

Catholic University Law Review

Volume 34
Issue 3 Spring 1985

Article 7

1985

The Sequential Distribution of Television Programming in a Dynamic Marketplace

David E. Leibowitz

Follow this and additional works at: <https://scholarship.law.edu/lawreview>

Recommended Citation

David E. Leibowitz, *The Sequential Distribution of Television Programming in a Dynamic Marketplace*, 34 Cath. U. L. Rev. 671 (1985).

Available at: <https://scholarship.law.edu/lawreview/vol34/iss3/7>

This Article is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.

THE SEQUENTIAL DISTRIBUTION OF TELEVISION PROGRAMMING IN A DYNAMIC MARKETPLACE

*David E. Leibowitz**

Motion pictures and other television programming are expensive to create, produce, and distribute. Few films recoup all of their costs, let alone garner any profits, from their initial release. Success, and the revenues that measure it, are ordinarily attained only through the sequential distribution of television programming in primary and ancillary markets.

Throughout the 1960's, the sequential distribution process was rather simple. Theatrical motion pictures were first exhibited in theaters, then broadcast on national network television, and finally, syndicated to individual television stations throughout the country. The distribution of made-for-television movies, however, began the process on the second rung of the ladder. During the 1970's, the process grew increasingly complex. Cable television, multipoint distribution service (MDS)¹ systems, and subscription television emerged as significant entertainment media. Today, fixed and direct broadcast satellite technology, satellite master antenna television services (SMATV),² cable pay-per-view, low power television, multichannel MDS systems, and home video add a wide variety of viewing choices. The

* Partner, Wiley and Rein, Washington, D.C.; Adjunct Professor, Communications Law Institute, Columbus School of Law, The Catholic University of America; Adjunct Professor, University of Miami School of Law; Chairman of the American Bar Association Patent, Trademark and Copyright Section Subcommittee on Satellite Carriers. Mr. Leibowitz was formerly a Policy Planning Advisor to the Register of Copyrights, United States Copyright Office, Washington, D.C. B.S. 1973, Boston University; J.D. 1976, State University of New York at Buffalo.

1. Multipoint Distribution Service (MDS) provides carrier microwave service for closed circuit television or nonvideo transmissions. An MDS station transmits omnidirectionally from a fixed location to multiple fixed receivers with directional antennas. The MDS transmitter has a limited distribution range of about 25 miles. See Stern, Krasnow & Senkowski, *The New Video Market Place and the Search for a Coherent Regulatory Philosophy*, 32 Cath. U.L. Rev. 545-49 (1983).

2. Satellite Master Antenna Television Services (SMATV) are a hybrid of satellite and cable technologies. They are private nonfranchised cable systems that receive their programming via the use of a satellite receiving dish (usually on the roof of an apartment building). The programming is distributed to subscribers over a coaxial cable. SMATV systems usually serve large multidwelling units such as apartment and condominium complexes in markets where regular cable services have not developed. See Hammond, *Now You See It, Now You*

advent of these new technologies, however, requires thoughtful analysis by program suppliers to determine their proper positioning in the distribution process.

The ordering of distribution may significantly affect the overall market value of the motion pictures. In selecting an order for the sequential distribution of motion pictures and other television programming, it is essential to have a complete understanding of how copyright and telecommunications schemes operate. Copyright, through public performance, reproduction, and distribution rights, is the engine that propels the program production industry. Telecommunications law sets the rules of the media highways. Together, they create a labyrinth of exclusive rights, compulsory licenses, prohibitions, and exemptions. This article will examine some of these rights, limitations, and prohibitions.

I. THE COPYRIGHT ACT AND THE PROGRAM DISTRIBUTION MARKETPLACE

A. *The Public Performance Right*

Section 106 of the Copyright Act of 1976 (Copyright Act)³ specifies a penumbra of exclusive rights afforded to owners of copyrighted works. Under subsection (4), the copyright owner of motion pictures and other audiovisual works has the exclusive right to perform publicly the copyrighted work. This broad right, however, is limited by a number of exceptions and limitations specified throughout chapter 1 of the Copyright Act.

Several key terms set forth in section 101 of the Copyright Act help define

Don't: Minority Ownership In An Unregulated Video Marketplace, 32 CATH. U.L. REV. 633, 635 n.6 (1983). See also Stein, Krasnow & Senkowski, *supra* note 1, at 543.

3. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C. § 106 (1982)). Section 106 provides:

Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

17 U.S.C. § 106 (1982).

the scope of the public performance right. "Perform", "publicly", and "transmit" are defined as follows:

To 'perform' a work means . . . in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible. . . .

To perform . . . a work 'publicly' means—

(1) to perform . . . it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance . . . of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times.

To 'transmit' a performance . . . is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.⁴

Based upon these definitions it is clear that "public performances" include theater exhibitions of motion pictures, retransmission activities of cable television systems, and performances of works in "semi-public" places such as clubs, lodges, factories, summer camps and schools.⁵ What it means, however, to fall within the scope of the public performance right is changing.

The exhibition of motion pictures in theaters through film prints is, for example, subject to the exclusive right of public performance. These prints are traditionally rented to theaters under restrictive conditions governing their use, retention, and ultimate return. As a result, the theatrical distribution process provides a relatively secure means of exploitation. In the future, however, the security of theatrical distribution may be jeopardized if film distributors begin to transmit motion pictures to theaters either for simultaneous or delayed exhibition. Once copyrighted materials are embodied in transmission media, a host of telecommunications and copyright issues governing the scope of their protection and use apply. These issues will be discussed at length in subsequent sections.

4. *Id.* § 101.

5. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 64 (1976) [hereinafter cited as HOUSE REPORT].

B. *The Communications Act of 1934*

The Communications Act of 1934 (Communications Act)⁶ complements the copyright law and establishes a program distribution marketplace. Section 325(a) of the Communications Act authorizes program suppliers to control the broadcast licensing of their product by prohibiting broadcasting stations from rebroadcasting "the program or any part thereof of another broadcasting station without the express authority of the originating station."⁷

Section 705 of the Communications Act (formerly section 605), titled "Unauthorized Publication or Use of Communications,"⁸ provides similar protection for nonbroadcast programming. This section prohibits the unauthorized interception and use of signals not broadcast "for the use of the general public." Section 705 also establishes a new regime governing interception for private viewing of satellite signals. Additionally, Congress recently amended this section to provide for civil remedies, as well as criminal liability, for its violation.⁹ These amendments, however, will be discussed later.

Together, sections 325(a) and 705 appear to provide rigorous protection against the rebroadcasting and other redistribution of programming. However, these sections also effectively remove telecommunication obstacles preventing the redistribution by all distributors (except broadcast stations) of unscrambled broadcast signals intended for use by the general public. Copyright implications for these acts may, nevertheless, remain.

II. THE SIGNIFICANCE OF SCRAMBLED BROADCAST SIGNALS

Most broadcast stations transmit unscrambled broadcast signals. The programming contained in these signals is freely available to all those with ordinary television receiving sets. Some broadcast stations, however, transmit part of their programming in scrambled form. These stations, sometimes referred to as "subscription television" or "STV", carry current or recent vintage motion pictures, and popular sporting events for a fee. In exchange for this fee, STV subscribers receive a decoder and authorization to view privately the programs in unscrambled form.

Although STV signals emanate from television broadcast stations, several

6. Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (1934) (codified as amended at 47 U.S.C. §§ 151-610 (1982)).

