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The Copyright Law and Its Relevance to CATV: Can an Old Dog be Taught New Tricks

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COMMENTS

THE COPYRIGHT LAW AND ITS RELEVANCE TO CATV: CAN AN OLD DOG BE TAUGHT NEW TRICKS

I. INTRODUCTION

Federal Copyright Protection

This nation has long recognized the necessity and importance of granting special protection to the products of our artists and inventors. Such preferential treatment is deemed essential as a means of insuring a continuing supply of artistic and inventive contributions for the use and enjoyment of our citizenry. The framers of our Constitution gave early recognition to this concept when they empowered Congress

> 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.[1]

This section of the Constitution was the basis for a series of copyright legislation, the most recent of which is the Copyright Act of 1909.[2]

The objective sought to be achieved by copyright legislation necessarily involves the balancing of competing interests so as to assure that the public is able to economically use and enjoy the products of artists and inventors while at the same time assuring a degree of protection to the artists and inventors that will encourage them to continue making their contributions.

In addition to the difficulty involved in balancing these interests, the 1909 legislation which seeks to achieve the balance is itself hampered by the fact that it is being applied to situations not anticipated at the time of its enactment.

The development of commercial radio broadcasting presented the first real test of the capacity of the 1909 Act to deal with later innovations. The alternatives open for resolving these new copyright problems rested either in judicial interpretation of the existing Copyright Act or in congressional action to specifically accommodate the new situations. The former alternative prevailed, with the courts using the technique of "semantic extension"[3] to make the Copyright Act prospective in nature, and thus capable of accommodating certain situations not specifically anticipated when drafting the original statute itself.

A recent development in the communications industry, however, may finally exhaust the willingness and ability of the court to effectively create copyright law for new innovations. This development is CATV systems, or cable television.

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1. U.S. CONST. art. I, § 8. The sole interest of the United States, and the primary object in conferring monopoly lies in the general benefit derived by the public from the labor of authors. *See* Fox Film Corp. v. Doyal, 286 U.S. 123 (1932). Reward to copyright holders is a secondary consideration. *See* United States v. Paramount, 334 U.S. 151 (1948).

2. 17 U.S.C. § 1 *et seq.* (1964).

3. *See* Jerome H. Remick & Sons v. American Auto Accessories Co., 5 F.2d 411 (6th Cir. 1925). *See also* 2 SUTHERLAND, STATUTORY CONSTRUCTION § 5201 (3d ed. 1969 Cum. Supp.).

The increasing use of CATV systems has created new problems in the field of public communications. Several underlying issues present themselves in the context of recent copyright and Federal Communications Commission litigation involving CATV systems. Basic inquiry is directed to: (1) whether the Copyright Act is adequate to resolve contemporary problems of copyright in the communications industry; (2) if it is, whether the radio cases interpretation of its terms have relevance for the cable television cases; and (3) if it is not, whether a revised Copyright Act is desirable, or, whether a third avenue is to be applied, *i.e.*, regulation by the Federal Communications Commission (F.C.C.).

II. The Copyright Act and the Radio Cases

A. *The Copyright Act of 1909*

In 1909, when the Copyright Act in substantially its present form was enacted, commercial radio was embryonic and television was unheard of. At that time, the primary method of presenting copyrighted material consisted of live performances in theaters and arenas. These performances presumably reached no further than the walls of the auditorium in which they were performed, and lasted no longer than the time it took to perform them, for the technology of amplification and reproduction as we know it, was then nonexistent. Therefore, there was no danger to the copyright holder of having a performance which he authorized reach far and beyond the audience he anticipated. It was with this method of presenting copyrighted material in mind that the drafters designed the Copyright Act of 1909. The Act protects the holders of copyrighted materials by granting them the exclusive right to present their works. Several protected methods of presenting these works are enumerated in the statute: delivering, authorizing the delivery, reading, reproducing, and most important for the purposes of this discussion, performing.[4] An infringement of any of these exclusive rights subjects the infringer to statutory damages as well as any actual damages subsequently determined through civil suit.[5]

The development of commercial radio broadcasting, however, drastically upset the certainty that once accompanied a copyright agreement, for it provided a new manner of performing copyrighted materials. When radio was used as the vehicle for performing copyrighted material, the extent of the audience, and consequently the amount of royalties, could no longer be gauged by the seating capacity of the theater in which it was performed.

