id.* §§ 115, 801 (Supp. 1978). Section 115 of the Copyright Act of 1976 provides for compulsory licenses for the distribution of phonorecords once phonorecords have been publicly distributed under the authority of the copyright owner. *Id.* § 115 (a)(1). The copyright owner is entitled to royalties on phonorecords distributed under the compulsory license. *Id.* § 115(c)(1). Section 115 thus specifies that “[w]ith respect to each work embodied in the phonorecord, the royalty shall be either two and three-fourths cents, or one-half of one cent per minute of playing time or fraction thereof, whichever amount is larger.” *Id.* § 115(c)(2). The section also provides for the time and manner of payment, *id.* § 115(c)(3), and remedies of the copyright owner upon default. *Id.* § 115(c)(4). Under § 801 of the Copyright Act of 1976, the Copyright Royalty Tribunal has the authority to make, in accordance with specified objectives, adjustments in the royalties payable under § 115. *Id.* § 801(b). For further discussion of the Copyright Royalty Tribunal, see note 65 *infra*; note 226 and accompanying text *infra*.

cast signals by cable telecasters.<sup>65</sup> With respect to the right of non-commercial television broadcasters to perform copyrighted musical compositions, the Copyright Act of 1976 provides for collective bargaining with determination of a license fee by an administrative tribunal should the parties fail to agree.<sup>66</sup> Indeed, the very existence of copyright protection for the commercial performance of a musical composition is due to a political decision made by Congress less than one hundred years ago to allow those who create certain kinds of works to obtain more than a zero price for their creations.<sup>67</sup>

Even if a market approach is adopted for products which have the public good characteristic, and assuming the market structure is such that a real-world competitive price and output will result, such results would have little relation to the perfectly competitive or efficient price and output — *i.e.*, a zero price with unrestricted use.<sup>68</sup> Moreover, it will be argued below that, if the production of a public good involves a natural monopoly or, at least, substantial concentration, government intervention is required.<sup>69</sup> Further, it will be demonstrated that where there is great uncertainty of demand for public goods at the time when decisions are made to invest in them, as is the case with respect to video-films, then neither real-world competitive markets, the efficiency criterion of perfect competition, nor any other objective criteria exist on which to base government intervention.<sup>70</sup>

Thus, although the public good and natural monopoly concepts justify government intervention in the determination of price and output, as well as in other financial matters, it will be shown that

65. *See id.* §§ 111, 801. Like § 115 of the Copyright Act of 1976, *see* note 64 *supra*, § 111 specifies the royalty due the copyright owner on secondary transmissions by cable systems. *Id.* § 111(d)(2)(B)-(D). The time and manner of payment are also provided for. *Id.* § 111(d)(5). Section 801 of the Act further provides that the Copyright Royalty Tribunal may make adjustments in the royalties due under § 111. *Id.* § 801(b)(2).

66. *Id.* § 118(b). The administrative agency, the Copyright Royalty Tribunal, is created by § 801 of the Copyright Act of 1976. *Id.* § 801(a). For other related functions of the Copyright Royalty Tribunal, *see* notes 64-65 *supra*. For a discussion of § 118, *see* Korman, *Performance Rights in Music Under Sections 110 and 118 of the 1976 Copyright Act*, 22 N.Y.L.S.L. REV. 521 (1977).

67. Copyright Act of 1897, ch. 4, 29 Stat. 481 (repealed 1906) (current version at 17 U.S.C. §§ 101-810 (Supp. 1978)).

Congress' power to enact such legislation derives in turn from an earlier decision by the drafters of the Constitution to include among Congress' enumerated powers 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. . . ." U.S. CONST. art. I, § 8, cl. 8.

68. For a discussion of the perfectly competitive or efficient price and output of a public good, *see* notes 47-58 and accompanying text *supra*.

69. *See* notes 73-103 and accompanying text *infra*.

70. *See* notes 96-103 and accompanying text *infra*.

such intervention can only be based on value judgments rather than objective or impersonal criteria.<sup>71</sup> The inevitable result is that the various producer and exhibitor interests engage in a great deal of litigation and lobbying for legislation in order to affect the price of the product and their shares of the income derived from it, or to prevent change via stalling and stalemate.

### C. *Natural Monopoly, Substantial Concentration, and Their Relation to the Public Good Characteristic*

The critical characteristic of a natural monopoly is an inherent tendency toward decreasing unit costs<sup>72</sup> of production as output increases.<sup>73</sup> In other words, unit costs (often called "average total costs" in economics textbooks) will decline only if more output is concentrated in a single producer.<sup>74</sup> The core of the natural monopoly concept is economies of scale.<sup>75</sup> Because efficiency demands that there be only one producer rather than the many necessary for a competitive market, a natural monopoly is often referred to as a market failure.<sup>76</sup> If markets fail, government intervention is justified and often required.<sup>77</sup>

A public good involves another type of market failure.<sup>78</sup> Recall that a public good is defined as one for which the marginal cost of additional consumption is zero up to the limit of capacity.<sup>79</sup> If marginal cost is zero and the capacity is large or infinite, as with broadcast television, unit costs of consumption will decrease as the number of persons consuming the good increases. On this reasoning, some

71. See notes 72-103 and accompanying text *infra*.

72. Several different meanings may be attached to the term "decreasing unit costs": 1) short-run decreasing costs—*i.e.*, when a firm has a given capacity already in being, total unit costs of production decline as output increases up to, or almost up to, the physical limits of capacity operation; 2) long-run decreasing costs—*i.e.*, the larger the plant constructed or the larger the unit of additional capacity put into operation, the lower will be its unit costs if operated to the capacity for which it was designed; 3) decreasing costs due to economies of scale external to the firm—*i.e.*, as an entire industry grows it may acquire some of its input at decreasing average costs because its growth enables the suppliers of its input to take advantage of potential economies of scale internal to their industries; 4) decreasing costs over time as a result of technological progress. The phenomenon of long-run decreasing costs due to economies of scale internal to the firm is the definition to which the concept of natural monopoly is related. See A. KAHN, *THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS* 124-30 (1970); C. PHILLIPS, *THE ECONOMICS OF REGULATION* 22 (1969).

73. See A. KAHN, *supra* note 72, at 119. For the conditions necessary for a single firm to prevent entry into a market in which there are decreasing unit costs, see D. DEWEY, *supra* note 54, at 114-19; W. VICKREY, *supra* note 52, at 249-59.

74. See A. KAHN, *supra* note 72, at 119.

75. See *id.* at 121-22.

76. See Bator, *supra* note 49, at 365-69.

77. See C. PHILLIPS, *supra* note 72, at 21.

78. See Bator, *supra* note 49, at 369-71.

79. See text accompanying notes 49-51 *supra*.

economists argue that television broadcasting has the natural monopoly characteristic.<sup>80</sup> This conclusion ignores a subtle distinction between the two concepts: while the natural monopoly concept is usually defined in terms of the cost of *production*, the public good concept is defined in terms of the cost of *consumption*.<sup>81</sup> The two definitions are not strictly commensurate. In order to compare these definitions, one can define both concepts in terms of the production process. The natural monopoly characteristic is evident when viewing the production process *ex ante*, the public good characteristic is evident when viewing the production process *ex poste*. Using television as an example, this distinction is easily clarified.

Viewing the production process *ex poste*, once a program's production costs are incurred and it is broadcast, the television network incurs no cost when an additional viewer watches. The marginal cost of production, in other words, is zero. Thus, television is a public good.<sup>82</sup> Since the total cost of production is already determined, the proportion of that cost incurred to service each viewer decreases indefinitely as the number of viewers increases. Accepting this analysis, some have concluded that network television exhibits the natural monopoly characteristic.<sup>83</sup>

Viewing the production process *ex ante*, however, it may be argued that additional viewers can only be attracted by spending more on television programs. Thus, the marginal cost of producing the programs is greater than zero, and networks will spend more to increase the size of the audience until advertising revenue from an additional viewer equals the cost of attracting that viewer.<sup>84</sup> This analysis, therefore, indicates that network television broadcasting is not a natural monopoly because it implies that unit production costs may not decrease indefinitely as the number of viewers increases.<sup>85</sup>

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80. See G. BECKER, *ECONOMIC THEORY* 95 (1971); NOLL, *supra* note 27, at 33.

81. See notes 72-73 & 79 and accompanying text *supra*.

82. See notes 49-51 and accompanying text *supra*.

83. See notes 72-80 and accompanying text *supra*.

84. See NOLL, *supra* note 27, at 10-11.

85. See notes 72-73 and accompanying text *supra*. Such an analysis may also be applied to motion pictures and musical compositions. Viewed *ex poste*, once the large production costs of a motion picture are incurred, it costs no more to supply each additional viewer until the capacity of the theatre is reached. Thus, the cost of production per viewer decreases indefinitely as the number of viewers who attend the movie increases. Motion pictures, therefore, would appear to have the natural monopoly characteristic. Viewed *ex ante*, however, if larger audiences can be attracted only by spending more in production, then the marginal cost of production is greater than zero. Thus, under this view, motion pictures do not have the natural monopoly characteristic.

The same analysis may be applied to musical compositions by noting that the cost of the composition is incurred by the composer in the time and effort spent in creating it. By analogizing this cost to that of the television networks or motion picture producers in producing video-films, the analysis employed in this footnote and the accompanying text may lead to the same disparate results regarding musical compositions.

Whether or not network television is a natural monopoly, the networks do, in fact, have great monopoly and monopsony power.<sup>86</sup> Much of their power results from the scarcity of frequencies available in the radio frequency spectrum and the policies of the FCC. In the early days of television, the FCC decided to allow very high frequency channels (VHF) and ultra high frequency channels (UHF) to compete in the same television markets rather than reserve different markets for each.<sup>87</sup> Since VHF broadcast signals travel farther and give a clearer picture than the UHF signals, UHF channels cannot compete effectively with VHF channels.<sup>88</sup> In addition, because of the scarcity of frequencies, the FCC assigned only three commercial channels to five large markets.<sup>89</sup> These actions effectively ensured that there would be only three national networks.<sup>90</sup> Moreover, these measures were buttressed by other rules promulgated by the FCC restricting the number of distant signals which cable telecasters could import and the types of programs they could telecast.<sup>91</sup>

Nevertheless, even if network television is not a natural monopoly and even if the FCC had not taken such actions as intermingling UHF and VHF stations, a tendency toward substantial concentration may be intrinsic to network television because of the high cost of producing prime time network shows.<sup>92</sup> With respect to advertiser-supported television, the funds available to produce such costly shows are a function of the size of the audience.<sup>93</sup> Only na-

86. NOLL, *supra* note 27, at 10 n.26. A monopsonist, or single buyer, is the counterpart of a monopolist, or single seller. When a buyer can force down the price of whatever he buys by buying less or threatening to do so, he is regarded as having monopsony power, just as when a seller can force up the price of whatever he sells by selling less, he is regarded as having monopoly power. D. DEWEY, *supra* note 54, at 197-98. J. ROBINSON, *THE ECONOMICS OF IMPERFECT COMPETITION* 216 (1934).

87. OWEN, *supra* note 47, at 121-22; Pearson, *supra* note 22, at 801; Note, *UHF and the FCC: The Search for a Television Allocations Policy*, 28 U. FLA. L. REV. 399 (1976).

88. An FCC rule requiring cable systems to carry *all* locally originated television broadcast signals neutralizes VHF's signal strength advantage over UHF with respect to cable television subscribers. See 47 C.F.R. § 76.57-.63 (1979). This somewhat offsets the competitive damage done to small UHF stations by cable systems when the latter further fragment the audience by importing distant program signals. Park, *supra* note 22, at 208.

89. Pearson, *supra* note 22, at 802. The five markets were Boston, Cleveland, Detroit, Philadelphia, and Pittsburgh. *Id.*

90. *Id.*

91. See Cable Television Order and Report, 36 F.C.C.2d 143 (1972). For a discussion of FCC restrictions on cable television's growth and competition with broadcast television, see notes 231-56 and accompanying text *infra*.