7. *Id.* § 325(a).

8. *Id.* § 605, as amended by Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984) (to be codified at 47 U.S.C. § 705).

9. Additionally, the Cable Communications Policy Act of 1984 imposes criminal and civil liability for the theft of cable television services. 47 U.S.C.A. § 633 (West Supp. 1984).

courts have held that the unauthorized interception and use of these signals is not permitted under section 705 of the Communications Act. The courts have reasoned that these signals are not broadcast "for the use of the general public."¹⁰

Copyright law also distinguishes between scrambled and unscrambled transmissions. For example, section 111 of the Copyright Act contains several exceptions and limitations relating to the unauthorized retransmission of unscrambled signals by various types of distributors.¹¹ Such unauthorized signals are permitted only under extremely limited circumstances. Specifically, section 111(b), titled "Secondary Transmission of Primary Transmission to Controlled Group", exempts from copyright liability the unauthorized secondary transmission of scrambled broadcast signals only if:

- (1) the primary transmission is made by a broadcast station licensed by the Federal Communications Commission; and
- (2) the carriage of the signals comprising the secondary transmission is required under the rules, regulations, or authorizations of the Federal Communications Commission; and
- (3) the signal of the primary transmitter is not altered or changed in any way by the secondary transmitter.¹²

III. PRIMARY AND SECONDARY TRANSMISSIONS

As already noted, the security provided to program suppliers through the strict control of film prints in theatrical exhibition is jeopardized once the programming is disseminated through transmission media. Copyrighted programming embodied in transmissions may be intercepted, redistributed, or recorded without authorization. And, as will be discussed, some of these activities may be permissible under the law. Section 111 of the Copyright Act is titled "Limitations on Exclusive Rights: Secondary Transmissions." Subsection (f) defines "primary transmission" and "secondary transmission" as follows:

10. *Movie Systems v. Heller*, 710 F.2d 492 (8th Cir. 1983); *National Subscription Television v. S & H Television*, 644 F.2d 820 (9th Cir. 1981); *American Television & Communications Corp. v. Western Techtronics, Inc.*, 529 F. Supp. 617 (D. Colo. 1982); *Home Box Office, Inc. v. Advanced Consumer Technology, Movie Antenna, Inc.*, 549 F. Supp. 14 (S.D.N.Y. 1981).

11. The distinction between scrambled and unscrambled signals also has taken on new meaning with respect to the private viewing of programming distributed via satellite. *See generally* text accompanying notes 64-86.

12. Copyright Act of 1976, 17 U.S.C. § 111(b) (1982). *See* HOUSE REPORT, *supra* note 5, at 92-93. At present, the FCC does not require any entity to distribute scrambled television broadcast signals. Thus, there is no exception from liability for the unauthorized retransmission of such signals.

A 'primary transmission' is a transmission made to the public by the transmitting facility whose signals are being received and further transmitted by the secondary transmission service, regardless of where or when the performance or display was first transmitted.

A 'secondary transmission' is the further transmitting of a primary transmission simultaneously with the primary transmission, or nonsimultaneously with the primary transmission if by a cable system not located in whole or in part within the boundary of the forty-eight contiguous States, Hawaii, or Puerto Rico: *Provided, however*, That a nonsimultaneous further transmission by a cable system located in Hawaii of a primary transmission shall be deemed to be a secondary transmission if the carriage of the television broadcast signal comprising such further transmission is permissible under the rules, regulations, or authorizations of the Federal Communications Commission.¹³

While section 111 is best known for governing secondary transmissions under the cable television compulsory license, it also controls other types of secondary transmissions including: Master Antenna Television Systems (MATVs); Instructional Broadcasting; Passive Carriers; and Non-Profit Translators and Boosters.

A. Master Antenna Television Systems (MATVs)

Rather than erecting individual roof antenna or connecting "rabbit ear" antenna to individual television sets, residents of apartments, condominiums, and other multidwelling establishments frequently receive their over-the-air broadcast signals through a central roof antenna connected by wire to all the individual units. This distribution system is commonly referred to as a master antenna television system or MATV. The distribution of these signals by an MATV system is considered both a secondary transmission and a public performance of the programming contained therein. Although these public performances ordinarily fall within the exclusive control of the copyright owners of the delivered programming, operators of MATV systems may be exempt from any copyright liability under certain circumstances.

For instance, section 111(a)(1) exempts secondary transmissions of copyrighted works from liability when they are

not made by a cable system, and consist entirely of the relaying, by the management of a hotel, apartment house, or similar establishment, of signals transmitted by a broadcast station licensed by the Federal Communications Commission, within the local service area of such station, to the private lodgings of guests or residents of

13. Copyright Act of 1976, 17 U.S.C. § 111(f) (1982).

such establishment, and no direct charge is made to see or hear the secondary transmission.¹⁴

Congress has limited the scope of this exemption, however, to MATV retransmissions made within the "local service area" of such broadcast stations. This term, as defined in section 111(f), incorporates the Federal Communications Commission's (FCC) rules, regulations, and authorizations which were in effect on April 15, 1976. These rules authorized certain broadcast stations to insist upon their carriage by cable operators signals on their cable systems (so called "must-carry" stations).¹⁵ Thus, the retransmission without authorization of any broadcast station by an MATV system located outside that station's local service area would be subject to full copyright liability.

It should be noted that the emergence of satellite-distributed origination and retransmission services in the United States has led to the interconnection of satellite earth stations with traditional master antenna systems. These satellite-master antenna television systems (SMATVs) distribute both local broadcast signals and satellite services to their residents.¹⁶

The distribution by SMATVs of satellite origination services such as Cable News Network (CNN), Home Box Office (HBO), Electronic Sports Programming Network (ESPN), and Music Television (MTV), is subject to full copyright liability and must be accomplished through licensing arrangements with the program originators. Broadcast stations that are redistributed via satellite, such as WTBS in Atlanta, WGN in Chicago, and WOR and WPIX in New York, however, present different problems. Since these stations are frequently broadcast in a community distant to the SMATV, their retransmission may not be prohibited under section 111(a). Such retransmissions may be permissible, however, if SMATVs qualify as "cable systems" under copyright law. For, as will be discussed in greater detail,¹⁷ cable television systems may indeed retransmit such "superstations"¹⁸ under compulsory licensing.¹⁹

14. *Id.* § 111(a)(1).

15. *Id.* § 111(f); 47 C.F.R. §§ 76.5(a), 76.59(a), 76.61(a), 76.64 (1984).

16. See *Learning from Cable's Grassroots*, CABLEVISION, Sept. 10, 1984, at 11.

17. See *infra* text accompanying notes 30-54.

18. See *Genius Challenges the Establishment*, CABLEVISION, Dec. 3, 1984, at 30.

19. Under the Copyright Act, a compulsory license is a legal device that permits a person or entity to use a copyrighted work without the express permission of the copyright owner within certain conditions and limitations specified in the copyright law. There presently are four compulsory licenses: (1) the cable television compulsory license to retransmit broadcast programming; (2) the mechanical compulsory license to manufacture and distribute phonorecords containing copyrighted nondramatic musical works; (3) the jukebox compulsory license to publicly perform nondramatic musical works; and (4) the public broadcasting com-

The United States Copyright Office has received requests for such compulsory licenses from SMATVs, as well as from traditional MATVs carrying broadcast signals beyond their local service areas. The issue of both SMATV and MATV eligibility for compulsory licenses under the Copyright Act, however, has not yet been subject either to administrative review by the Copyright Office or to judicial review by the courts.