In 1925, the courts began considering the problems of liability for infringement of copyrighted material through the use of radio broadcasts.[6] In deciding that an unlicensed broadcast on commercial radio of a copyrighted song con-

4. *See* 17 U.S.C. at § 1 (1964).

5. *Id.* at § 101(b).

6. Jerome H. Remick & Sons v. American Auto Accessories Co., 5 F.2d 411 (6th Cir. 1925).

stituted statutory infringement, the court realized the problem of applying the Copyright Act to an emerging technological innovation:

> [T]he statute may be applied to new situations not anticipated by Congress, if, fairly construed, such situations come within its intent and meaning . . . . While statutes should not be stretched to apply to new situations not fairly within their scope, they should not be so narrowly construed as to permit their evasion because of changing habits due to new inventions and discoveries.[7]

B. *The Radio Cases*

1. *Multiple Performance*

The first case to deal with "performance" as the basis for finding a person other than the original broadcaster liable for copyright infringement was *Buck v. Jewell-LaSalle Realty Co.*[8] LaSalle Hotel operated a master radio receiving set from which wires were run to speakers in all public and private rooms in the hotel, enabling guests to hear the programs received by the master set. Copyrights to some of the songs thus transmitted—from unlicensed radio broadcasts—belonged to Buck. Against Buck's charge that the defendant had infringed its "performing" rights, the hotel argued that there could be only one "performance" of the song per broadcast, and that under these facts, the radio station had exhausted the performance right by its broadcast. In finding for the copyright holder and rejecting the hotel's assertion that each rendition of a protected work can give rise to only one performance, the Court formulated the "multiple performance doctrine."

> While this [multiple performance] may not have been possible before the development of radio broadcasting, the novelty of the means used does not lessen the duty of the courts to give full protection to the monopoly of public performance for profit which Congress has secured to the composer.[9]

The Court concluded that there was very little difference between the situation of a hotel engaging an orchestra to perform copyrighted songs without the permission of the copyright holder, and that of its making available to its guests the same song through the use of a master radio receiving set and a network of loudspeakers and headphones.

2. *Quantum of Rebroadcasters' Acts*

In the *Society of European State Authors and Composers, Inc. v. New York Hotel Statler Co.*,[10] the district court was confronted with the question of a hotel's liability for copyright infringement under the Copyright Act as a result of making radio programing available to its guests. The facts in *SESAC*, how-

7. *Id.* at 411.
8. 283 U.S. 191 (1931) [hereinafter referred to as *Buck*].
9. *Id.* at 198.
10. 19 F. Supp. 1 (S.D.N.Y. 1937) [hereinafter referred to as *SESAC*].

ever, differed from those in *Buck*. In *Buck*, the guests had no control over the speaker system—they could neither turn it off, nor choose the station which they wished to listen to. In *SESAC*, two different radio stations were received at the defendant hotel and made available to its guests. The guests could thus choose which of the stations they wished to listen to, as well as turn the speakers off by activating an on-off switch. The hotel premised its defense upon this distinction: the only performance that occurred took place at the time the guest turned on the speaker in his room, and, therefore, the operation of the hotel's receiving set and speaker systems in and of itself did not constitute a "performance" within the meaning of the Copyright Act. The district court found the hotel liable for copyright infringement, basing its decision on the meaning of "performance" handed down in the *Buck* case. In its reasoning the court concerned itself with the result of the hotel's actions—affording presentation of a copyrighted piece of music without the permission of the copyright holder. The court viewed as irrelevant the last physical act required to convert the radio signal into an audible sound. The court said:

> I do not agree to that principle [only the last step counts] as here applied, for the reception of a broadcast program by one who listens to it is not any part of the performance itself. Indeed, both physically and mentally it is about as far removed from performance as can well be imagined.[11]

Therefore, *SESAC* looked at the defendant's contribution to the total process and concluded, as did the court in *Buck*, that

> . . . when the owner of a hotel does as much as is done in the Hotel Pennsylvania to promote the reproduction and transmission within its walls of a broadcast program received by it, it must be considered as giving a performance thereof within the principle laid down by the Supreme Court in [*Buck*].[12]

It thus appeared that hotels would be unable to successfully deny that they had "performed." However, they hoped they would be able to avoid liability for their "performance" through the finding of an implied license granting them permission to "perform" the copyrighted material.

3. *The Doctrine of Implied Licenses*

A footnote in *Buck* raised an issue subsidiary but critical to the role of copyright in the emerging radio industry—that of implied license. Under the theory of implied license it is argued that once an authorized performance of a copyrighted material is broadcast, it is available for the use of anyone who can receive and rebroadcast the performance.[13] Thus, if under the doctrine of multiple performance, a party is charged with "performance" on the grounds

11. *Id.* at 4.
12. *Id.*
13. 40 F.2d 734 (D.C. Cal. 1929) [hereinafter referred to as *Debaum*].

that he rebroadcast an authorized performance of a copyrighted work without the permission of the copyright holder, he could raise as a defense the proposition that he received permission from the copyright holder to rebroadcast by virtue of a license implied from the original agreement between the copyright holder and the original broadcaster. The issue was first raised by way of dictum in *Buck v. Debaum*.[14] There the court held that there was no copyright infringement on the part of a restaurant owner who provided entertainment for his customers through the operation of a regular radio receiving set. The set in question had no extra amplifying devices nor any additional speakers attached to it. The court was of the opinion that when the copyright holders of the material in question licensed the broadcasting station to disseminate the song, "they impliedly sanctioned and consented to any 'pick-up' out of the air that was possible in radio reception."[15] This dicta is apparently what Justice Brandeis was making reference to in his footnote in *Buck* where he stated:

> If this copyrighted composition had been broadcast by [the radio station] with plaintiff's consent, a license for its commercial reception and distribution by the hotel company might possibly have been implied. Compare with *Buck v. Debaum*.[16]

Thus, by thrust of dicta at least, the court in *Buck* envisioned the issue it was to face, if not the answer it was to pose, in the later CATV system situation.

Mr. Justice Brandeis' footnote suggestion was later discussed in *SESAC*, whose facts further differed from those in *Buck* in that the station that originally broadcast the songs in question had obtained a license from the copyright holder to broadcast these songs. The licensing agreement, however, was written so that performance was authorized only for the radio station, and expressly prohibited any sublicensing of the right to perform the material by the radio station-licensee. In its discussion of the defense raised by the defendant regarding an implied license, the court examined the licensing agreement entered into between the copyright holder and the radio broadcasting company, concluding that by its very terms it was intended to authorize performance *exclusively* by the radio station and by no other party. In the court's opinion, the clause therein which expressly proscribed any type of sublicensing agreements was superfluous; it was intended merely to reinforce the objective sought to be achieved by both parties, *i.e.*, the grant of a limited authorization to perform. The court dealt with Justice Brandeis' footnote by stating:

> If I am wrong in this view of the limitations, and, in order to protect the copyright owner, such limitation is necessary on such a

14. *Id.*

15. *Id.* at 735. It appears, however, that the rationale of the court in this case was considerably weakened by the "multiple performance doctrine" later established in *Buck*. In this case the court states: "The actions, play, and use of the Copyrighted composition has been completed within the studio." (p. 735). This statement would be certainly questionable under the later "multiple performance doctrine."