92. In the early 1970's, the Columbia Broadcasting System paid about \$200,000 for each one-hour variety show or dramatic special, and as much as \$750,000 for a made-for-TV movie. *CBS v. American Soc'y of Composers, Authors and Publishers*, 400 F. Supp. 737, 743 (S.D.N.Y. 1975), *rev'd*, 562 F.2d 130 (2d Cir. 1977), *rev'd and remanded sub nom. Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979). For a discussion of television program production, see NOLL, *supra* note 27, at 44-49; OWEN, *supra* note 47, at 37-48.

93. NOLL, *supra* note 27, at 5.

tional networks and a few local stations in large markets would be able to generate audiences large enough to support such shows.<sup>94</sup>

The video-film industry contains several other areas in which monopoly power, or something close to it, might be exercised. The substantial concentration in motion picture production gives the producers monopoly power in bargaining with theater owners over exhibition rights.<sup>95</sup> The right of performing rights societies to renegotiate their shares in the profits from existing video-films to be used on television gives them effective monopoly power.<sup>96</sup> And local cable television has the same power since it clearly has the natural monopoly characteristic.<sup>97</sup>

In a competitive rather than a concentrated market, the public good and uncertainty of demand characteristics of video-films may not require a great deal of government intervention with respect to price or income distribution: the seller will not be able to demand the monopoly price or to shift the risk of loss forward, nor will a buyer have monopoly power to appropriate all profit above production costs or to shift the risk of loss backward. The public good characteristic of video-films, however, may place stringent requirements on the number of firms necessary for workable competition.<sup>98</sup> That is, unless there are a great many alternative sellers and buyers, the fact that the marginal cost of video-films is zero<sup>99</sup> may allow significant exploitation to occur at levels of concentration which would be innocuous in industries in which marginal cost rises in conformity with the usual textbook assumption of the law of diminishing returns.<sup>100</sup> If

94. The uncertain impact of cable television also makes it difficult to determine whether substantial concentration is inherent in network television. On the one hand, satellite transmission of microwave signals is much cheaper than terrestrial transmission and is becoming still cheaper; thus, cable television networks will be economically feasible and possibly competitive with network broadcasting. R. STANLEY, *supra* note 40, at 270-74; Epstein & Cass, *Cable-Satellite Networks: Structure and Problems*, 24 CATH. U. L. REV. 692, 694 (1975); Smith, *Television Enters the 80's*, N.Y. Times, Aug. 19, 1979, § 6 (Magazine), at 16. On the other hand, the public good characteristic and scale economies inherent in prime time shows may be enough to prohibit a "workably" competitive market structure. For a discussion of the notion of a workably competitive market structure, see Clark, *Toward a Concept of Workable Competition*, 30 AM. ECON. REV. 241 (1940); Markham, *An Alternative Approach to the Concept of Workable Competition*, 40 AM. ECON. REV. 349 (1950).

95. For a discussion of the power of motion picture producers, see notes 145-65 and accompanying text *infra*.

96. For a discussion of the monopoly power of performing rights societies, see notes 166-230 and accompanying text *infra*.

97. Cable Television Report & Order, 36 F.C.C.2d 143, 145 (1972); GOVERNMENT AFFAIRS STUDY, *supra* note 27, at 350.

98. See note 94 *supra*.

99. See notes 47-51 and accompanying text *supra*.

100. "The law of diminishing returns states that if increasing quantities of a variable factor are applied to a given quantity of fixed factors, the marginal product and the average product of the variable factor will eventually decrease." R. LIPSEY & P. STEINER, *ECONOMICS* 170 (5th ed. 1978). For further discussion of the law of diminishing returns, see D. DEWEY, *supra* note 54, at 71-75; R. LIPSEY & P. STEINER, *supra*, at 170; W. VICKREY, *supra* note 52, at 214.

this supposition is true, substantial government involvement in the determination of price and income distribution in this industry will be necessary, even if the number of firms is such that market structure is workably competitive by the usual standards.

Assuming real-world competitive markets are unworkable because of the natural monopoly characteristic or are undesirably inefficient because of the public good characteristic, it may be suggested that the theory of public utility regulation provides the only objective criterion upon which to base government intervention.<sup>101</sup> If this theory is not applicable, then no objective criteria exist upon which to base such intervention.

The theory employed with respect to public utilities, which are the paradigmatic regulated industries, is that when demand for a product or service is reasonably certain, price can be set to bring in enough revenue to cover current costs, replace depreciated capital, and earn a fair rate of return on invested capital.<sup>102</sup> Thus, the ability to accurately forecast demand becomes crucial, so that the amount of invested capital necessary to satisfy demand can be determined. In the case of public utilities like gas, electricity, water, and telephone service, demand is reasonably certain and stable, and the product is relatively homogeneous. In the video-film industry, however, there is a) substantial uncertainty of demand prior to production, b) significant product differentiation, and c) great disparity in financial returns on investment.<sup>103</sup> Hence, the public utility regulation model cannot be used as a basis for government intervention in this industry. Lacking workably competitive markets or objective criteria with respect to price, output, and the distribution of income, government intervention in the video-film industry must be based upon value judgments and naked political power.

#### D. *The Common Product Characteristic*

As discussed above, the public good, natural monopoly, and uncertainty of demand characteristics of video-films justify government intervention in the setting of prices and the distribution of income, but do not provide objective criteria for such intervention.<sup>104</sup> This problem is exacerbated by the common product characteristic of

101. For a discussion of the theory of public utility regulation, *see generally* R. LIPSEY & P. STEINER, *supra* note 100, at 298-302.

102. For a discussion of utility rate structures, *see* A. KAHN, *supra* note 72, at 25-57; C. PHILLIPS, *supra* note 72, at 303-45; C. WILCOX & W. SHEPHERD, *supra* note 14, at 321-43.

103. *See* notes 40-42 and accompanying text *supra*.

104. *See* notes 98-103 and accompanying text *supra*.



video-films—*i.e.*, much of the same artistic material can be shown in motion picture theaters, on cable television, or on television broadcasting networks. The cost of the video-film is thus a type of common or overhead cost<sup>105</sup> which should be shared by all three types of exhibitors in proportions reflected in market prices. In the absence of government intervention of some sort, interests within the video-film industry having monopoly power could conceivably shift the burden of the costs of production to other interests without such power, resulting in an inequitable distribution of revenue. Government intervention with respect to price and output in one or more of these markets will affect 1) competition among the three types of exhibition; 2) the amount of revenue derived from video-films; 3) the distribution of this revenue among the various producer and exhibitor groups; and 4) consumer welfare.

### III. THE FIVE CONFLICTS

#### A. *Video-Film Producers Versus Television Networks and Motion Picture Theatres*

The video-film producers are involved in conflicts with two types of exhibitors of their programs: television networks<sup>106</sup> and motion picture theaters.<sup>107</sup> These conflicts center on how the risk of loss and the financial returns in excess of production and distribution costs

105. Regarding firms which produce multiple products, economists distinguish between joint products and common products. A. KAHN, *supra* note 72, at 77. Products are joint when an increase in production of one product causes an increase in the output of another product—*i.e.*, products which are produced in *fixed* proportions. *Id.* at 78. For example, wool and mutton are joint products from sheep. In the long run, the proportions of most joint products can be varied. *Id.* at 79. In the sheep example, the animals may be bred to have more or less wool. When products are truly joint, they can be produced only in fixed proportions and the costs they share cannot be separated. *Id.*

In contrast, when multiple products can be produced in *variable* proportions, they are called common products. *Id.* at 78. An example is a factory which can produce all tables, all chairs, or some combination of both. If proportions are variable, one can often identify the marginal cost of any one product as the addition to total cost of the common production process occasioned by increasing the output of that one product while holding the output of the others unchanged. *Id.* at 79. See also J. DEAN, *MANAGERIAL ECONOMICS* 317-19 (1959). One study has indicated:

The most extreme case of variable proportions . . . occurs when two or more products of one enterprise are technically completely independent (that is, where changes in the output of one have no necessary connection with the quantity of the other or others). The costs that are common to such products are often called "overhead costs." The retailer who makes many goods available to consumers in the same place and at the same time is an example of a seller of many independent goods with common costs, *i.e.*, "overhead," in the rent of his store and the services of his sales clerks.

M. BOWMAN & G. BACH, *ECONOMIC ANALYSIS AND PUBLIC POLICY* 253 n.2 (1944).

106. See notes 114-44 and accompanying text *infra*.

107. See notes 145-65 and accompanying text *infra*.

should be apportioned. In one dispute, the government sued the networks in the interest of the video-film producers alleging that the three networks use their monopsony power to reduce the financial returns to video-film producers in violation of sections 1 and 2 of the Sherman Act.<sup>108</sup> The government and one of the networks entered into a consent decree to which the video-film producers took exception<sup>109</sup> because, *inter alia*, it contained a provision allowing the network to demand four-year options on exclusive television exhibition rights to new television series.<sup>110</sup> According to the video-film producers, four-year options unjustly bind them far into the future before the value of a series can be established.<sup>111</sup>

The second conflict involves the question whether many of these same producers — who object to being contractually bound to the networks before the value of their product is determined — should be allowed to demand that owners of motion picture theatres bid on the right to exhibit a picture without being given a chance to view it prior to bidding. Thus, in the part of the exhibition market in which the major film producers have monopoly power over motion picture theatres,<sup>112</sup> they are demanding not only that the theatre owners bid

108. *United States v. NBC*, [1978] 1 Trade Cas. ¶ 61,842, at 73,503, 73,504-06 (C.D. Cal.), *approving consent decree entered in* *United States v. NBC*, [1978] 1 Trade Cas. ¶ 61,855, at 73,580 (C.D. Cal.). For §§ 1 and 2 of the Sherman Act, *see* 15 U.S.C. §§ 1-2 (1976). For further discussion of this case and the underlying dispute, *see* note 15 *supra*; notes 125-40 and accompanying text *infra*.

109. Public comment concerning the proposed consent decree was considered by the court pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16 (1976). *See* notes 130-36 and accompanying text *infra*.

110. *United States v. NBC*, [1978] 1 Trade Cas. ¶ 61,842, at 73,508-14 (C.D. Cal.), *approving consent decree entered in* *United States v. NBC*, [1978] 1 Trade Cas. ¶ 61,855, at 73,580 (C.D. Cal.). In their comments submitted in opposition to the proposed consent judgment, the video-film producers also objected on the following grounds: 1) the inadequacy of the restrictions on internal production of television programs by the networks; 2) the inadequacy of the restrictions on exclusive network rights to programs and talent; and 3) the failure to delay effectiveness of the decree until agreements were reached with the Columbia Broadcasting System (CBS) and the American Broadcasting Company (ABC). *Id.* at 73,509-11. Other parties objecting to various terms of the decree were CBS and ABC, the pay cable television industry, and various public interest groups. *Id.* at 73,511-14. *See also* notes 130-36 and accompanying text *infra*.

111. *Id.* at 73,510.

112. *See generally* Harmetz, *supra* note 7. Seven of the major producer-distributors accounted for 70-83% of the gross income from film distribution in the United States and Canada between 1970 and 1974. T. BALIO, *supra* note 41, at 461 (Table 1). These same seven producers, however, accounted for only 36-51% of the prime time series on network television during the same period. OWEN, *supra* note 47, at 29. The individual shares are quite small and volatile, and the rank size of major producers changes from year to year. *Id.* Whereas the major film producers completely dominate film production, the television market for video-films is much less concentrated and has been described as monopolistically competitive. *Id.* at 17. The difference in concentration is easily explained. Oligopolies frequently exist in industries in which there are economies of scale which are large relative to the market. The public good aspect of video-films means that there are scale economies in distribution from inventory economies and density-of-outlet phenomena. In broadcasting, these distribution economies do

on a picture before its true worth has been established, but also that the theater owners be deprived of a chance to judge the picture's worth for themselves before bidding.<sup>113</sup>

### 1. Video-Film Producers Versus the Networks

Both the FCC and the Department of Justice have attempted, by rulemaking<sup>114</sup> and a Sherman Act suit<sup>115</sup> respectively, to reduce the monopsony power of the networks vis-à-vis video-film producers. It is not clear that either attempt has been successful.