B. *Instructional Broadcasting*

Notwithstanding the exclusive right of copyright owners to control the public performance of their works, section 110(2) of the Copyright Act exempts public performances of nondramatic literary or musical works in situations involving instructional broadcasts.²⁰ Section 111(a)(2)²¹ additionally exempts the secondary transmission of these instructional broadcasts when made for the educational purposes described in section 110(2). Given the limited scope of these exemptions, they would not apply to most motion pictures and other television programming.

C. *Passive Carriers*

Section 111(a)(3) exempts the secondary transmission of a primary transmission embodying a performance of a copyrighted work when the secondary transmission is

made by any carrier who has no direct or indirect control over

pulsory license to publicly perform nondramatic musical and pictorial, graphic, and sculptural works. Copyright Act of 1976, 17 U.S.C. §§ 111, 115 (1982).

20. Subsection 110(2) provides:

(2) performance of a nondramatic literary or musical work . . . by or in the course of a transmission, if—

(A) the performance . . . is a regular part of the systematic instructional activities of a governmental body or a nonprofit educational institution; and

(B) the performance or display is directly related and of material assistance to the teaching content of the transmission; and

(C) the transmission is made primarily for—

(i) reception in classrooms or similar places normally devoted to instruction, or

(ii) reception by persons to whom the transmission is directed because their disabilities or other special circumstances prevent their attendance in classrooms or similar places normally devoted to instruction, or

(iii) reception by officers or employees of governmental bodies as a part of their official duties or employment

Copyright Act of 1976, 17 U.S.C. § 110(2) (1982).

21. "Certain Secondary Transmissions Exempted.—The secondary transmission of a primary transmission embodying a performance or display of a work is not an infringement of copyright if . . . (2) the secondary transmission is made solely for the purpose and under the conditions specified by clause (2) of section 110" Copyright Act of 1976, 17 U.S.C. § 111(a)(2) (1982).

the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others²²

This provision was originally drafted by Congress to insulate telephone companies and other traditional common carriers from copyright liability for their delivery of copyrighted materials to authorized recipients.²³ In recent years, however, it has been judicially interpreted to cover the activities of satellite resale carriers that deliver the over-the-air broadcast signals of "superstations" to cable television systems for their retransmission to their subscribers. This exemption has been applied to satellite resale carriers even in situations where: 1) the transmissions were limited to one satellite transponder, thereby raising questions as to the carrier's possible "selection" of the primary transmission;²⁴ 2) the carrier of the redistributed superstation services marketed its activities;²⁵ and 3) the carrier deleted from the primary transmission certain information and other materials contained in the Vertical Blank Spacing Interval²⁶ unrelated to the copyrighted broadcast materials ultimately retransmitted by the cable systems.²⁷

D. Non-Profit Translators and Boosters

Section 111(a)(4) exempts certain secondary transmissions of public performances from liability when the

secondary transmission is not made by a cable system but is made by a governmental body, or other nonprofit organization, without any purpose of direct or indirect commercial advantage, and without charge to the recipients of the secondary transmission

22. *Id.* § 111(a)(3).

23. See *Eastern Microwave, Inc. v. Doubleday Sports, Inc.*, 534 F. Supp. 533 (N.D.N.Y.), *rev'd*, 691 F.2d 125 (2d Cir. 1982), *cert. denied*, 459 U.S. 1226 (1983).

24. See *Eastern Microwave*, 691 F.2d at 125.

25. *Id.*

26. The video television picture is reproduced on a television set by an electron gun in the rear of the television receiver. The gun scans left and right across lines (there are 525 lines on a standard set) and then down on the television screen. When the electron gun reaches the bottom of the screen, it shuts off briefly and returns to the top of the screen to repeat the process. The vertical blanking interval (VBI) is that period of time and space in the transmission of television signals when the television picture is blank and while the electron gun is traveling from the lower right hand part of the screen to the top to begin another sequence of line by line transmission of picture information.

WGN Continental Broadcasting Co. v. United Video, Inc., 523 F. Supp. 403, 405 (N.D. Ill. 1981), *rev'd*, 693 F.2d 622 (7th Cir. 1982).

27. *WGN Continental Broadcasting Co.*, 693 F.2d at 625.

other than assessments necessary to defray the actual and reasonable costs of maintaining and operating the secondary transmission service.²⁸

The Report of the House Judiciary Committee notes that this exemption is intended to embrace "the operations of nonprofit 'translators' or 'boosters,' which do nothing more than amplify broadcast signals and retransmit them to everyone in an area for free reception."²⁹

IV. CABLE TELEVISION SYSTEMS

The most commercially significant retransmissions of broadcasts of motion pictures, sporting events, and other television programming are made by cable television systems.³⁰ Since the inception of the Copyright Act of 1909, cable systems have been subject to full copyright liability for their program originations and their distribution of nonbroadcast and satellite origination services.³¹ Cable systems, however, generally were not held liable for copyright for retransmitting broadcast programming until 1978.³²

Sections 111, 501, and 801 of the 1976 Copyright Act establish the cable television copyright compulsory licensing mechanism. This mechanism permits cable television systems to retransmit the programming embodied in broadcast signals without obtaining the express permission of the owners of the copyrighted programming.³³ The compulsory license, however, is conditioned upon compliance with several requirements set forth in the Copyright Act. Although a complete discussion of the compulsory license is unnecessary for purposes of this article,³⁴ a brief overview is warranted given the

28. Copyright Act of 1976, 17 U.S.C. § 111(a)(4) (1982).

29. See HOUSE REPORT, *supra* note 5, at 92.

30. CABLEVISION, *supra* note 18, at 30.

31. Under § 1(e) of the 1909 Copyright Act, program originations and distributions on nonbroadcast programming by cable television systems were considered public performances. However, this is no longer the case. See *Teleprompter Corp. v. CBS*, 415 U.S. 394 (1974); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, *reh'g denied*, 393 U.S. 902 (1968). The retransmissions remain subject to full copyright liability under § 106(4) of the 1976 Copyright Act, 17 U.S.C. § 106(4) (1982).

32. See *Teleprompter Corp.*, 415 U.S. at 394; *Fortnightly Corp.*, 392 U.S. at 390.

33. See Copyright Act of 1976, 17 U.S.C. § 111(c)(1) (1982).

34. For a more complete discussion of the compulsory license, see Besen, Manning & Mitchell, *Copyright Liability for Cable Television: Compulsory Licensing and the Course Theorem*, 21 LAW & ECON. 67 (1978); Ladd, *A Paval for Print: Accommodating Copyright to the Tele-Technologies*, 29 J. COPYRIGHT SOC'Y U.S.A. 246 (1982); Leibowitz, Ladd, Schrader & Oler, *Copyright, Cable, and the Compulsory License: A Second Chance*, 3 COM. & THE LAW 3 (1981); Comment, *Cable Television's Compulsory License: An Idea Whose Time Has Passed?*, 25 N.Y.L. SCH. L. REV. 925 (1982); Comment, *Copyright Owners v. Cable Television: The Evolution of a Copyright Liability Conflict*, 33 SYRACUSE L. REV. 633 (1982).

increasing commercial significance of the compulsory license, and its limited beneficiaries.