16. Buck v. Jewell-LaSalle Realty Co., 283 U.S. 191 at 199, n.5 (1931).

> license as I have before me, the limitation quoted above certainly exorcises the possibility of any implied sub-license, glanced at by Mr. Justice Brandeis in a footnote to his opinion in the LaSalle Hotel case. . . .[17]

The court's treatment in *SESAC* of Justice Brandeis' footnote brings into sharp focus a dichotomy which exists within the theory of implied license: licenses implied in fact as opposed to licenses implied in law. The former would result from a finding, as a matter of fact, that the intent of the parties to the original licensing agreement was to extend the right of performance to parties outside the original agreement. Such a conclusion would have to rest upon the agreement itself and would not be directly influenced by considerations of public policy. Inasmuch as any finding of such a license is based upon the intent of the bargaining parties, an express intention of the parties found in their agreement prohibiting sublicensing, or unauthorized use of the performance would seemingly be sufficient to defeat the possibility that an implied in fact license exists.

The license implied in law is based not on the agreement and the intention of the parties to it, rather, it is the result of a finding by the court, as a matter of law, as to what result *should* obtain. It is, in effect, an opportunity for the court to reach a conclusion in a given case which it feels is warranted by the dictates of public policy. Thus, any finding based upon the existence of a license implied in law is in reality nothing more than the statement of a legal conclusion. It follows, therefore, that the inclusion of express prohibitions in a licensing agreement which a court believes to be inimicable with public policy will be rendered ineffective by means of the court declaring the existence of a license implied in law, which would affect a result thought to be consonant with the public policy.

The problem created by the Brandeis footnote in *Buck* is that it is not clear which type of implied license was alluded to.[18] The court in *SESAC* apparently assumed that Brandeis was referring to an implied in fact license and accordingly held that no such license could be implied from an agreement that expressly proscribed sublicensing of the protected material by the licensee. It would thus appear that *SESAC* had settled the effect that specific proscriptions in a contract would have with respect to the existence of implied in fact licenses. Its decision, however, still left open the possibility of raising the defense of a license implied in law, or in more realistic terms, it left available a means by which a court could implement what it considered to be in the best interests of the public, regardless of the express intention of the contracting parties.

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17. Society of European State Authors and Composers, Inc. v. New York Hotel Statler Co., 19 F. Supp. 1 at 6 (S.D.N.Y. 1937).

18. *Id.* at 6.

III. FORTNIGHTLY AND THE RADIO CASES

On the basis of the *Buck* decision, copyright holders and radio broadcasters established a framework for operations that has prevailed for the past forty years. The initial development of the television industry posed no great challenge to the existing copyright-broadcaster structure. There was very little significance to be attached to the factual differences involved in a hotel providing television receivers in its guest rooms as contrasted to radio receiving sets.

The introduction of CATV systems, however, does pose a serious question as to the propriety of applying *Buck* to this new innovation, and, ultimately, the adequacy of the statute upon which *Buck* was based, *i.e.*, the Copyright Act of 1909. The expanding operation of CATV systems involves policy considerations and complex factual situations that were not present when *Buck* was decided, let alone when the Copyright Act was adopted. Such can be seen through an analysis of *Fortnightly Corp. v. United Artists Television, Inc.*[19] and the court's struggle therein with the precedent of the radio cases. A brief discussion of the workings of a CATV system is necessary, however, to set the context for the analysis as well as to emphasize the extent of the innovation with which the courts were faced.

A. *Technical Aspects of CATV Systems*

Basically, CATV systems receive and amplify "signals transmitting programs broadcast by one or more television stations and distribute such signals by wire or cable to subscribing members of the public"[20] for a fee. Initially, CATV systems were installed in areas where there was no local broadcasting service, or in areas where reception was made difficult or impossible because of mountainous or rugged terrain. Through the use of sophisticated, powerful amplification equipment and the use of coaxial cables, which insulated the system's output signals from atmospheric conditions as well as overcoming the problem of physical interference from mountains and irregular terrain, CATV systems were able to provide peak reception to areas theretofore unable to receive any type of programing. As a result of a growing demand for more variety in television programing, CATV systems were introduced for the purpose of bringing broadcasts from distant cities into areas already being served adequately by local broadcasters. In some instances these distant broadcasts could have been picked up by the viewer with the aid of a roof-top antenna; in other instances such reception would have been impossible. Revenue for CATV systems is generated by, first, an initial charge to the subscriber for installing a "drop-wire" from the main trunk of the system to the subscriber's home, and, second, a fixed monthly charge thereafter.