In 1970, the FCC promulgated three rules with respect to the relations between the networks and video-film producers: 1) the financial interest rule;<sup>116</sup> 2) the syndication rule,<sup>117</sup> and 3) the prime-time access rule.<sup>118</sup>

The financial interest rule states that no television network shall acquire any financial or proprietary right or interest in a television program produced by a person other than the television network itself, except that it may acquire a license or other exclusive right to network exhibition of such programs.<sup>119</sup> The FCC had found a direct relationship between new programs chosen for network schedules and network acquisition of subsidiary rights and interests.<sup>120</sup> The Commission concluded that the networks were using their monopsony power to obtain financial interests in programs produced by others and, thus, were excluding wholly independent producers from the market.<sup>121</sup>

The second FCC rule involves syndication, which is the distribution of video-films to individual stations for nonnetwork television broadcasting.<sup>122</sup> The rule prohibits a television network from selling,

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not require large firms (in fact, many different-sized firms coexist) because the networks capture the economic advantages of distribution economies. This is not true in film distribution which is dominated by the major producers who have integrated production and distribution. *Id.* at 28.

113. For further discussion of the conflict over "blind bidding," see notes 145-65 and accompanying text *infra*.

114. See 47 C.F.R. § 73.658 (1979); notes 116-24 and accompanying text *infra*.

115. See *United States v. NBC*, [1978] 1 Trade Cas. ¶ 61,842, at 73,503 (C.D. Cal.); notes 108-11 and accompanying text *supra*; notes 125-40 and accompanying text *infra*.

116. 47 C.F.R. § 73.658(j)(1)(ii) (1979). See also *Mount Mansfield Tel., Inc. v. FCC*, 442 F.2d 470 (2d Cir. 1971) (upholding the rule as promulgated).

117. 47 C.F.R. § 73.658(j)(1)(i) 1979. See also *Mount Mansfield Tel., Inc. v. FCC*, 442 F.2d 470 (2d Cir. 1971) (upholding the rule as promulgated).

118. 47 C.F.R. § 73.658(k) (1979). See also *Mount Mansfield Tel., Inc. v. FCC*, 442 F.2d 470 (2d Cir. 1971) (upholding the rule as promulgated).

119. 47 C.F.R. § 73.658(j)(1)(ii) (1979).

120. See *Mount Mansfield Tel., Inc. v. FCC*, 442 F.2d 470, 485 (2d Cir. 1971).

121. See *id.* See also Amendment of Part 73 of the Commission's Rules and Regulations With Respect to Competition and Responsibility in Network Television Broadcasting, 23 F.C.C.2d 382 (1970) (report and order).

122. For further explanation of syndication, see *Mount Mansfield Tel., Inc. v. FCC*, 442 F.2d 470 (2d Cir. 1971).

licensing, or distributing television programs of which it is not the sole producer.<sup>123</sup> This rule is logically inherent in the financial interest rule since the right to syndicate and receive a fee for such services is the right to a particular financial interest.

The prime-time access rule states that no television station in the top fifty markets shall broadcast more than three hours of network programs during the hours between 7:00 and 11:00 p.m.<sup>124</sup> By mandating one hour of nonnetwork programming, this rule prevents the networks from avoiding the other two rules by simply refusing to buy programs from outside sources or by threatening to do so.

In 1972, the Department of Justice brought an antitrust suit seeking to strengthen these rules.<sup>125</sup> In 1977, the government and the National Broadcasting Company (NBC) signed a consent decree which paralleled the FCC's three rules but was more detailed.<sup>126</sup> The consent decree won court approval<sup>127</sup> but not before serious objections were raised (and rejected) concerning the provisions in the decree limiting the duration of options by which the network acquires exclusive rights to a television program or series.<sup>128</sup> This issue is crucial to the determination of whether the networks can take advantage of their monopsony power over video-film producers. In most cases, option contracts between television networks and producers of

123. 47 C.F.R. § 73.658(j)(1)(i) (1979).

124. *Id.* § 73.658(k).

125. See *United States v. NBC*, [1978] 1 Trade Cas. ¶ 61,842, at 73,503, 73,504-06 (C.D. Cal.) *approving consent decree entered in* *United States v. NBC*, [1978] 1 Trade Cas. ¶ 61,855, at 73,580 (C.D. Cal.). The government first filed separate but similar complaints against the American Broadcasting Company, the Columbia Broadcasting System, and the National Broadcasting Company in April, 1972. See *id.* ¶ 61,842, at 73,504. The original actions were dismissed without prejudice on November 13, 1974, for failure of the plaintiff to comply with court orders. See *id.* The government filed new complaints on December 10, 1974, alleging the same violations of the Sherman Act. See *id.*

126. See *United States v. NBC*, [1978] 1 Trade Cas. ¶ 61,855, at 73,580 (C.D. Cal.). In one respect, the consent decree appeared to be even more restrictive than the FCC rules: the decree prohibited NBC from producing more than 2½ hours of prime-time programming per week. *Id.* at 73,582. In contrast, the FCC prime-time access rule merely prohibits broadcasting network television programs—all of which, under the rule, could conceivably be produced by the network itself—for more than three of the four daily hours of prime time. 47 C.F.R. § 73.658(k) (1979). This restriction, however, placed no substantial burden on NBC, since the network was then only producing one prime-time series consuming one hour per week. [1978] 1 Trade Cas. ¶ 61,842, at 73,509, *approving consent decree entered in* *United States v. NBC*, [1978] 1 Trade Cas. ¶ 61,855, at 73,580 (C.D. Cal.).

In addition, although the prime-time access rule does not mention, let alone regulate, network production of programming for the remaining hours of the day, see 47 C.F.R. § 73.658(k) (1979), the NBC consent decree also defined "daytime hours," and "fringe hours," limiting the number of those hours for which NBC could produce its own programs. See [1978] 1 Trade Cas., ¶ 61,855, at 73,581-82 (consent decree).

127. See *United States v. NBC*, [1978] 1 Trade Cas. ¶ 61,842, at 73,503 (C.D. Cal.), *approving consent decree entered in* *United States v. NBC*, [1978] 1 Trade Cas. ¶ 61,855, at 73,580 (C.D. Cal.).

128. See *id.* ¶ 61,842, at 73,509-10; notes 110-11 and accompanying text *supra*.

a series of programs are entered into before the programs have been developed. Thus, if the networks can successfully demand that a low price, agreed upon when the worth of the program is uncertain, be maintained through option contracts for a number of years even though the program is later found to be more valuable, the network stands to gain the entire profit while the producer bears the entire risk of loss.

The government originally sought a two-year limit on options which a network could acquire, but was apparently forced to compromise and accept a four-year limit in order to convince NBC to accept the consent decree.<sup>129</sup> In proceedings under the Antitrust Procedures and Penalties Act<sup>130</sup> in which the court heard comments upon the proposed consent decree, the video-film producers objected that the four-year limit was too long.<sup>131</sup> The other two major commercial networks, the Columbia Broadcasting System (CBS) and the American Broadcasting Company (ABC), opposed the four-year time limit as being too short.<sup>132</sup> With supporting affidavits from an economist<sup>133</sup> and a professor of law,<sup>134</sup> they argued that placing a time limit on options which networks can purchase prevents producers from realizing the value of their video-films at an early date.<sup>135</sup> They further asserted that such a restriction would force out of competition small independent producers who are not in a position to absorb costs of production without the quick realization of the full exploitation value of a program or series.<sup>136</sup>

129. *See id.* at 73,510. NBC was also allowed to renegotiate a single year's extension of the contract after the first broadcast. *Id. See also id.* ¶ 61,855, at 73,583 (consent decree).

130. 15 U.S.C. § 16 (1976). The Antitrust Procedures and Penalties Act provides for 1) public notice of the terms and effects of consent decrees proposed in antitrust cases, and 2) consideration of public comment on the proposed decree. *See id.* § 16(b)(c). The Attorney General must consider and respond to any public comment received. *Id.* § 16(d). The court may enter the proposed consent judgment only upon a finding that its entry is "in the public interest." *Id.* § 16(e)-(f).

131. *United States v. NBC*, [1978] 1 Trade Cas. ¶ 61,842, at 73,510 (C.D. Cal.), *approving consent decree entered in United States v. NBC*, [1978] 1 Trade Cas. ¶ 61,855, at 73,580 (C.D. Cal.).

132. *Id.* ¶ 61,842, at 73,512.

133. Affidavit of Franklin M. Fisher, 42 Fed. Reg. 25,199 (1977).

134. Affidavit of Richard A. Posner, 42 Fed. Reg. 25,231 (1977). *See also* Crandall, *FCC Regulation, Monopsony, and Network Television Costs*, 3 BELL J. ECON. & MANAGEMENT SCI. 483 (1972), *reprinted in* 42 Fed. Reg. 25,215 (1977).

135. *United States v. NBC*, [1978] 1 Trade Cas. ¶ 61,842, at 73,512 (C.D. Cal.), *approving consent decree entered in United States v. NBC*, [1978] 1 Trade Cas. ¶ 61,855, at 73,580 (C.D. Cal.).

136. *Id.* ¶ 61,842, at 73,512. The court noted that there was a factual dispute arising from these conflicting positions. *Id.* at 73,510. The government contended that the networks obtained initial exclusive exhibition options of six or seven years, and, therefore, characterized the relief as substantial. *Id.* On the other hand, the video-film producers contended that industry practice was to obtain options of only five years and, thus, the four-year limitation ought not to be considered substantial. *Id.* The court did not attempt to resolve this dispute.

The position taken by CBS and ABC is based upon questionable assumptions. First, the argument assumes that the ability to sell a long term option is more valuable to the producers than the ability to sell a short term option with the possibility of reaping higher profits in renegotiating rights to the program when its value is later proven. It is quite possible and probable, however, that the networks' monopsony power, which allows them to demand options on long term exclusive exhibition contracts, depresses the total value of programs and series substantially below the value which they would have in a competitive market or in a market in which exclusive exhibition contracts are negotiated on an annual basis. In this respect, the networks' argument is similar to the argument made for baseball's reserve clause.<sup>137</sup> Baseball club owners contended that because they were assuming the risk of loss and the costs of developing quality ballplayers, they were justified in requiring players to sign long term exclusive contracts.<sup>138</sup> Many economists believe that the costs incurred by the owners due to player development and risk assumption are outweighed by the increase in their profits due to the monopsony power inherent in the reserve clause to depress salaries.<sup>139</sup>

The networks' argument also assumes that there are no risk takers other than the networks willing to finance video-film producers. Even accepting such an implausible assumption, if the length of time for which options on exclusive exhibition rights can be negotiated were shortened, thereby reducing the networks' monopsony power, other risk takers would be encouraged to finance productions because of the possibility of greater profits.<sup>140</sup>

There is yet another possible flaw in the networks' argument. If the networks were not constrained by the FCC's financial interest rule, over time they could profit from their monopsony power by agreeing to nonexclusive exhibition contracts while demanding a percentage of the profits from syndication, broadcasts in foreign nations,

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137. See *Flood v. Kuhn*, 316 F. Supp. 271 (S.D.N.Y. 1970), *aff'd*, 443 F.2d 264 (2d Cir. 1971), *aff'd*, 407 U.S. 258 (1972) (holding that Congress did not intend to include the business of baseball within the scope of the antitrust laws even though it is engaged in interstate commerce; thus, baseball's reserve clause could not be held to violate those laws).

138. See *Flood v. Kuhn*, 316 F. Supp. 271, 275 (S.D.N.Y. 1970), *aff'd*, 443 F.2d 264 (2d Cir. 1971), *aff'd*, 407 U.S. 258 (1972).