Generally, cable television systems may simultaneously retransmit,³⁵ without commercial deletion, substitution, or other alteration,³⁶ United States television broadcast signals that the FCC permits them to carry.³⁷ Additionally, the compulsory license extends to the retransmission of Mexican and Canadian signals by cable systems located within their respective limited border zones of the United States.³⁸

Under the compulsory license, cable operators are required to submit semiannual Statements of Account and Royalties to the United States Copyright Office. The Copyright Office examines those Statements, and deducts reasonable operating costs.³⁹ The balance is then deposited in the U.S. Treasury for ultimate distribution (along with the accumulated interest) to copyright owners by the Copyright Royalty Tribunal (CRT).⁴⁰

The royalty rates, originally set in section 111(d)(2),⁴¹ have been adjusted by the CRT, in accordance with section 801(b)(2). The adjustments reflect

35. Copyright Act of 1976, 17 U.S.C. §§ 111(c)(1), 111(e), 111(f) (1982). Section 111(e) of the copyright law, however, provides an exception from the requirement of simultaneous retransmission for cable television systems located in Alaska, Guam, the Northern Mariana Islands and the Trust Territory of the Pacific Islands.

36. *See id.* § 111(c)(3).

37. *See id.* § 111(c)(1).

38. *See id.* § 111(c)(4).

39. *See id.* § 111(d)(3).

40. *See id.* § 111(d)(4) (describing the functions of the Copyright Royalty Tribunal).

41. Subsection 111(d)(2)(B) provides:

(B) except in the case of a cable system whose royalty is specified in subclause (C) or (D), a total royalty fee for the period covered by the statement, computed on the basis of specified percentages of the gross receipts from subscribers to the cable service during said period for the basic service of providing secondary transmissions of primary broadcast transmitters, as follows:

(i) 0.675 of 1 per centum of such gross receipts for the privilege of further transmitting any nonnetwork programming of a primary transmitter in whole or in part beyond the local service area of such primary transmitter, such amount to be applied against the fee, if any, payable pursuant to paragraphs (ii) through (iv);

(ii) 0.675 of 1 per centum of such gross receipts for the first distant signal equivalent;

(iii) 0.425 of 1 per centum of such gross receipts for each of the second, third, and fourth distant signal equivalents;

(iv) 0.2 of 1 per centum of such gross receipts for the fifth distant signal equivalent and each additional distant signal equivalent thereafter; and

in computing the amounts payable under paragraphs (ii) through (iv), above, any fraction of a distant signal equivalent shall be computed at its fractional value and, in the case of any cable system located partly within and partly without the local service area of a primary transmitter, gross receipts shall be limited to those gross receipts derived from subscribers located without the local service area of such primary transmitter

changes in both inflation⁴² and in the signal carriage and syndicated programming rules of the FCC.⁴³ The latter rate adjustments have raised the royalty payments significantly and have been the subject of controversy in the courts and in the Congress.⁴⁴

Although the secondary transmission of all broadcast signals is subject to compulsory licensing,⁴⁵ royalties generally are calculated on the basis of cable carriage of distant nonnetwork programming.⁴⁶ In assessing liability under the compulsory licensing system, Congress determined that copyright owners of broadcast programming, retransmitted by cable within the station's local service area, did not threaten economically the copyright owner.⁴⁷ Similarly, Congress noted that copyright owners of programming distributed by national television networks are paid on the basis of nationwide coverage and, therefore, are not injured by the cable retransmission.⁴⁸ Congress recognized, however, that the copyright owner's ability to market the programming in the cable community is impaired by nonnetwork programming retransmitted beyond a station's local service area. In a sense, the program supplier is dealing in used goods.⁴⁹ Thus, the compulsory license is intended to compensate the program supplier for this impairment of market value.

The above-mentioned principles also apply to those who seek to claim a portion of the collected royalties. Thus, royalties generally are distributed to copyright owners who have filed claims with the Copyright Royalty Tribunal (CRT),⁵⁰ and whose works were "included in a secondary transmission

Id. § 111(d)(2)(B). The Copyright Act allows small television systems to calculate their royalties on a reduced and simplified basis. *Id.* §§ 111(d)(2)(C), 111(d)(2)(D).

42. *Id.* §§ 801(b)(2)(A), 801(b)(2)(D); 46 Fed. Reg. 897 (1981) (as amended by 47 Fed. Reg. 44,728 (1981), codified at 37 C.F.R. 308 (1984)); *National Cable Television Ass'n v. Copyright Royalty Tribunal*, 689 F.2d 1077 (D.C. Cir. 1982).

43. Copyright Act of 1976, 17 U.S.C. §§ 801(b)(2)(B)-801(b)(2)(C) (1982). See *National Cable Television Ass'n v. Copyright Royalty Tribunal*, 689 F.2d 1077 (D.C. Cir. 1982); *Malrite Television v. FCC*, 652 F.2d 1140 (2d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1981).

44. See 128 CONG. REC. H10,639 (daily ed. Dec. 20, 1982); H.R. 6164, 98th Cong., 2d Sess. (1984) (introduced by Rep. Kastenmeier); H.R. 2902, 98th Cong., 1st Sess. (1983) (introduced by Rep. Synar); H.R. 3419, 98th Cong., 1st Sess. (1983) (introduced by Rep. Hall); S. 1270, 98th Cong., 1st Sess. (1983) (introduced by Sen. DeConcini).

45. It should be noted that, in a recent Notice of Policy Decision, the Copyright Office stated that it had no reason to question a negotiated license for the retransmission of broadcast signals "provided that the negotiated license covers retransmission rights for all copyrighted works carried by a particular broadcast station for the entire broadcast day for each day of the entire accounting periods." 49 Fed. Reg. 46,829, 48,831 (1984).

46. Copyright Act of 1976, 17 U.S.C. § 111(d)(2)(B) (1982).

47. See HOUSE REPORT, *supra* note 5, at 90.

48. *Id.*

49. *Id.*

50. Copyright Act of 1976, 17 U.S.C. § 111(d)(4)(A) (1982). The Copyright Act also

made by a cable system of a nonnetwork television program in whole or in part beyond the local service area of the primary transmitter"⁵¹

In 1978, the first year of operation under the CRT, approximately \$15-million in collected royalties and accumulated interest were distributed to copyright holders.⁵² Since that time, the number of cable television systems and subscribers have increased substantially along with CRT adjusted royalty rates. As a result, the U.S. Copyright Office estimates that over \$100-million in collected royalties and accumulated interest will be available for distribution to copyright owners for cable retransmissions during 1984.⁵³

The bulk of cable royalties has been allocated to copyright owners of motion pictures and other syndicated programming; the remainder has been divided into smaller portions among sports claimants, the Public Broadcasting Service, music performing rights societies, U.S. and Canadian Broadcasters, devotional claimants, and National Public Radio (the latter for the retransmission of their copyrighted programming by cable television systems that also provide radio retransmission services).⁵⁴

V. PERFORMANCES IN BARS, RESTAURANTS AND SIMILAR ESTABLISHMENTS

Proprietors of bars and restaurants frequently entertain their patrons with television performances of live sporting events and other programming. Although the operation of these television sets generally constitutes public performances under section 106(4) of the copyright law,⁵⁵ the right of the program supplier or broadcaster to control such performances is limited.

Section 110(5) of the copyright law exempts from copyright liability:

[the] communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private home unless—

provides special eligibility for royalties for copyright owners of works that were (1) included in a secondary transmission identified in a Statement of Account Substitute Program Log; or (2) included in nonnetwork programming consisting exclusively of distant aural signals. *Id.* §§ 111(d)(4)(B)-111(d)(4)(C).