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19. 392 U.S. 390 (1968) [hereinafter referred to as *Fortnightly*].
20. *See* 47 C.F.R. § 74.1101(a) (1969).

B. *Fortnightly's Operations*

The Fortnightly Corporation owned and operated CATV systems in the towns of Clarksburg and Fairmont, West Virginia.[21] These areas were served by two local television stations, but because of the topography of the locale, most residents were unable to receive signals from neighboring areas. Subscription to Fortnightly's systems allowed area residents to receive broadcasts from five additional stations: three from Pittsburgh, Pennsylvania, one from Steubenville, Ohio, and one from Wheeling, West Virginia. Fortnightly's systems consisted of large antennas located on hills above each city, with connecting coaxial cables leading to a building which housed the "head equipment." This equipment amplified and modulated the signals received and converted them to different frequencies in order to transmit the signals effectively while maintaining and improving their strength. These new signals were sent out from the "head equipment" to individual sets by means of connecting coaxial cables. In the course of its operations, Fortnightly neither originated its own programs nor edited the programs it carried.[22]

United Artists Television, Inc. granted licenses to each of the five stations mentioned above to broadcast certain motion pictures on which it held the copyrights. These licenses did not authorize carriage of the broadcasts by CATV systems, and in several instances, expressly prohibited such carriage. Broadcasts made under these licenses were carried as part of the normal service furnished by Fortnightly to its subscribers. United Artists sued Fortnightly in Federal District Court for the Southern District of New York[23] for infringement under sections 1 (c) and (d) of the Federal Copyright Act.[24] These subsections reserve

21. On December 31, 1963, Fortnightly had 9,571 and 7,047 subscribers at Clarksburg and Fairmont respectively. The monthly rate charged ranged from $3.75 to $5.00 per installation, which was in addition to an installation fee of about $20.00. The combined cost of Fortnightly's two systems was between $750,000 and $1,000,000. *See* United Artists Television, Inc. v. Fortnightly Corp., 255 F. Supp. 177 at 187 (S.D.N.Y. 1966) *and* 392 U.S. 390, 393, n.7 (1968).

22. For a complete and detailed analysis of the process, *see* United Artists Television, Inc. v. Fortnightly Corp., 255 F. Supp. 177 at 187-98 (S.D.N.Y. 1966). *See infra* notes 30-37 and accompanying text.

23. United Artists Television, Inc. v. Fortnightly Corp., 255 F. Supp. 177 (S.D.N.Y. 1966).

24. Exclusive rights as to copyrighted work. Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right.

(c) To deliver, authorize the delivery of, read, or present the copyrighted work in public for profit if it be a lecture, sermon, address or similar production, or their non-dramatic literary work; to make or procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, delivered, presented, produced, or reproduced; and to play or *perform* it in public for profit, and to exhibit, represent, produce, or reproduce it in any manner or by any method whatsoever. . . .

(d) To *perform* or represent the copyrighted work publicly if it be a drama, or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be excluded, *performed*, represented, produced or reproduced, and to exhibit, *perform*, represent, pro-

to the copyright holder the exclusive right to "perform . . . in public for profit [non-dramatic literary works]," and to "perform . . . publicly [dramatic works]."[25] United Artists sought damages and injunctive relief. The issue of infringement was separately tried,[26] and the court ruled in favor of United Artists. On interlocutory appeal under 28 U.S.C. section 1292(b)[27] the Court of Appeals for the Second Circuit affirmed,[28] and certiorari was granted.[29] Reversing, the Supreme Court held that Fortnightly did not, through its CATV systems, "perform" the copyrighted motion pictures within the meaning of the Copyright Act, and thus was not liable for copyright infringement.