139. Noll, *Major League Team Sports*, in *THE STRUCTURE OF AMERICAN INDUSTRY* 365, 366-71, 381-87 (5th ed. W. Adams 1977); Rottenberg, *The Baseball Players Labor Markets*, 64 J. POL. ECON. 242, 252-54 (1956); Scully, *Pay and Performance in Major League Baseball*, 64 AM. ECON. REV. 915, 927-29 (1974).

140. Such investment could be further enhanced by granting video-film producers full copyright protection with respect to distant signal importation by cable telecasters, thereby assuring investors of additional revenues from successful films. See notes 231-56 and accompanying text *infra*.

and other ancillary financial interests. It may be that by demanding long term exclusive exhibition contracts, the networks achieve the same financial rewards through the presumably higher advertising rates charged on exclusive broadcasts and the money saved by not having to pay more for the exclusive rights. Just as one can capitalize the value of future income one is to receive from an income-producing asset, one can capitalize the value of money one does not have to pay periodically for the exclusive right to use an income-producing asset. Thus, allowing networks to demand four-year exclusive exhibition options probably allows them to reap substantial benefits from their monopsony power over video-film producers.

Nevertheless, even in a competitive television market for video-films, producers would not wish to prohibit exclusive exhibition contracts completely.<sup>141</sup> When not coerced by excessive market power on the buyer's side, exclusive exhibition contracts allow producers to engage in a form of temporal price discrimination which is both legal and beneficial to the producers. By making available an exclusive right of exhibition on the first run, the producer should be able to command a higher price from the network than he would if that exhibitor knew that others would be competing for the first-run audience. On later runs, the producer would settle for a lower price, as networks would not expect to be able to charge advertisers as much for a video-film which is no longer novel. In effect, the producer can thereby charge more to those willing to pay more and charge less to those seeking to pay less.

In the same way, book publishers sell the hard cover edition at a substantially higher price than subsequent sales of soft cover or paperback books a year or so later. First-run motion picture theaters charge higher prices than second-run or neighborhood theaters which show the same films at later dates. In a competitive market, the producer of a video-film series would wish to be able to engage in this legal form of price discrimination rather than be required to exhibit the series simultaneously in many outlets.

It has already been suggested that the combined effect of the four characteristics of video-films indicates that any government intervention in this industry is arbitrary — *i.e.*, not based on economic

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141. *But see* Chazen & Ross, *Federal Regulation of Cable Television: The Visible Hand*, 83 HARV. L. REV. 1820, 1833 (1969). The authors of the Harvard article argue that program producers have no interest in exclusive exhibition contracts, and that only inertia and pressure from networks causes them to enter into such contracts. *Id.* The authors, however, do not discuss and, thus, appear to overlook the point that the sale of exclusive exhibition contracts permits producers to engage in advantageous temporal price discrimination. *See* text accompanying and following this footnote.

efficiency determined by the market — and therefore must be based instead wholly upon considerations of equity.<sup>142</sup> Considering the monopsony power of the major television networks<sup>143</sup> over video-film producers for the duration of option contracts,<sup>144</sup> substantial restrictions should be placed on the permissible time limit of exclusive exhibition options. The Department of Justice's original proposal of a two-year time limit would seem to be appropriate.

## 2. *Film Producers Versus Motion Picture Theatres*

Prior to *United States v. Paramount Pictures, Inc.*,<sup>145</sup> film producers owned interests in many of the nation's theaters.<sup>146</sup> In 1945, theatres owned or controlled by the five major producers accounted for approximately 45% of the domestic film rentals.<sup>147</sup> The *Paramount* decision in 1946, however, required the major producers to sever connections with theater chains.<sup>148</sup> As a result of this decision, the major filmmakers are vertically integrated with respect to finance, production, and distribution, but not exhibition.

Theatres bid for the right to exhibit motion pictures. Between 1972 and 1975, pictures were routinely offered with forty-eight-hour cancellation clauses.<sup>149</sup> After seeing a film, theater owners had

142. See notes 98-104 and accompanying text *supra*.

143. NOLL, *supra* note 27, at 16-17; OWEN, *supra* note 47, at 11, 121.

144. Some writers have stated that once the option for exclusive exhibition rights expires, the market shifts from a monopsony to a monopoly. NOLL, *supra* note 27, at 45; Fastow, *supra* note 24, at 529-30. This rather loose use of the term monopoly is technically incorrect and produces a misleading impression. The terms monopoly and monopsony refer to market structure—the number of sellers and buyers in an industry—and not to the fact that one of many sellers of a differentiated product may sell a product or service which is highly valued by buyers. A video-film producer who owns a popular series which commands a high price has no more monopoly power than does a professional athlete whose services are in great demand. In terms of economic theory, both merely earn a high economic rent, which is the return on a product whose supply is fixed. A monopolist, on the other hand, is able to charge a high price by intentionally restricting supply. See R. LIPSEY & P. STEINER, *supra* note 100, at 380; OWEN, *supra* note 47, at 30, 37-48.

145. 334 U.S. 131 (1948). In *Paramount*, the United States alleged that a number of practices in the motion picture industry violated §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2 (1976). 344 U.S. at 140-41.

146. See *United States v. Paramount Pictures, Inc.*, 66 F. Supp. 323, 353-56 (S.D.N.Y.) (opinion on the merits), 70 F. Supp. 53, 67-68 (S.D.N.Y. 1946) (findings of fact, conclusions of law, and decree), *aff'd in part, rev'd and remanded in part*, 334 U.S. 131 (1948). The district court distinguished between 1) theaters owned solely by producers, 2) theaters owned jointly by two or more producers, and 3) theaters owned jointly by a producer and an independent owner. 70 F. Supp. at 67. Although the district court held, *inter alia*, that only sole ownership by a producer was legal, 66 F. Supp. at 355-56; 70 F. Supp. at 72, the Supreme Court ruled that joint ownership by a producer and an independent was also legal unless shown to be an unreasonable restraint of trade. 344 U.S. at 152-53. On remand, the district court held that all ownership of theatres by producers-distributors was an unreasonable restraint of trade. 85 F. Supp. 881, 893-94 (S.D.N.Y. 1949).

147. D. DEWEY, *MONOPOLY IN ECONOMICS AND LAW* 262 (1959).

148. See 85 F. Supp. at 895; note 146 *supra*.

149. Harmetz, *supra* note 7, § C, at 7, col. 4.



forty-eight hours in which to cancel their bids.<sup>150</sup> In recent years, only one major video-film producer allowed the forty-eight-hour clause, and that producer ceased to use it when many theaters cancelled several of its pictures.<sup>151</sup>

Currently, film producers require motion picture exhibitors to acquiesce in blind bidding.<sup>152</sup> Bids are based upon titles, cast, plot-line, and availability dates of films.<sup>153</sup> In addition, the film producers often require exhibitors to agree to nonrefundable guarantees.<sup>154</sup> Although it is not clear whether and to what extent there would be nonrefundable guarantees in a competitive market,<sup>155</sup> the practice of blind bidding is anticompetitive by nature since any reasonable definition of a competitive market assumes that both buyers and sellers have substantial knowledge concerning all relevant aspects of the product and market.<sup>156</sup> The existence of blind bidding is in itself evidence that the ten major film producers have substantial monopoly power over the several thousand motion picture exhibitors.<sup>157</sup>

The uncertainty of demand characteristic of video-films<sup>158</sup> implies that a substantial portion of the costs of production are incurred before it is known whether demand will be sufficient to recoup production costs and earn a profit. Thus, the crucial question is how the risk of loss and the financial returns in excess of production costs should be apportioned. Blind bidding is an attempt by those with market power to keep exhibitors ignorant in order to shift a greater portion of the risk of loss to them than they would bear in a competitive market. This practice makes exhibitors unwilling speculators on high risk investments. Such a high pressure climate is not conducive to independent theater ownership and, in general, only large chains are operating profitably.<sup>159</sup> Since only the major film producers have the market power to demand blind bidding, the practice results in

150. *Id.*

151. *Id.* See also W. HURST & W. HALE, MOTION PICTURE DISTRIBUTION: BUSINESS AND/OR RACKET 33-36 (1975).

152. See Note, *Blind Bidding and the Motion Picture Industry*, 92 HARV. L. REV. 1128, 1128 (1979).

153. See *id.* at 1131-32.

154. See *id.* at 1130. "A guarantee is a minimum rental fee which the exhibitor will pay regardless of admissions revenue." *Id.*

155. In a competitive market, certain films might be able to command nonrefundable guarantees because of the reputations of the producers, directors, writers, or actors.

156. C. FERGUSON & S. MAURICE, *supra* note 49, at 236; McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, in E. MANSFIELD, *supra* note 60, at 248.

157. See Harmetz, *supra* note 7, § C, at 7, col. 5; Note, *supra* note 152, at 1129.

158. See notes 40-46 and accompanying text *supra*.

159. Letter from John H. Shenefield, Assistant United States Attorney General, Antitrust Division, to Representative David J. Swartz, Massachusetts House of Representatives (April 21, 1978). The letter states in pertinent part:

lower costs and risks for them than for those borne by companies producing fewer films; therefore, the practice probably inhibits entry into the market of movie producers.<sup>160</sup> Similarly, although non-refundable guarantees may occur in a competitive market, the apparent monopoly power of film producers may enable them to demand guarantees which are much larger than those available in a competitive market. In view of the apparent power of the film producers, the policy of preserving competition which lies behind the antitrust laws,<sup>161</sup> and the lack of objective pricing criteria to be found in a competitive market, nonrefundable guarantees should also be prohibited or sharply restricted.

At least fifteen states have passed laws forbidding blind bidding.<sup>162</sup> Besides prohibiting distributors from engaging in blind bidding, these laws prevent them from demanding advances or non-refundable guarantees.<sup>163</sup> The Motion Picture Association of America, which represents the film producers, is currently challenging Ohio's anti-blind-bidding law as an unconstitutional regulation of interstate commerce.<sup>164</sup> Although one commentator has suggested that such laws are indeed unconstitutional as well as unwise,<sup>165</sup> the evident strength of the producers' monopoly power seems to compel the adoption of these laws, if not by the states, then by the federal government.

The bargaining strength of the exhibitors vis à vis the distributors is weak. Blind bidding requires exhibitors to formulate their bids without sufficient data on which to make an informed judgment as to the quality, artistic merit, or probable box office appeal of the preferred products. . . . Since an exhibitor is reduced to the role of a speculator on high risk investments, it is not at all surprising that in general only the large chains are still operating profitably.

*Id.* The letter also notes that "blind bidding may lessen competitive pressures for the production of quality films" and "inhibit entry into the market." *Id.*

160. See note 159 *supra*.

161. See *United States v. Von's Grocery Co.*, 384 U.S. 270, 274-77 (1966).

162. Harmetz, *supra* note 7. The Pennsylvania state legislature recently passed a bill which would prohibit blind bidding and non-refundable guarantees. Feature Motion Picture Fair Business Practices Law, Act No. 1980-14, §§ 1-12, 1980 Pa. Legis. Serv. 31 (to be codified at PA. STAT. ANN. tit. 73, §§ 203-1 to -11). See *Bill OK'd to End Getting Movies Sight Unseen*, Philadelphia Inquirer, Feb. 13, 1980, § E, at 1, col. 5. For further examples of anti-blind-bidding laws, see, e.g., Alabama Motion Picture Fair Competition Act, ALA. CODE §§ 8-18-1 to -6 (Supp. 1979); Georgia Motion Picture Fair Competition Act, GA. CODE ANN. §§ 106-1301 to -1305 (Supp. 1979); Motion Picture Fair Bidding Act, IDAHO CODE §§ 18-7701 to -7708 (Supp. 1979); Virginia Motion Picture Fair Competition Act, VA. CODE §§ 59.1-255 to -261 (Supp. 1979).