51. Copyright Act of 1976, 17 U.S.C. §§ 801(b)(3), 804(d) (1982).

52. 45 Fed. Reg. 63,026 (1980). As a result of accumulated interest, this amount increased to approximately \$17 million by time of final distribution.

53. Discussion with Walter Sampson, Chief, Licensing Division, United States Copyright Office (Dec. 7, 1984).

54. See generally 49 Fed. Reg. 7845 (1984); 48 Fed. Reg. 46,411 (1983); 48 Fed. Reg. 9552 (1983); 47 Fed. Reg. 9,879 (1982); 46 Fed. Reg. 58,545 (1981); 45 Fed. Reg. 63,026 (1980).

55. See HOUSE REPORT, *supra* note 5, at 86-87.

- (A) a direct charge is made to see or hear the transmission; or
- (B) the transmission thus received is further transmitted to the public.⁵⁶

This exemption would appear to insulate from liability most public performances in bars and restaurants. However, as later discussion will illustrate, this exemption has been interpreted rather narrowly by the courts.

In 1975, while Congress was considering proposals to revise the copyright law, the Supreme Court addressed the issue of public reception in *Twentieth Century Music Corp. v. Aiken*.⁵⁷ In this case, the Court denied copyright liability for performances of musical works contained in radio transmissions in a fast-food restaurant ("George Aiken's Chicken") that had a radio with outlets to four speakers built into the ceiling. When Congress revised the copyright law in 1976, it codified a limited public reception exemption as applied in *Aiken*.⁵⁸ In its Report on Copyright Law Revision, however, the House Judiciary Committee stated that:

[it] considers this fact situation to represent the outer limit of the exemption, and believes that the line should be drawn at this point. Thus, the clause would exempt small commercial establishments whose proprietors merely bring onto their premises standard radio or television equipment and turn it on for their customers' enjoyment, but it would impose liability where the proprietor has a commercial 'sound system' installed or converts a standard home receiving apparatus (by augmenting it with sophisticated or extensive amplification equipment) into the equivalent of a commercial sound system. Factors to consider in particular cases would include the size, physical arrangement, and noise level of the areas within the establishment where the transmissions are made audible or visible, and the extent to which the receiving apparatus is altered or augmented for the purpose of improving the aural or visual quality of the performance for individual members of the public using those areas.⁵⁹

Several cases have confirmed the narrow application of section 110(5) with respect to: (1) the type of equipment used; and (2) the spatial configuration of the establishment (1,055 square feet total area with a public area of 620 square feet) as set down in *Aiken*.⁶⁰

56. Copyright Act of 1976, 17 U.S.C. § 110(5) (1982).

57. 422 U.S. 151 (1975).

58. See HOUSE REPORT, *supra* note 5, at 87.

59. *Id.*

60. *Broadcast Music v. United States Shoe Corp.*, 678 F.2d 816 (9th Cir. 1982); *Sailor Music v. Gap Stores*, 516 F. Supp. 923 (C.D.N.Y. 1981), *aff'd*, 668 F.2d 84 (2d Cir. 1981), *cert. denied*, 456 U.S. 945 (1982).

Restaurants and bars of a size equal to, or smaller than, "George Aiken's Chicken" may presumably perform programming embodied in over-the-air television broadcasts on a "standard" television receiver without incurring liability if there is no direct charge to customers for viewing the programs. The question that must be asked, however, is what constitutes a "standard" television receiver? At least one court has held that the exemption is inapplicable where a satellite earth station is used to receive satellite signals carrying programming to be shown on a television receiver. *National Football League v. American Embassy, Inc.*⁶¹ concerned the interception of a private network satellite feed of Miami Dolphin football games by several restaurants and lounges in the Miami home market. In this case, the United States District Court for the Southern District of Florida concluded that, under present circumstances, an earth station is not "a single receiving apparatus of a kind commonly used in private homes."⁶² Nevertheless, it is possible that courts may reconsider this position in the future as the number of privately owned earth stations increases. It also is not clear whether performances on large-screen televisions (for example, forty inches diagonally and larger) would be exempt under section 110(5). Arguably, such sets, like satellite dishes, are not of a "kind commonly used in private homes."

It also is difficult to gauge how courts will construe the condition of "public reception of the transmission" in situations concerning transmissions from cable television, MDS systems, subscription television, and other so-called "private" transmissions. Nevertheless, even if the exemption is extended to such "private" transmissions, their unauthorized interception and communication still may violate section 705 of the Communications Act of 1934.⁶³

VI. RECEPTION FOR PRIVATE VIEWING

The issue of reception for private viewing has taken on increased significance during the last decade as new transmission services have begun to deliver programming intended for a limited segment of the public. The mere reception of these services, for purposes of private viewing, does not constitute a "public performance" under copyright law. Therefore, no copyright liability will attach to this limited activity. Protection to program suppliers may be available, however, for the unauthorized private reception and viewing of certain types of transmissions under the Communications Act of 1934,

61. No. 83-0701 (S.D. Fla. Mar. 25, 1983).

62. *Id.*

63. *See supra* note 8.

as amended in 1984.⁶⁴

As already noted, section 705 of the Communications Act protects against the unauthorized interception and use of signals not broadcast "for the use of the general public."⁶⁵ This term, with regard to activities that constituted public performances under copyright law, has been restrictively interpreted to prevent the unauthorized interception of both STV and MDS signals containing programming that, while of "interest" to the general public, was not intended for the "use" of the general public.⁶⁶ Additionally, in 1979, the FCC interpreted this provision to cover satellite signals as well.⁶⁷ This interpretation was not judicially affirmed, however, until 1982.⁶⁸ Congress finally addressed the issue of satellite reception in general, and reception of such signals for private viewing in particular, in section 705 of the Cable Communications Policy Act of 1984 (Act of 1984).⁶⁹ This section confirms that satellite signals are subject to proscriptions against unauthorized interception and use.⁷⁰

The Act of 1984, however, also creates a new subsection (b) to govern the "private viewing" of unencrypted signals distributing "satellite cable programming."⁷¹ The unauthorized interception and private viewing of all encrypted satellite signals, and unencrypted signals other than those distributing "satellite cable programming," remain as violations of section 705. Under this regime, proprietary rights holders are encouraged to establish a reasonable marketing mechanism if they wish to receive compensation

64. The Communications Act of 1934 was amended by the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984) (codified at 47 U.S.C.A. §§ 521-611 (West Supp. 1985)).

65. Cable Communications Policy Act of 1984, *supra* note 64, at § 5 (to be codified at 47 U.S.C. § 705).

66. *See supra* note 10; *Movie Systems v. Heller*, 710 F.2d 492 (8th Cir. 1983); *Home Box Office v. Advanced Consumer Technology, Movie Antenna, Inc.*, 549 F. Supp. 14 (S.D.N.Y. 1981); *United States v. Westbrook*, 502 F. Supp. 588 (E.D. Mich. 1980).

67. *See* FCC, Public Notice, Unauthorized Interception and Use of Multipoint Distribution Service Transmissions, No. 11850 (Jan. 24, 1979).

68. *National Football League v. American Embassy, Inc.*, No. 83-0701 (S.D. Fla. Mar. 25, 1983); *Rainbow Programming Servs. v. Hirabbai R. Patel*, No. 82-6009 (N.D. Fla. Nov. 18, 1982).

69. Cable Communications Policy Act of 1984, *supra* note 64.

70. 130 CONG. REC. H10,438-10,440 (daily ed. Oct. 1, 1984). "These provisions deal with . . . the growing practice of individuals taking down satellite delivered programming for private, homeviewing by means of privately owned backyard earth stations, as well as the increasing need to adopt stronger penalties and remedies for the unauthorized interception of signals prohibited under section 605." *Id.* at H10,438.

71. The term "satellite cable programming" is defined as "video programming which is transmitted via satellite and which is primarily intended for the direct receipt by cable operators for their retransmission to cable subscribers." Cable Communications Policy Act, *supra* note 64, at § 5(c)(1) (to be codified at 47 U.S.C. § 705(c)(1)).

for private viewing of their unscrambled signals. Failure to do so would free the individual viewers from any obligation to compensate the rights holders.

Two definitions establish the parameters for the private viewing regime. The first term, "private viewing", refers to "the viewing for private use in an individual's dwelling unit by means of equipment owned or operated by such individual, capable of receiving satellite cable programming directly from a satellite."⁷² The explanation of this definition in the Congressional Record clarifies the meaning of this term by analogizing private viewing to situations that would be considered "private performances" under copyright law.⁷³ Further, private viewing does not "include any retransmission by so-called 'private cable' or 'satellite master antenna television' systems. Nor is it contemplated that an individual may redistribute programming received by his satellite equipment to the homes or residences of his neighbors."⁷⁴

Second, the new regime is limited to the private viewing of "satellite cable programming." This term is defined as "video programming which is transmitted via satellite and which is primarily intended for the direct receipt by cable operators for their retransmission to cable subscribers."⁷⁵ Moreover, the definition also would cover any audio transmission accompanying the video programming.⁷⁶ It does not, however, include other types of satellite transmissions (such as data transmissions in alphanumeric or other forms).⁷⁷ Nor does it apply to private feeds of programming by television networks and other program distributors that "are not intended for the direct receipt by cable operators for their retransmission to cable subscribers."⁷⁸

A gray area concerns the unscrambled transmission of closed-circuit sports and special events intended primarily for viewing by paying customers in public performance licenses, but also licensed to one or more cable operators for distribution to their subscribers. In these cases, the explanation in the Congressional Record suggests that "one must look to the facts of the case to determine whether this is the 'primary' intent of the sender."⁷⁹

New section 705(d) also substantially increases the criminal penalties and, for the first time, specifies civil remedies for violations of section 705(a).

72. Cable Communications Policy Act, *supra* note 64, at § 5(c)(4) (to be codified at 47 U.S.C. § 705(c)(4)).

73. See 130 CONG. REC. S14,288 (daily ed. Oct. 11, 1984).

74. *Id.*

75. Cable Communications Policy Act, *supra* note 64, at § 5(c)(1) (to be codified at 47 U.S.C. § 705(c)(1)).

76. 130 CONG. REC. S14,287 (daily ed. Oct. 11, 1984).

77. *Id.* at S14,288.

78. Cable Communications Policy Act, *supra* note 64, at § 5(c)(1) (to be codified at 47 U.S.C. § 705(c)(1)).

79. See *supra* note 77.

With respect to criminal violations, a willful violator of section 705(a) may be fined a maximum of \$1,000 or imprisoned for up to six months, or both.⁸⁰ These penalties may be increased to a maximum of \$20,000 or one year imprisonment for a first violation "for purposes of direct or indirect commercial advantage or private financial gain".⁸¹ A maximum of \$50,000 and not more than two years imprisonment, or both, may be levied for subsequent offenses.⁸² Civil remedies now include injunctive relief,⁸³ as well as actual damages and profits or statutory damages generally ranging between \$250 to \$10,000. These damages may be (1) raised to a maximum of \$50,000 for a willful violation "for purposes of direct or indirect commercial advantage or private financial gain",⁸⁴ or, (2) lowered to not less than \$100 where "the violator was not aware and had no reason to believe that his acts constituted a violation."⁸⁵ Court costs and reasonable attorneys fees⁸⁶ may also be awarded to the prevailing party under this statutory violation.

VII. THEFT OF CABLE TELEVISION SERVICES

As with the unauthorized interception and private viewing of satellite distributed MDS and STV services, the interception for private viewing of programming distributed on cable television without permission does not, in and of itself, constitute copyright infringement. Nevertheless, a variety of state laws governing theft of services have been applied to protect the interests of both cable operators and program suppliers.⁸⁷ Recognizing the severity of the problem, Congress supplemented these state laws with specific

80. Cable Communications Policy Act, *supra* note 64, at § 5(d)(1) (to be codified at 47 U.S.C. § 705(d)(1)).

81. Cable Communications Policy Act, *supra* note 64, at § 5(d)(2) (to be codified at 47 U.S.C. § 705(d)(2)).

82. *Id.*

83. Cable Communications Policy Act, *supra* note 64, at § 5(d)(3)(B) (to be codified at 47 U.S.C. § 705(d)(3)(B)).

84. Cable Communications Policy Act, *supra* note 64, at § 5(d)(2) (to be codified at 47 U.S.C. § 705(d)(2)).

85. Cable Communications Policy Act, *supra* note 64, at § 5(d)(3)(C) (to be codified at 47 U.S.C. § 705(d)(3)(C)).

86. Cable Communications Policy Act, *supra* note 64, at § 5(d)(3)(B) (to be codified at 47 U.S.C. § 705(d)(3)(B)).

87. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3709 (1983); CAL. PENAL CODE §§ 593d, 593e (West 1983); GA. CODE ANN. §§ 46-5-2, 46-5-3 (1982); HAWAII REV. STAT. § 275-9 (Supp. 1983); ILL. ANN. STAT. ch. 38, § 16-10 (Smith-Hurd 1983); 1983 LA. ACTS 471; MASS. GEN. LAWS ANN. ch. 166, §§ 42A, 42B (West 1976), amended by 1983 MASS. ACTS ch. 98; MICH. COMP. LAWS ANN. § 750.540(c) (West 1983); N.H. REV. STAT. ANN. § 638:5-a (Supp. 1983); 1983 N.J. SESS. LAW SERV. ch. 15 (West); N.C. GEN. STAT. § 14-118.5 (1981); OHIO REV. CODE ANN. § 4933.42 (Page 1982); 1983 OKLA. SESS. LAWS ch. 133; R.I. GEN. LAWS § 11-35-16 (1981); VA. CODE § 18.2-165.1 (1982). The great majority of states prohibit the theft of cable television or telecommunications services.

federal sanctions against the theft of cable services in the Cable Communications Policy Act of 1984.⁸⁸

Section 633 of the Act, entitled "Unauthorized Reception of Cable Service," imposes both criminal and civil liability against those who "intercept or receive or assist in intercepting or receiving any communications service over a cable system, unless specifically authorized to do so by a cable operator or as may otherwise be specifically authorized by law."⁸⁹ Liability under this provision may be imposed both against the actual individual who intercepts the programming and against those individuals who manufacture or distribute "black-boxes" and other unauthorized converters "intended by the manufacturer or distributor (as the case may be) for unauthorized reception of any communications service offered over a cable system in violation of [section 633]."⁹⁰ The penal sanctions and civil remedies under section 633 parallel those specified earlier for violations of section 705.⁹¹

VIII. HOME RECORDING

Within the last few years, home video cassette recorders (VCRs) have emerged in great numbers. Today, more than seventeen percent of American homes are equipped with VCRs;⁹² and penetration is expected to explode in the near future.⁹³ A principal feature of the VCR is the capability to record broadcast programming either for purposes of delayed viewing soon after the original broadcast (known as "time shifting") or for retention over an extended period of time (known as "librarying").