163. See, e.g., OHIO REV. CODE ANN. § 1333.06 (Page 1979).

164. See *Allied Artists Pictures Corp. v. Rhodes*, No. C-2-78-1031 (S.D. Ohio, filed Oct. 4, 1978) (complaint seeking declaratory judgment and injunctive relief). The statute at issue in this litigation is OHIO REV. CODE ANN. §§ 1333.05-07 (Page 1979). The district court recently denied the defendant state officers' motion to dismiss the complaint or alternatively to abstain from exercising jurisdiction. *Allied Artists Pictures Corp. v. Rhodes*, 473 F. Supp. 560 (S.D. Ohio 1979).

165. Note, *supra* note 152, at 1139-47.

B. *Composers of Music Versus Video-Film Producers  
and Television Networks*

There are two major antitrust cases involving composers suing and being sued by video-film producers and television networks.<sup>166</sup> In order to understand these complex cases, a brief background of the relations between composers and video-film producers is necessary.<sup>167</sup> The Copyright Act of 1897<sup>168</sup> granted composers an exclusive right in the public performance for profit of their work.<sup>169</sup> Because of the number of theaters, cabarets, hotels, and restaurants using their compositions, composers soon found the task of enforcing this right to be beyond their capacity.<sup>170</sup> The American Society of Composers, Authors and Publishers (ASCAP), a so-called performing rights society, was formed in 1914 in order to finance a staff of "music police" who would systematically investigate establishments in which music is played to detect copyright infringements.<sup>171</sup> Under this system, composers grant ASCAP a nonexclusive right to license others to perform their compositions.<sup>172</sup> ASCAP, acting as an agent,<sup>173</sup> then licenses musical compositions under a blanket license which permits the user to perform any or all of ASCAP's compositions.<sup>174</sup> In terms

166. *CBS v. American Soc'y of Composers, Authors and Publishers*, 400 F. Supp. 737 (S.D.N.Y. 1975) (holding that blanket licensing of musical compositions used in television programs did not violate the antitrust laws), *rev'd*, 562 F.2d 130 (2d Cir. 1977) (holding that blanket licensing constituted price fixing and was therefore a per se violation of § 1 of the Sherman Act, 15 U.S.C. § 1 (1976)), *rev'd and remanded sub nom. Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979) (holding that the use of blanket licenses was not per se unlawful and remanding to consider the legality of such licenses under the rule of reason); *Bernstein v. Universal Pictures, Inc.*, 379 F. Supp. 933 (S.D.N.Y. 1974) (dismissing antitrust suit on the ground that the claims lay within the exclusive jurisdiction of the National Labor Relations Board), *rev'd and remanded*, 517 F.2d 976 (2d Cir. 1975) (remanding for reconsideration of the jurisdictional issue). For a discussion of *Broadcast Music, Inc.*, see notes 209-25 *infra*. For a discussion of *Bernstein*, see notes 189-208 *infra*.

167. For a further discussion of the conflict between composers and video-film producers, see Cirace, *supra* note 23.

168. Act of Jan. 6, 1897, ch. 4, 29 Stat. 481 (amending 40 REV. STAT. § 4966) (repealed 1906) (current version at 17 U.S.C. §§ 101-810 (Supp. 1978)).

169. *Id.*

170. See *CBS v. American Soc'y of Composers, Authors and Publishers*, 400 F. Supp. 737, 741 (S.D.N.Y. 1975), *rev'd*, 562 F.2d 130 (2d Cir. 1977), *rev'd and remanded sub nom. Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979).

171. Allen, *The Battle of Tin Pan Alley*, 181 HARPERS 514, 521 (Oct. 1940); Finklestein, *ASCAP as an Example of the Clearing House System in Operation*, 14 BULL. COPYRIGHT SOC'Y 2 (1966); 5,000,000 Songs, FORTUNE, Jan. 1933, at 27.

172. *CBS v. American Soc'y of Composers, Authors and Publishers*, 400 F. Supp. 737, 742 (S.D.N.Y. 1975), *rev'd*, 562 F.2d 130 (2d Cir. 1977), *rev'd and remanded sub nom. Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979).

173. *CBS v. American Soc'y of Composers, Authors and Publishers*, 400 F. Supp. 737, 742 (S.D.N.Y. 1975), *rev'd*, 562 F.2d 130 (2d Cir. 1977), *rev'd and remanded sub nom. Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979).

174. *CBS v. American Soc'y of Composers, Authors and Publishers*, 400 F. Supp. 737, 742 (S.D.N.Y. 1975), *rev'd*, 562 F.2d 130 (2d Cir. 1977), *rev'd and remanded sub nom. Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979).

of economic analysis, the collective selling of the right to perform musical compositions gives composers a great deal of monopoly power.

In 1946, ASCAP sought to increase its revenue from licenses on compositions used in motion pictures.<sup>175</sup> The rates then in effect were set in fixed dollar terms and had remained unchanged since 1933.<sup>176</sup> A contract due to expire in 1947 required each theatre exhibitor to pay ASCAP a graduated annual license fee which was computed according to the number of seats in the exhibitor's theatre.<sup>177</sup> ASCAP proposed to substitute a system in which each theatre paid a standard portion of its gross revenue.<sup>178</sup> Although each theater was to pay at the same rate, the larger first-run theaters would pay much more than they had under the old contract, while the increases for smaller neighborhood theaters would not be as large.<sup>179</sup> The magnitude of the proposed 200% increase in total license fees can be more fully appreciated when compared to the 60% rise in the consumer price index over the same period (1933-1946).<sup>180</sup> In addition, such an arrangement would require purchasers to buy the rights to more compositions than they want at a higher price than they desire to pay.<sup>181</sup> Finally, such licenses could be used to approx-

175. Film Daily, Mar. 28, 1947, at 1, col. 3; Motion Picture Daily, Mar. 24, 1947, at 1, col. 4.

176. Film Daily, Mar. 28, 1947, at 1, col. 3; Motion Picture Daily, Mar. 24, 1947, at 1, col. 4.

177. Variety, Apr. 23, 1947, at 38, col. 1. The annual fee was 10 cents per seat for theatres with less than 800 seats, 15 cents per seat for theatres with 800 to 1599 seats, and 20 cents per seat for theatres with more than 1,600 seats. *Id.*

178. Film Daily, Aug. 22, 1947, at 1, col. 2; Hollywood Rep., Aug. 22, 1947, at 1, col. 4. ASCAP desired to charge an annual fee equal to the dollar amount the licensee would collect at top adult prices from a single performance at full capacity in his theatre. Film Daily, *supra*, at 1, col. 2; Hollywood Rep., *supra*, at 1, col. 4.

179. See *Alden-Rochelle, Inc. v. American Soc'y of Composers, Authors & Publishers*, 80 F. Supp. 888, 895 (S.D.N.Y.), *modified*, 80 F. Supp. 900 (S.D.N.Y. 1948). For a discussion of *Alden-Rochelle*, see notes 185-88 and accompanying text *infra*.

180. U.S. DEPT. OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES 210-11 (1975); Motion Picture Daily, Aug. 25, 1947, at 1, col. 4. Moreover, exhibitors were at the same time experiencing a 15-20% decline in attendance from the peak levels of 1946. Variety, Oct. 1, 1947, at 16, col. 4.

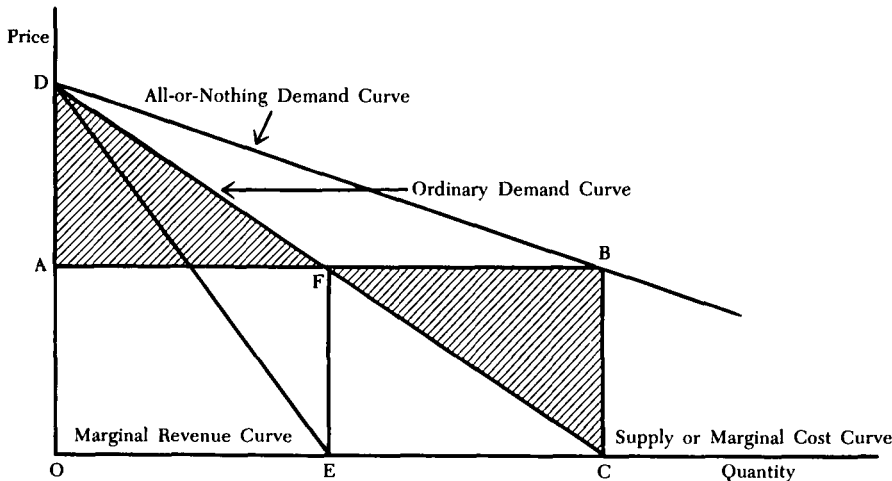
181. See *Alden-Rochelle, Inc. v. American Soc'y of Composers, Authors and Publishers*, 80 F. Supp. 888, 892, 895-96 (S.D.N.Y.), *modified*, 80 F. Supp. 900 (S.D.N.Y. 1948). At the time, many film producers were affiliated with music publishers who were members of ASCAP and shared in the blanket licensing fees paid by exhibitors. *Id.* at 892. If a film producer wanted to use music owned by a member of ASCAP, the producer obtained a license to record the music on the sound track but not to perform it in the theater; thus, the exhibitor had to pay ASCAP for a blanket license to show the film and, thus, the film producer's publisher affiliate benefited. *Id.* at 892-93. If the producer sought to use music not owned by ASCAP, the producer obtained a license both to record and to perform; the cost of the license to perform would then be reflected in the fee charged the exhibitor, and the exhibitor would not have to pay for a separate blanket license. *Id.* at 893. The exhibitors argued that all music should be licensed in this second way, freeing them of any obligation to pay for blanket licenses. *Id.* at 895-96. In

imate the effects of a discriminating monopoly.<sup>182</sup>

Motion picture exhibitors strenuously resisted the proposed increase and, after much negotiation, a compromise was reached between ASCAP and a representative of the majority of theater exhibitors.<sup>183</sup> Some exhibitors, however, continued to fight any "seat

*Alden-Rochelle*, the exhibitors achieved their objective when the court issued a decree which, in effect, mandated the second method of handling performance rights. *Id.* at 903. See notes 185-88 and accompanying text *infra*.

182. The following diagram will be of assistance in explaining how such a result might occur:



Because a monopolist is free to choose the price at which he will sell his product, and thereby determine the quantity he will produce, ordinarily he will opt to maximize his profits by producing that quantity of goods at which marginal cost equals marginal revenue and charging the corresponding price which the demand curve indicates the market will bear at that output. Figure 1 indicates that since the marginal cost of supplying performance rights to existing compositions is zero at all quantities, *see* notes 49-51 and accompanying text *supra*, the monopolistic owner of such rights would choose to sell OE units of performance rights at price OA. The monopolist thus takes in OAFE in total revenue.

If the monopolist can charge each buyer the amount that the buyer is willing to pay, however, he can increase his total revenues. That is, those on the DF portion of the demand curve would be willing to pay more than price OA for each unit of performance rights, and those on the FC portion of the demand curve will purchase performance rights if a price less than OA is charged. The shaded triangles DAF and FBC represent the additional revenues such price discrimination would produce. A monopolist's price discrimination is perfect if the monopolist can charge each buyer the maximum he or she is willing and able to pay. J. ROBINSON, *supra* note 86, 187 n.1.

Although the difficulty of determining how much each buyer is willing to pay makes this result impracticable, the same results can be approximated by a blanket license, under which a buyer must purchase either a certain quantity of performance rights or none at all. Thus, if buyers are given the choice of purchasing either OC units at an average price of OA or nothing at all, then—assuming they buy—the total revenue derived is reflected in OABC. Since triangle DAF is equal to triangle FCB, the total revenue from the all-or-nothing bargain (OABC) is equal to the total revenue of the discriminating monopolist (DOC). *See id.* at 187; W. VICKREY, *supra* note 52, at 104. For a more complete analysis of the effect of the blanket license, *see* Cirace, *supra* note 23, at 285-86.

183. *Alden-Rochelle, Inc. v. American Soc'y of Composers, Authors and Publishers*, 80 F. Supp. 888, 895 (S.D.N.Y.), *modified*, 80 F. Supp. 900 (S.D.N.Y. 1948); Cirace, *supra* note 23, at 291.

tax."<sup>184</sup> In *Alden-Rochelle v. American Society of Composers, Authors and Publishers*,<sup>185</sup> it was held that ASCAP had violated the Sherman Act,<sup>186</sup> and that motion picture exhibitors could no longer be required to buy performance licenses as a transaction separate from the lease of the pictures to which they pertained.<sup>187</sup> Film producers thereafter negotiated directly with individual copyright owners or their publishers for performance rights, and supplied theatres the performance rights along with the films.<sup>188</sup>

### 1. Composers Versus Video-Film Producers

The system prior to *Alden-Rochelle* gave composers monopoly power over theatre exhibitors because ASCAP and another performing rights society, Broadcast Music, Inc. (BMI),<sup>189</sup> were the only major sellers of performance rights to over 16,000 theatres.<sup>190</sup> In contrast, the present system skews bargaining power in the other direction. The dozen or so major video-film producers have monopsony power over most of the myriad composers with whom they deal.<sup>191</sup> Thus, it is not surprising that the composers brought suit against video-film producers.

In *Bernstein v. Universal Pictures, Inc.*,<sup>192</sup> the composers alleged that the video-film producers, acting in concert, refused to con-

184. Film Daily, Feb. 18, 1948, at 1, col. 1.

185. 80 F. Supp. 888 (S.D.N.Y.), *modified*, 80 F. Supp. 900 (S.D.N.Y. 1948). In *Alden-Rochelle*, the operators of 200 motion picture theaters sought treble damages and injunctive relief on the theory that ASCAP's licensing policies violated the federal antitrust laws. *Id.* at 890. The court denied money damages, but held that the theater operators were entitled to injunctive relief. *Id.* at 895-99. In so holding, the court stated that "[a]lmost every part of the [ASCAP] structure, almost all of [ASCAP's] activities in licensing motion picture theatres, involve a violation of the anti-trust laws." *Id.* at 893. See 15 U.S.C. § 1 (1976). See also *M. Witmark & Sons v. Jensen*, 80 F. Supp. 843 (D. Minn. 1948), *appeal dismissed mem. sub nom. M. Witmark & Sons v. Berger Amusement Co.*, 177 F.2d 515 (8th Cir. 1949) (holding that ASCAP's licensing practices violated the antitrust laws).

186. 80 F. Supp. at 893.

187. 80 F. Supp. at 890. See note 181 *supra*.

188. See Timberg, *The Antitrust Aspects of Merchandising Modern Music: The ASCAP Consent Judgment of 1950*, 19 L. & CONTEMP. PROB. 294, 302 (1954).

189. BMI has been described recently as follows:

BMI, a nonprofit corporation owned by members of the broadcasting industry, was organized in 1939, is affiliated with or represents some 10,000 publishing companies and 20,000 authors and composers, and operates in much the same manner as ASCAP. Almost every domestic copyrighted composition is in the repertory either of ASCAP, with a total of three million compositions, or of BMI, with one million.

*Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 5 (1979) (footnote omitted).

190. See *Alden-Rochelle, Inc. v. American Soc'y of Composers, Authors and Publishers*, 80 F. Supp. at 892; *cf.* note 189 *supra* (indicating that ASCAP's and BMI's control of copyright licenses has continued to the present).

191. See notes 192-204 and accompanying text *infra*.

192. 379 F. Supp. 93 (S.D.N.Y. 1974), *rev'd and remanded*, 517 F.2d 976 (2d Cir. 1975).

tract for their services except on certain standard terms reserving to producers the copyright and other ownership rights in words and music composed on their behalf.<sup>193</sup> The terms were contained in three successive contracts negotiated between the Composers and Lyricists Guild of America (CLGA) and the Association of Motion Picture and Television Producers, a trade association of motion picture producers.<sup>194</sup> These standard agreements represented the minimum terms under which composers' services could be obtained.<sup>195</sup> Pursuant to these contracts, film producers owned the copyrights to the works composed.<sup>196</sup> Although each of the successive contracts provided increased wages and shares of the copyright royalties, the producers generally refused to agree to copyright ownership by individual composers.<sup>197</sup>

The economic issues reflected in *Bernstein* can be reduced to two: 1) who should own the copyright to music composed for video-films; and 2) assuming composers retain the copyright to their music, should the remuneration for performance rights be determined prior to production or should it be periodically renegotiated? The characteristics of musical compositions and video-films discussed earlier<sup>198</sup> prevent any simple solution to these problems. The public good characteristic of musical compositions makes the identification of the value of a composer's contribution to the product difficult to determine — *i.e.*, since the marginal cost of using the composition is zero,<sup>199</sup> any price set for the composer's work will be arbitrary and bear no relation to an efficient market price.<sup>200</sup> If, in addition, monopoly or monopsony power is introduced respectively on the composer or producer side of the market, the price established is likely to be not only arbitrary, but either excessive or inadequate.<sup>201</sup>

Since the first issue — the proper ownership of the copyright to music composed for video-films — cannot be determined by any ob-

193. 517 F.2d at 978-79; 379 F. Supp. at 935.

194. 517 F.2d at 978-79; 379 F. Supp. at 934-35.

195. 517 F.2d at 978-79; 379 F. Supp. at 936-37. Pursuant to these terms, composers received at least 50% of the performance fees for their works. *Bernstein v. Universal Pictures, Inc.*, 79 F.R.D. 59, 61 (S.D.N.Y. 1978) (on remand, district court denied motion for a jury trial because of the complexity of the issues). Furthermore, the producer became the owner of the copyright. *Id.* at 61-62. On occasion, however, a composer in greater public favor could command enough bargaining power to enable him to retain the copyright and receive a greater share of the performance fee. *Id.* at 62.

196. *Bernstein v. Universal Pictures, Inc.*, 79 F.R.D. 59, 61-62 (S.D.N.Y. 1978). See also note 195 *supra*.

197. 517 F.2d at 979; 379 F. Supp. at 937. See also note 195 *supra*.

198. See notes 36-105 and accompanying text *supra*.

199. See notes 49-51 and accompanying text *supra*.

200. See notes 52-54 & 68-70 and accompanying text *supra*.

201. See notes 98-100 and accompanying text *supra*.

jective criterion, the determination must be made politically.<sup>202</sup> On the principle that such issues should be resolved against those with market power, the ownership of the copyright should be awarded to the composers. This solution would be especially appropriate if all terms concerning recording and future performance rights were to be finally negotiated prior to production;<sup>203</sup> the producer benefits by fixing a cost for the film early in its production, and the composer benefits since ownership of copyright means that he retains the exclusive right to all revenue derived from the music when performed outside the movie theatre.

Once the ownership of the copyright is allocated to the composer, the licensing fee can be determined in one of four ways: 1) by final negotiation with individual composers prior to production; 2) by negotiation with individual composers subject to periodic renegotiation; 3) by collective bargaining with composers prior to production; or 4) by collective bargaining with composers subject to periodic renegotiation.

Prior to production of a video-film, the individual composers are not only without monopoly power themselves, but are subject to the monopsony power of the highly concentrated video-film producers.<sup>204</sup> Thus, requiring final negotiation with the individual composers prior to production would unfairly limit the composers' return on their work.

If, however, the composer has the right to renegotiate his share of the proceeds from a video-film after production — when substitution is no longer feasible<sup>205</sup> — the composer is in a kind of monopoly position with respect to that particular film. To prohibit the producers from securing contracts establishing an enduring price for the performance rights to music used in soundtracks is to enable the composers to exact unfairly high licensing fees after production. Moreover, if composers were permitted to bargain collectively when renegotiating performance license fees, they would wield the same kind of bargaining power held to be unlawful in *Alden-Rochelle*.<sup>206</sup>

202. See notes 98-103 and accompanying text *supra*.

203. See notes 204-08 and accompanying text *infra*.

204. See note 191 and accompanying text *supra*. A composer's position is not aided by any supposed "uniqueness" of his artistic product. See *CBS v. American Soc'y of Composers, Authors and Publishers*, 400 F. Supp. 737, 771, 783 (S.D.N.Y. 1975), *rev'd*, 562 F.2d 130 (2d Cir. 1977), *rev'd and remanded sub nom. Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979). The district court in *BMI* noted that video-film producers view compositions as "substantially interchangeable," 400 F. Supp. at 771, or even "fungible." *Id.* at 783.

205. Substitution of different music would be extremely costly once the music is affixed to a soundtrack and many film prints have been produced.

206. See notes 166-88 and accompanying text *supra*.



Therefore, to prevent the composers from exerting such power, a composer's share in the profits should be determined prior to production. Collective bargaining should be employed, however, to ameliorate the disparity in bargaining power between individual composers and video-film producers. The minimum basic agreements involved in *Bernstein* were negotiated on this basis and provide precedent for such an arrangement.<sup>207</sup> Contracts between producers and performing artists, requiring that the latter be paid residuals — *i.e.*, requiring payment each time a video-film is run — are similarly negotiated.<sup>208</sup>

## 2. Musical Performing Rights Societies Versus the Television Networks

The *Alden-Rochelle* decree prohibited the performing rights societies from engaging in collective bargaining with the owners of motion picture theaters on behalf of the copyright owners.<sup>209</sup> As a result of *Alden-Rochelle*, film producers negotiate with individual composers for the performance rights to their compositions and supply those rights to the theater owners along with the film.<sup>210</sup> The case, however, did not involve the different medium of television. Producers making video-films for television continued to obtain licenses which only covered the recording of music on soundtracks, and the networks were thus required to purchase blanket performance licenses in order to broadcast the films.<sup>211</sup> CBS then challenged the blanket performance licence in *Broadcast Music, Inc. v. CBS*,<sup>212</sup> on the grounds that it violated the Sherman Act's ban on price fixing and tying contracts.<sup>213</sup> Although the network would have

207. See *Bernstein v. Universal Pictures, Inc.*, 517 F.2d at 978-79; 379 F. Supp. at 936-37; notes 194-97 and accompanying text *supra*. In 1971, the composers launched an unsuccessful strike and simultaneously filed a charge with the National Labor Relations Board (NLRB) alleging that the refusal of the Association of Motion Picture and Television Producers to bargain with the CLGA over copyright ownership violated § 8(a)(3) of the National Labor Relations Act. 517 F.2d at 979. See 29 U.S.C. §§ 152(3)-(5), 158(a)(13) (1976); see notes 194-96 and accompanying text *supra*. The CLGA subsequently withdrew its unfair labor practice charge recognizing that the NLRB lacked jurisdiction over it since CLGA members are independent contractors rather than employees. See 517 F.2d at 980.

208. OWEN, *supra* note 47, at 34-35, 37, 42.

209. 80 F. Supp. at 903.

210. See notes 161-88 and accompanying text *supra*. See also note 181 *supra*.

211. *CBS v. American Soc'y of Composers, Authors and Publishers*, 400 F. Supp. 737, 742-43 (S.D.N.Y. 1975), *rev'd*, 562 F.2d 130 (2d Cir. 1977), *rev'd and remanded sub nom. Broadcast Music, Inc. v. CBS*, 441 U.S.1 (1979). For a discussion of *Broadcast Music, Inc.*, see notes 212-25 and accompanying text *infra*.

212. 441 U.S. 1 (1979). For further discussion of *Broadcast Music, Inc.*, see generally Cirace, *supra* note 23.