In 1984, the Supreme Court addressed the issue of home recording in *SONY Corporation of America v. Universal City Studios*.⁹⁴ This case principally concerned a claim of contributory infringement made by several copyright owners of motion pictures and other television programming against SONY for SONY's manufacture and distribution of video recorders. The Court specifically limited the issue in the case to whether home recording of copyrighted works involving unscrambled over-the-air television broadcasts violate the Copyright Act of 1976. In considering this issue, the Court stated that SONY could be found contributorily liable only if the VCRs were

88. See *supra* note 64.

89. 47 U.S.C.A. § 633(a)(1) (West Supp. 1984).

90. *Id.*

91. *Id.* §§ 633(b)-633(c).

92. See *VCRs: Coming on Strong*, TIME, Dec. 24, 1984, at 45; *VCRs: A Success Story That's Caused Some Failures*, BROADCASTING, Dec. 10, 1984, at 50.

93. See *supra* note 92.

94. 104 S. Ct. 774 (1984).

not capable of commercially significant noninfringing uses.⁹⁵ In denying relief, the Court ruled that home recording of off-the-air programming for purposes of time shifting is a fair use⁹⁶ and not an infringement of copyright. Thus, VCRs are at least capable of one significant noninfringing use.⁹⁷ The Court buttressed its decision by relying on testimony given in the district court by several copyright owners who had no objection to such private copying.⁹⁸

Because of the narrow factual setting presented in *SONY* and the principal claim of contributory infringement, it is difficult to assess whether certain specific acts of home recording in an action for direct copyright infringement would be free from liability. For example, would home recording by an individual for purposes of librarying, rather than time shifting, be treated the same? What about tape-to-tape duplication or recording from such "private" transmissions as STV, MDS, or cable television? Further, will the issue of contributory infringement be resolved in the same manner if the Court is asked to consider the soon-to-be-marketed dual-slot VCRs that facilitate tape-to-tape duplication by one machine?⁹⁹ The answers to these questions remain to be seen.

IX. HOME VIDEO DISTRIBUTION

In addition to their recording capability, VCRs have created a new market for the authorized and unauthorized distribution of motion pictures and other programming.¹⁰⁰ Thousands of video stores have opened throughout the country in shopping centers, drug stores, grocery stores, and other heavily trafficked locations.¹⁰¹ Although these operations generate millions of dollars in revenues for program suppliers, they do so at the cost of depriving

95. *Id.* at 789.

96. For a discussion of fair use, see generally *infra* text accompanying notes 107-11.

97. *Sony Corp.*, 104 S. Ct. at 789.

98. *Id.* at 790.

99. See *Interactive VCR System Using Standard Recorder*, 5 COM. DAILY, Jan. 30, 1985, at 5.

100. With respect to unauthorized copying, Congress addressed the continuing problem of copyright piracy of motion pictures and audiovisual works in the Piracy and Counterfeiting Amendments of 1982, Pub. L. No. 97-180, 96 Stat. 91 (codified as amended at 18 U.S.C. § 2318 (1982)). The unauthorized interception of satellite signals and the piracy of video recordings are international problems. See, e.g., *Report on How to Protect the Nation's Creativity by Protecting the Value of Intellectual Property, 1984: Hearings on S. 1183 Before the Senate Comm. on the Judiciary, 98th Cong., 2d Sess 8 (1984)*; Leibowitz, Ladd, Flacks, *Footprints Over the Caribbean: Bringing Program Protection in Step with Satellite Technology*, 1 ENTERTAINMENT & SPORTS L.J. 1 (1984); Leibowitz, *Bringing Protection for Satellite-Delivered Programming Down to Earth*, 2 COM. LAW. 1 (1984).

101. See *VCRs: Coming on Strong*, TIME, Dec. 24, 1984, at 49.

program suppliers the ability to control strictly the exploitation of their works. This anomaly results from a provision in section 109 of the copyright law known as the "first sale doctrine."¹⁰²

Under section 109, once an authorized copy of a protected work is distributed (for example, the sale of a video cassette to a video dealer), the copyright owner loses control over any further distribution (such as rental, lease, or lending) of that particular copy. The first sale doctrine thus depends upon a legal distinction made between the exclusive rights in the copyright in a work and the rights of the owner of a material object that embodies a copyrighted work.

Some film distributors are trying to develop a home video sales market through relatively low sales prices. Nevertheless, the home video market to date remains principally a rental market. Because of the first sale doctrine, home video film distributors that try to operate in both sales and rental markets are forced to receive their total rental royalty compensation "up-front," as part of the sales price, and forego any future revenues derived in the multiple rentals of their works. Thus, while video rental operations may be equivalent to theaters in providing films for viewing, they are relieved of the types of financial responsibilities that attach to theatrical exhibition under copyright law.

Last year, Congress considered proposals to alter the first sale doctrine to enable copyright owners to participate directly in the revenues generated by home video rentals.¹⁰³ The 98th Congress, however, concluded without legislative action. Instead, Congress aligned itself with consumer and electronic hardware groups to preserve the status quo.¹⁰⁴

The first sale doctrine terminates a copyright owner's control only over the further distribution of previously distributed copies. It does not impair the copyright owner's ability to control public performances made from those copies. Recently, a new wrinkle on public performance rights was addressed in *Columbia Pictures Industries v. Redd Horne, Inc.*¹⁰⁵ In this case,

102. "Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord." Copyright Act of 1976, 17 U.S.C. § 109(a) (1982).

103. See H.R. 1028, 98th Cong., 1st Sess. (1983) (introduced by Rep. Edwards for himself and Rep. Mineta); S. 33, 98th Cong., 1st Sess. (1983) (introduced by Sen. Mathias for himself, Sen. Melcher, Sen. Cranston, and Sen. Baker).

104. See The Record Rental Amendment of 1984, Pub. L. No. 98-450, 98 Stat. 1727 (1984) (to be codified at 17 U.S.C. § 109). Congress, relieved of the kind of hardware industry and consumer pressures present in the home video area, however, did successfully alter the first sale doctrine concerning the distribution of sound recordings.

105. 568 F. Supp. 494 (W.D. Pa. 1983), *aff'd*, 749 F.2d 154 (3d Cir. 1984).

defendant operated two retail video outlets called Maxwell's Video Showcase. These outlets operated as typical video sales and rental stores with one difference: each outlet contained more than forty separate viewing rooms in which up to four people could privately view the rented video cassettes placed in VCRs operated by the store employees. Despite the private and individual nature of the viewing rooms, these activities were construed to be public performances under the copyright law and thus subject to the exclusive control of the film copyright owners.¹⁰⁶

X. OFF-AIR RECORDING FOR EDUCATIONAL, NEWS MONITORING, AND ARCHIVAL USE

As noted earlier, the "fair use" doctrine was one of the primary reasons why the Supreme Court found SONY free from contributory copyright infringement.¹⁰⁷ Over the years, this doctrine has been judicially developed to allow certain unauthorized uses of copyrighted works in situations where copyright restrictions are unreasonable or overreaching. The fair use doctrine, therefore, evolved as an equitable rule of reason. Its application depends on specific factual contexts of particular cases. As a result, it is difficult to consider fair use as a hard-and-fast rule to determine when certain otherwise infringing activities may trigger copyright liability.