213. 441 U.S. at 6. See Sherman Act §§ 1-2, 15 U.S.C. §§ 1-2 (1976). CBS sought injunctive relief for the alleged antitrust violations and a declaration of copyright misuse. 441 U.S. at 6 n.7.

been satisfied with an injunction merely enjoining ASCAP and BMI from offering blanket licenses—thereby allowing the networks to seek performance licenses from individual composers—CBS also sought to substitute a “per use” system.<sup>214</sup> Under such a system, ASCAP and BMI would be required to license compositions in the ASCAP and BMI pools in accordance with a schedule of fees established under court supervision.<sup>215</sup> Since television networks produce very few of the video-films they broadcast, relying instead on the same producers who supply theatres,<sup>216</sup> such a decree would probably lead to a system like that instituted in the wake of *Alden-Rochelle*,—i.e., video-film producers would supply performance rights to the networks along with the video-films.<sup>217</sup>

In *Broadcast Music, Inc.*, the Supreme Court held that the collective selling of musical performance rights to television networks is not per se illegal, but must be judged by a “rule of reason” analysis.<sup>218</sup> The Supreme Court’s explicit reluctance to give a definitive decision is understandable given the presence of the income distribution problem analyzed above.<sup>219</sup> The problem is further complicated by the kind of market structure involved: a bilateral monopoly.<sup>220</sup> In such a market, since neither the buyer nor the seller can dominate the other, price and output are indeterminate, de-

214. 400 F. Supp. at 747. See Cirace, *supra* note 23, at 297-98.

215. 400 F. Supp. at 747 n.7.

216. *Id.* at 742.

217. See notes 166-88 & 209-10 and accompanying text *supra*.

218. 441 U.S. at 16. The Court reversed the judgment of the Second Circuit which had held that in issuing blanket licenses to television networks, the performing rights societies were engaged in price fixing which is illegal per se under the Sherman Act. 562 F.2d at 140. See Sherman Act § 1, 15 U.S.C. § 1 (1976). Having found a per se violation, the court of appeals had not needed to consider the “rule of reason” analysis and, therefore, the Supreme Court remanded. 441 U.S. at 16. On remand, applying the “rule of reason” approach, the Second Circuit held that the issuance of blanket, nonexclusive licenses did not unreasonably restrain trade in violation of the Sherman Act. *CBS v. American Soc’y of Composers, Authors and Producers*, 48 U.S.L.W. 2713 (2d Cir. May 6, 1980), *implementing Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979).

219. See notes 36-105 and accompanying text *supra*. The *Broadcast Music, Inc.* Court stated that “we have some doubt—enough to counsel against application of the *per se* rule—about the extent to which this practice threatens . . . competitive pricing as a free market’s means of allocating resources.” 441 U.S. at 23 (citation omitted).

220. See Cirace, *supra* note 23, at 281-85. Actually, the market structure involved in the *Broadcast Music, Inc.* situation is a bilateral oligopoly—i.e., several sellers confronting several buyers. *Id.* at 281. There are two major domestic sellers (ASCAP and BMI), and three major buyers (CBS, NBC, and ABC). See 441 U.S. at 4-5. Nevertheless, the market structure of a bilateral monopoly is substantially analogous to a bilateral oligopoly because both ASCAP and BMI have substantial monopoly power and the television networks have substantial monopsony power. Moreover, bilateral monopoly and bilateral oligopoly are analytically indistinguishable because price and output in both market structures are indeterminate and depend upon the bargaining rules and the strategy employed. See W. VICKREY, *supra* note 52, at 115-16.

pending upon bargaining rules and strategy.<sup>221</sup> Thus, if composers have the right to periodically renegotiate performance rights to existing video-films on a collective basis, they will have great monopoly power. The previous discussion of the conflict over the separate sale price of performing rights to music for films exhibited in theatres established that until antitrust actions such as *Alden-Rochelle* loosened their grip on that medium, the performing rights societies used their collective power through blanket licensing to approximate the discriminating monopoly solution.<sup>222</sup> Continuing to permit unregulated blanket licensing of performance rights to television networks would simply perpetuate the existing monopoly power of the composers over the television medium.

On the other hand, the major television networks have great monopsony power over video-film producers<sup>223</sup> who, in turn, have monopsony power over individual composers.<sup>224</sup> Thus, if the networks can require video-film producers to supply performance rights along with the video-films, and if the individual composers lack the power to periodically renegotiate their agreements with the producers, the networks can not only avoid the monopoly power of the performing rights societies, but can also assert monopsony power over individual composers to obtain a lower price through their monopsony power over video-film producers. Moreover, given the bilateral monopoly market structure plus the public good aspect of video-films, there is no market solution to the dilemma of whether to grant composers monopoly power via renegotiation rights or to permit television networks to exercise their monopsony power in the manner just discussed.<sup>225</sup>

The only viable solution, short of having the Copyright Royalty Tribunal<sup>226</sup> set the price for performance rights on the basis of politi-

221. W. VICKREY, *supra* note 52, at 115-16; Cirace, *supra* note 23, at 283-84; note 220 *supra*.

222. See notes 164-88 and accompanying text *supra*.

223. See notes 114-44 and accompanying text *supra*.

224. See notes 189-208 and accompanying text *supra*.

225. See Cirace, *supra* note 23, at 281-85; notes 47-103 and accompanying text *supra*. In the analogous situation of labor negotiations between an industrywide labor union and a corporate giant, a middle ground is possible because marginal cost is not zero. For example, when the United Auto Workers union bargains with General Motors over the wage rate, the marginal cost to workers of foregoing leisure or unemployment benefits is weighed against the value of the marginal hour of labor to the employer. A. REES, *THE ECONOMICS OF WORK AND PAY*, 131-36 (2d ed. 1979); W. VICKREY, *supra* note 52, at 116.

226. The Copyright Act of 1976, established the Copyright Royalty Tribunal, see 17 U.S.C. §§ 801-810 (Supp. 1978), to consist of five commissioners appointed for seven year terms by the President with the advice and consent of the Senate. *Id.* § 802. The tribunal is empowered to adjust copyright royalty rates with respect to compulsory licenses for the right to record phonorecords sold to the public, *id.* § 115, and compulsory licenses for juke boxes, *id.* § 116. It

cal considerations and adjusted historical prices,<sup>227</sup> is to attempt to develop a competitive market solution through government intervention. To be successful, such an attempt must diminish the effect of the monopoly elements in the video-film industry. First, competition within the television medium can be fostered by allowing cable television to compete with network broadcasters without restraints on the content of either's programming. In return, cable television stations would be subject to full copyright liability to video-film producers for all distant signal importation.<sup>228</sup> Second, video-film producers should be required to supply networks with the performance rights to music recorded on soundtracks along with the video-film. Finally, composers should bargain collectively with video-film producers prior to production for a minimum share in all future profits derived from video-films on which their compositions are recorded. These recommendations attempt to strike the same balance sought in the recommendations proposed above for the conflict between the composers and the video-film producers, and are based on the same reasoning.<sup>229</sup>

On the other hand, with respect to the performing rights for compositions recorded on *existing* video-films to be shown on broadcast or cable television, the Copyright Royalty Tribunal should be given authority to set license fees based upon historical prices. Since any price established for licensing fees is arbitrary and unrelated to any objectively determined cost of the product,<sup>230</sup> basing such fees on historical price would both avoid the unresolvable wrangling of renegotiation and preserve established market expectations. As the video-films in this category become a smaller percentage of the total number shown, the licensing fees should reflect that fact.

is also authorized to determine the proper distribution of royalties for public broadcasting if performing rights societies and broadcasters fail to agree, *id.* § 118, and, within prescribed limits, to adjust compulsory royalty rates for cable television. *Id.* § 111(c). The Copyright Act could be amended to authorize the tribunal to set performance license fees for commercial television as well. For other duties of the tribunal, *see* notes 63-66 and accompanying text *supra*.

227. Historical price has already been used in one context: in the implementation of the 1950 consent decree which ASCAP signed with the United States Government empowering the federal district court to set a reasonable fee for performing rights should ASCAP and a licensee fail to agree. *United States v. American Soc'y of Composers, Authors and Publishers*, [1950-1951] Trade Cas. ¶ 62,595, at 63,750, 63,754 (1950). The court has never exercised this power, but has instead preferred to take the role of mediator. *See* Garner, *supra* note 23, at 127-28. However, the court has set interim fees in this manner, pursuant to authority also conferred by the decree. [1950-1951] Trade Cas. at 63,754. *See* Garner, *supra* note 23, at 145. Given the wide range of possible prices for a product whose marginal cost is zero, the court, if it did choose to set a price, would probably choose the historical price with minor adjustments.

228. *See* notes 231-56 and accompanying text *infra*.

229. For the reasoning underlying these recommendations, *see* notes 198-208 and accompanying text *supra*.

230. *See* notes 36-105 and accompanying text *supra*.

### C. *The Conflict Over Copyright Liability for Imported Broadcast Signals*

In *Fortnightly Corp. v. United Artists Television, Inc.*<sup>231</sup> and in *Teleprompter Corp. v. CBS*,<sup>232</sup> the Supreme Court held that cable systems incurred no copyright liability under the Copyright Act of 1909<sup>233</sup> for the retransmission of local and distant broadcast signals to cable system subscribers.<sup>234</sup> Nevertheless, four policy studies by independent commissions<sup>235</sup> and the 1971 Consensus Agreement between broadcasters, cable systems, and video-film producers agreed that some form of copyright liability should exist for programs imported by cable systems.<sup>236</sup> The Copyright Act of 1976<sup>237</sup> adopted this suggestion and imposes copyright liability under certain circumstances.<sup>238</sup> Pursuant to the statute, a cable system is subject to compulsory licensing, whereby the cable system obtains the right to retransmit the signals of any broadcast station licensed by the FCC in return for an annual payment of royalties to the Copyright Royalty Tribunal according to a fee schedule fixed by the statute.<sup>239</sup> The Copyright Royalty Tribunal then divides the collected royalties among the claiming copyright holders.<sup>240</sup>

The compulsory license available to cable systems, however, is limited to retransmissions of signals which FCC regulations permit cable systems to carry in the first place.<sup>241</sup> Under current FCC reg-

231. 392 U.S. 390 (1968) (holding that cable systems have no copyright liability for retransmitting signals carrying copyrighted motion pictures).

232. 415 U.S. 394 (1974) (holding that cable systems have no copyright liability for retransmitting distant signals carrying copyrighted programs).

233. 17 U.S.C. § 1-216 (1976).

234. 415 U.S. at 405, 414-15; 392 U.S. at 400-02. The Court reasoned that cable systems, in retransmitting broadcast signals, do not "perform" the copyrighted material within the meaning of § 1(c), (d) of the Copyright Act of 1909, 17 U.S.C. § 1(c)-(d). 415 U.S. at 402-14; 392 U.S. at 395-402. For a discussion of the effect of the Copyright Act of 1976, 17 U.S.C. §§ 101-810 (Supp. 1978), see notes 237-41 and accompanying text *infra*.

235. STAFF OF SUBCOMM. ON COMMUNICATIONS, HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 94TH CONG., 2D SESS., CABLE TELEVISION: PROMISE VERSUS REGULATORY PERFORMANCE (Comm. Print 1976); CABINET COMM. ON CABLE COMMUNICATIONS, CABLE, REPORT TO THE PRESIDENT (1974); RESEARCH AND POLICY COMM. OF THE COMM. FOR ECONOMIC DEVELOPMENT, BROADCASTING AND CABLE TELEVISION: POLICIES FOR DIVERSITY AND CHANGE (1975); SLOAN COMM'N ON CABLE COMMUNICATIONS, ON THE CABLE (1971).

236. Cable Television Report and Order, 36 F.C.C.2d 143, 284, app. D (1972). For further discussion of the 1971 Consensus Agreement, see GOVERNMENT AFFAIRS STUDY, *supra* note 27; Lapiere, *supra* note 22; Verrill, *CATV's Emerging Role: Cablecaster or Common Carrier*, 34 L. & CONTEMP. PROB. 586 (1969).

237. 17 U.S.C. §§ 101-810 (Supp. 1978).

238. 17 U.S.C. § 111 (Supp. 1978). See note 241 *infra*.

239. *Id.* § 111(c), (d).

240. *Id.* § 111(d).

241. *Id.* § 111(c) (1), (2). Section 111(c) (2) provides that the "willful and repeated" retransmission of broadcast signals is an actionable infringement and subject to remedy under the

ulations, cable systems are 1) required to carry certain broadcast signals;<sup>242</sup> 2) limited in carrying distant commercial signals;<sup>243</sup> and 3) required to delete particular network or syndicated programs and certain sports events from signals which are carried.<sup>244</sup> The FCC's recognized jurisdiction over cable systems has been sharply confined by the courts, however, which have struck down several FCC regulations on the ground that the Commission either lacked, or failed to establish, jurisdiction to promulgate such rules.<sup>245</sup>

Now, after more than a decade of what the FCC has described as "tentative" regulation,<sup>246</sup> the Commission is conducting a rulemaking proceeding intended to eliminate its distant signal and syndicated exclusivity rules for cable systems.<sup>247</sup> Cable systems could thus re-

Copyright Act of 1976 "where the carriage of the signals comprising the secondary transmission is not permissible under the rules, regulations, or authorizations of the Federal Communications Commission." *Id.* § 111(c) (2).

242. *See, e.g.*, 47 C.F.R. §§ 76.57(a), .59(a), .61(a), .63(a) (1979) (requiring cable systems in all markets to carry certain signals upon the request of the transmitting station; the extent of the requirements varies with the size of the market and its location relative to the transmitting broadcast stations).

243. *See, e.g., id.* §§ 76.59(b), .61(b), .63(b).

244. *See, e.g., id.* §§ 76.92-.99, .151-.161.

245. The Supreme Court has held that the FCC has jurisdiction over cable systems under the Communications Act of 1934, 47 U.S.C. §§ 151-609 (1976), but its authority is restricted to that "reasonably ancillary to the effective performance of the [FCC's] various responsibilities for the regulation of television broadcasting." *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968). For examples of FCC regulations of cable television held to lie beyond the bounds of this authority, *see, e.g.*, *FCC v. Midwest Video Corp.*, 440 U.S. 689, 696 (1979) (invalidating regulations requiring cable systems to carry at least 20 channels and to dedicate a minimum number of channels to public, governmental, educational, and leased access); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 28-31 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977) (setting aside regulations prohibiting cable systems from exhibiting certain feature films and sports events carried by broadcast television on the ground that the FCC had not established jurisdiction). On the other hand, courts have often upheld FCC regulation of cable systems. *See, e.g.*, *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) (regulation requiring cable systems with 3,500 or more subscribers to provide facilities for the local production and transmission of original programs upheld); *Treasure Valley CATV Comm. v. United States*, 562 F.2d 1182 (9th Cir. 1977) (restrictions on the number of broadcast stations carried by a cable system upheld); *Carter Mt. Transmission Corp. v. FCC*, 321 F.2d 359 (D.C. Cir.), *cert. denied*, 375 U.S. 961 (1963) (refusal to grant a cable system the facilities to import distant broadcast signals upheld where FCC had found that such importation might destroy a local television broadcast station).

246. *See Inquiry into the Economic Relationship Between Television Broadcasting and Cable Television*, 71 F.C.C.2d 632, 645 (1979) (report).

247. *See Cable Television Syndicated Program Exclusivity Rules*, 71 F.C.C.2d 1004 (1979) (notice of proposed rulemaking). The distant signal rules limit the number of broadcast signals a cable system may carry according to the size of the market. *See* 47 C.F.R. §§ 76.57-.63 (1979). The FCC has listed four grounds for such regulation:

- (1) as a means of assuring the public against a net loss of television service as a consequence of cable-created audience losses which would undermine the economic support of television stations and in the process deprive the poor and those living in areas unserved by cable of video services;
- (2) as necessary to support the broadcast television station allocations policy with its emphasis on local service;
- (3) as a means of eliminating what was perceived to be the unfair means by which cable television systems competed with local broadcasters, and
- (4) as necessary to assure against injury to the continued production of television programming.

transmit distant broadcast signals and syndicated programs without limitation, other than the copyright liability arising under the Copyright Act of 1976.<sup>248</sup> The networks have opposed this proposal.<sup>249</sup> In addition, some industry groups have urged the FCC to require cable systems to obtain the consent of the broadcast station whose signal is being retransmitted.<sup>250</sup> This suggestion has received the support of the video-film producers and major league professional sports.<sup>251</sup>

The battles over the proper extent of cable system regulation and the price that cable systems ought to pay for the use of the broadcast signals they retransmit are reflections of the broader conflict over income distribution in the video-film industry. These issues are complicated by the competitive threat posed by unrestricted cable systems to the monopoly position of broadcast television networks. Technology has also undermined the allocation of power preserved by existing regulatory limitations on cable systems since satellite transmission of microwave signals is becoming ever more economical and may make satellite-connected cable television networks feasible and competitive.<sup>252</sup>

The conflict may be resolved by Congress, however, where members of both houses have introduced legislation<sup>253</sup> substantially

71 F.C.C.2d at 1021 (footnotes omitted). For a discussion of the history and nature of these rules, see *Inquiry into the Economic Relationship Between Television Broadcasting and Cable Television*, 71 F.C.C.2d 632, 654-59 (1979) (report).

The syndicated exclusivity rules generally accord exclusive rights to carry certain programs to major market television stations and forbid cable systems from retransmitting such programs via imported distant signals. See 47 C.F.R. §§ 76.151-161 (1979). The supporting rationale is the same as that used to support regulation of distant signal importation. See 71 F.C.C.2d at 1021, *quoted supra*. For a discussion of the history of the syndicated exclusivity rules, see *Cable Television Syndicated Program Exclusivity Rules*, 71 F.C.C.2d 951, 956-64 (1979) (report).

248. See *Cable Television Syndicated Program Exclusivity Rules*, 71 F.C.C.2d 1004, 1026, 1054 (1979); note 238 and accompanying text *supra*; note 241 *supra*.

249. See *Cable Television Syndicated Program Exclusivity Rules*, 71 F.C.C.2d 1004, 1027-28.

250. See *id.* The petition containing this recommendation was actually filed by the National Telecommunications and Information Administration of the United States Department of Commerce, *id.* at 1027, but broadcast interests were described as "generally receptive" to this suggestion. *Id.* at 1030. Those supporting such a requirement agree that "the present marketplace is distorted because cable television is permitted to function outside the television program distribution marketplace . . . [so that] a retransmission consent policy might be a constructive, workable approach to bring cable into this marketplace." *Id.* Indeed, the Association of Independent Television Stations perceived such a regulation as "'an acceptable form of copyright'" *Id.* (source of quotation not cited).

251. *Id.* at 1031-32. Although the FCC denied the petition of the National Telecommunications and Information Administration, *id.* at 1033-34, 1054, it did not altogether foreclose further consideration of a retransmission consent requirement; indeed, it invited comments on "all aspects of retransmission consent including details on how it would work." *Id.* at 1035.

252. See *id.* at 1015-16; note 94 *supra*.

253. H.R. 3333, 96th Cong., 1st Sess. (1979); S. 622, 96th Cong., 1st Sess., 125 CONG. REC. S2,525 (daily ed. Mar. 12, 1979); S. 611, 96th Cong., 1st Sess. (1979). See also H.R. 13015, 95th Cong., 2d Sess. (1978) (forerunner of H.R. 3333).

amending or entirely replacing the Communications Act of 1934.<sup>254</sup> One of these acts, the proposed Communications Act of 1979,<sup>255</sup> would eliminate FCC restrictions on distant signal importation by removing the Commission's jurisdiction over cable systems, and would also subject distant signal importation to full copyright liability.<sup>256</sup> If such proposals are incorporated into final legislation amending or replacing the Communications Act of 1934, the income distribution problem in the video-film industry will be alleviated. Allowing unrestricted competition between cable and broadcast television may result in additional producers of video-films to supply them. As the video-film industry becomes more competitive, the ability of any interest group to take advantage of the industry's public good and uncertainty of demand characteristics in order to shift the distribution of income in the group's favor will diminish. Thus, passage of legislation such as the Communications Act of 1979 may not only lead to greater competition and consumer choice, but may also reduce the need for government intervention in the distribution of income.

#### IV. CONCLUSION

The five conflicts over income distribution in the video-film industry<sup>257</sup> are reflections of four economic characteristics of the industry: 1) the uncertainty of demand for the products at the time the decisions are made to invest in their production;<sup>258</sup> 2) the public good characteristic of the product;<sup>259</sup> 3) the tendency within the industry toward natural monopoly or substantial concentration;<sup>260</sup> and 4) the common product characteristic of video-films.<sup>261</sup> As a result of the public good characteristic of the products and the uncertainty of

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254. 47 U.S.C. §§ 151-609 (1976).

255. H.R. 3333, 96th Cong., 1st Sess. (1979).

256. *Id.* § 453. Section 453 provides in pertinent part:

(a) No person within the jurisdiction of the United States shall:

(2) rebroadcast or otherwise retransmit any program or portion of a program originated by a broadcast station without the express authority of such station or of the person who owns or controls the exclusive rights to the program involved.

(b) Except as otherwise provided in subsection (a), the Commission shall not have any authority to establish or enforce any restriction, requirement, or other rule or regulation relating to the retransmission by any person or any program or portion of a program originated by a broadcast station. No State or unit of general local government shall have any authority to establish or enforce any such restriction, requirement, or other rule or regulation.

*Id.*

257. See notes 17-21 & 106-256 and accompanying text *supra*.

258. See notes 40-46 and accompanying text *supra*.

259. See notes 47-71 and accompanying text *supra*.

260. See notes 72-103 and accompanying text *supra*.

261. See notes 104-05 and accompanying text *supra*.



demand for them, no objective market criteria exist by which to determine the prices of the goods produced.<sup>262</sup> The tendency toward substantial concentration within the industry then permits those with market power to use these characteristics to affect the prices of the products so as to obtain a higher proportion of the revenues from them.<sup>263</sup> Government intervention is required to redress inequities in the balance of market power to permit a fairer distribution of income among the various interests.<sup>264</sup>

After examining five areas of conflict within the video-film industry, this article has suggested means of adjusting the allocation of market power.

First, in light of the monopsony power of the major television networks over video-film producers, there should be substantial restrictions on the permissible duration of exclusive exhibition contracts demanded of producers by the networks. Since the four-year limit contained in the consent decree between the Department of Justice and NBC provides little change from the usual duration of negotiated exclusivity contracts, the government's proposed two-year limitation would more effectively remedy the weakness in the video-film producers' bargaining position.<sup>265</sup>

Second, in light of the video-film producers' monopoly power over exhibitors, video-film producers should be prohibited from requiring motion picture exhibitors to bid blind.<sup>266</sup>

Third, composers should hold the copyright to the works they produce for video-film producers and television networks, but they should be required to bargain collectively prior to production for their share of all future profits earned from the video-films using their music.<sup>267</sup> The Copyright Royalty Tribunal should be given the authority to set licensing fees for existing video-films based on historical prices.<sup>268</sup>

Fourth, in order to reduce the present monopsony power of broadcast television networks over composers and video-film producers, regulations limiting cable systems in the importation of distant broadcast signals should be removed to allow competition between cable and broadcast television.<sup>269</sup> At the same time, to ensure that

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262. See notes 47-53 & 68-70 and accompanying text *supra*.

263. See notes 98-103 and accompanying text *supra*.

264. See notes 98-103 and accompanying text *supra*.

265. See notes 125-44 and accompanying text *supra*.

266. See notes 145-65 and accompanying text *supra*.

267. See notes 198-208 & 218-30 and accompanying text *supra*.

268. See notes 218-30 and accompanying text *supra*.

269. See notes 241-51 and accompanying text *supra*.

cable systems compete for video-films on the same level, cable systems should be subject to full copyright liability.<sup>270</sup>

Because of the economic characteristics of this industry, any assignment of the market position to any interest must be the arbitrary result of political choice. To achieve a more equitable distribution of income in the industry requires recognition that any such distribution is ultimately determined by government intervention and cannot be expected to arise naturally from market forces.

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270. See notes 252-56 and accompanying text *supra*.