The "fairness" doctrine was codified as section 107 of the Copyright Act of 1976. Section 107 provides several illustrative, but not limiting, examples of the kinds of uses that may be considered as "fair use" "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research"¹⁰⁸

In enacting the Copyright Act of 1976, Congress discussed the possible application of fair use in the context of off-the-air recording for purposes of nonprofit classroom use. In its Report of Copyright Law Revision, the House Judiciary Committee noted:

The problem of off-the-air taping for nonprofit classroom use of

106. *Id.* at 500.

107. *See generally supra* text accompanying notes 95-96.

108. 17 U.S.C. § 107 (1982). Section 107 then sets out four factors to be examined by courts in determining whether a particular use should be considered fair use:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

Id.

copyrighted audiovisual works incorporated in radio and television broadcasts has proved to be difficult to resolve. The Committee believes that the fair use doctrine has some limited application in this area, but it appears that the development of detailed guidelines will require a more thorough exploration than has so far been possible of the needs and problems of a number of different interests affected, and of the various legal problems presented. Nothing in section 107 or elsewhere in the bill is intended to change or prejudge the law on the point. On the other hand, the Committee is sensitive to the importance of the problem and urges the representatives of the various interests, if possible under the leadership of the Register of Copyrights, to continue their discussions actively and in a constructive spirit.¹⁰⁹

In 1981, after a series of discussions and negotiations, representatives of broadcasters, educators, copyright owners, and creative guilds agreed to guidelines governing specific types of off-air taping by nonprofit educational institutions that would be considered fair use. Generally, these guidelines allow nonprofit educators to videotape off-the-air without obtaining prior permission, and to retain the tapes for forty-five days.¹¹⁰ Within this period, educators may obtain permission from the copyright owner to purchase the right to retain the videotape.¹¹¹ If permission is neither requested nor granted, the tapes must be erased or destroyed at the expiration of the forty-five day period.¹¹²

Although the guidelines generally were agreed to by the various negotiating groups, the Association of Media Producers voted not to endorse them. The Motion Picture Association of America, Inc. (MPAA) took no position (several individual MPAA companies, however, did endorse the guidelines).

The fair use doctrine does not shield all types of recording of copyrighted programming in television broadcasts. For example, *Pacific & Southern Co v. Duncan*¹¹³ held that the off-air recording and subsequent marketing of television news broadcasts by Ms. Duncan's television news monitoring service was not free from copyright liability under the doctrine of fair use.¹¹⁴ Notwithstanding the *Duncan* case, however, Congress has recognized the importance of recording and retaining news broadcasts for archival purposes

109. See HOUSE REPORT, *supra* note 5, at 71-72.

110. Guidelines for Off-Air Recording of Broadcast Programming for Educational Purposes, COPYRIGHT L. REP. (CCH) ¶ 20,157 (Dec. 30, 1981).

111. *Id.*

112. *Id.*

113. 572 F. Supp. 1186 (N.D. Ga. 1983), *aff'd in part, rev'd in part*, 744 F.2d 1490, *reh'g denied*, 749 F.2d 733 (11th Cir. 1984) (reversing the district court's denial of injunctive relief).

114. *Id.*

by directing the Librarian of Congress to establish and maintain a library to be known as the "American Television and Radio Archives (Television and Radio Act)."¹¹⁵

Most of the television programming in the Archives will be acquired through required statutory deposits of published works under sections 407 and 408 of the copyright law, through exchanges from other archives, and through purchases.¹¹⁶ These collections may be supplemented under the Television and Radio Act, which authorizes the Librarian, under limited circumstances, to reproduce a fixation of a "transmission program which consists of a regularly scheduled newscast or on-the-spot coverage of news events."¹¹⁷ This section further allows the Library of Congress to distribute a reproduced news broadcast "by loan to a person engaged in research,"¹¹⁸ or for deposit in other libraries or archives that meet "the requirements of section 108(a)."¹¹⁹ The distributed copy, however, may only be used for research and "not for further reproduction or performance."¹²⁰

XI. CONCLUSION

This article has surveyed the labyrinth of rights and limitations placed upon the use of motion pictures and other television programming in the marketplace. As should now be evident, the market value of a program through the entire distribution process may be altered dramatically depending upon the order of distribution. A sequence for program distribution based strictly upon the scope of protection in the various transmission and distribution systems would be divided into several levels (the sequential ordering within a particular level would be subject to individual discretion):

Level 1: Theatrical Distribution

Level 2: Home Video Rentals (without sales of any copies)

Scrambled Satellite Origination Services

Cable Pay-Per-View

Traditional Pay Cable (i.e., Showtime, HBO)

MDS Systems (both single and multichannel)

Advertiser-Supported Cable Origination Services (either originated by the cable system or delivered to it via scrambled satellite signals)

115. American Television and Radio Archives Act, Pub. L. No. 94-553, 90 Stat. 2601 (codified at 2 U.S.C. § 170 (1982)).

116. *Id.* §§ 407-08 (1982).

117. *Id.* § 170(b).

118. *Id.* § 170(b)(3)(A).

119. *Id.* § 170(b)(3)(B).

120. *Id.* § 170(b).

- Level 3: Home Video Sales
 - Subscriber Television (scrambled broadcast signals)
 - Unscrambled Satellite Origination Services
- Level 4: Network Television Broadcast
 - Independent Station Television Broadcast (including Low-Power Television)

In practice, however, this sequence is not strictly followed. The reason is that legal protection is but one of many factors that must be considered in the programming marketplace. Other factors include: market penetration of each distribution medium; viewer demographics within the medium; relative bargaining power of licensors and users within the medium; and the effect of distribution on use of other media. Several examples illustrate the difficulty in decision making.

First, although it may appear logical to utilize all or many of the possible distribution media to exploit fully a film product, copyright owners in the past have been reluctant to make their programming vulnerable to unauthorized uses. Thus, until very recently, Walt Disney Productions, in order to combat potential piracy, limited the use of several of their classic films to theatrical exhibition.¹²¹

Second, there have been occasions where what would appear to be a logical distribution medium has been passed over. An example would be the network broadcast licensing to potentially large audiences of films (such as *Gone With the Wind*) directly from theatrical exhibition instead of after pay cable and home video.¹²²

Third, television networks no longer attach the same value, if any, to broadcasts of major motion pictures because of the dilution of the viewing audience through home video and pay cable. And today, this attitude is spreading in the pay cable industry as home video whittles away at its potential viewing audience.¹²³

Finally, other program suppliers have passed over most distribution media in creating ad hoc television networks consisting of independent stations and network affiliates for transmission of particular programs. Operation Prime Time is one such example.¹²⁴

121. See *Eisser's Plans Include Returning Disney to the Television Screen*, CABLEVISION, Dec. 10, 1984, at 36.

122. See Melanson, *MGM/UA Hits Sour Note With 'GWTW' Tapes*, VARIETY, Feb. 7, 1985, at 8.

123. See *Western Wrapup: VCR's, Inter-industry Relationships*, BROADCASTING, Dec. 17, 1984, at 102; "We're All In This Together", CABLEVISION, Dec. 10, 1984, at 36.

124. "Operation Prime Time Hurdles Past Others", ADVERTISING AGE, Mar. 14, 1983, § 2, at 10, col. 1.

The television program marketplace is a dynamic one. And, as new methods of distribution emerge onto the scene, the distribution process will continue to grow ever more complex.