C. *The Fortnightly Decision.*

1. *Fortnightly at the District Court*

The instant case was tried in the United States District Court for the Southern District of New York in 1966. Fortnightly defended on several grounds: (1) it did not perform the copyrighted motion pictures in public because the motion pictures were not made visible or audible within the CATV system, but were rendered visible and audible only by the operation of privately owned television sets of the subscribers; (2) a license for its operations should be implied in law by virtue of the fact that the original broadcast was licensed; and (3) the imposition of copyright liability upon its activities would erode the underlying purpose of the Federal Communications Act "to secure the maximum benefits of radio [and television] to all the people of the United States."[30]

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duce, or reproduce it in any manner or by any method whatsoever. . . .
17 U.S.C. §§ 1(c) and (d) (1964) (emphasis added).

25. *Id.* "Drama" has been interpreted so as to include much of the material of which television programs are comprised including motion picture photoplays. Patterson v. Century Productions, Inc., 93 F.2d 489 (2d Cir. 1937); Hervert v. Shanley Co., 229 F. 340 (2d Cir. 1916); Metro-Goldwyn-Mayer Distributing Corp. v. Bijou Theatre Co., 3 F. Supp. 66 (D. Mass. 1933); Tiffany Productions, Inc. v. Dewing, 50 F.2d 911 (D. Md. 1931).

26. Pursuant to Pre-Trial Order Number Two, February 7, 1966, the district court ordered that the trial of the action proceed in four designated stages; that the basic issues of copyright infringement and licenses implied in law be tried first, and that other defenses such as unfair trade practices and unfair competition be tried in subsequent stages.

27. 28 U.S.C. § 1292(b) (1967): "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided*, however, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or Court of Appeals or a judge thereof shall so order."

28. United Artists Television, Inc. v. Fortnightly Corp., 377 F.2d 872 (2d Cir. 1967).

29. Fortnightly Corp. v. United Artists Television, Inc., 389 U.S. 969 (1967).

30. *See* United Artists Television, Inc. v. Fortnightly Corp., 377 F.2d 872, 883 (2d Cir. 1967). Fortnightly's contention is that "commercial television broadcasting . . . is governed by the Communications Act of 1934, *as amended*, 47 U.S.C. § 1 et seq. (1967), *as implemented* by regulation promulgated by the F.C.C., and under the Act so implemented no person may lawfully impose a charge upon the reception of commercial television broad-

It appears from the defenses that the courts were going to be forced to test the validity of their decisions in the radio cases in the context of the cable television industry. In his opinion for the district court, Judge Herlands answered the first defense only after closely examining and comparing the various electronic and technological functions of the equipment used in CATV systems with those used in the television broadcasting industry.

The court's findings revealed that the performance of the copyrighted motion pictures by the licensed television stations consists of transducing[31] motion picture films into electro-magnetic energy, a process whereby nothing audible nor visible was produced in its studios.[32] These findings further concluded that Fortnightly's operations begin after the television broadcaster has radiated the electro-magnetic energy toward the horizon by use of its broadcasting antenna. Programs, the films in this case, in the form of the electro-magnetic waves are received on Fortnightly's antennas, and then travel through coaxial cables to a building where the "head equipment" is located. The function of this "head equipment" is to modulate, on new carrier waves derived from locally supplied electrical energy, the pattern of variations of the input signals. Thereby, there are created output signals which are replicas in electronic terms of the input signals. The essential feature of Fortnightly's systems is that they duplicate and reproduce, on newly supplied energy, patterns, arrangements, configuration variations, and sequences of energy that originated from the original broadcast antenna.[33] The net effect of Fortnightly's electronic processing is to transmit through its coaxial cables to its subscribers reproduced signals on new carrier waves. Based upon these findings of fact regarding the technical aspect of the various equipment used by the television broadcaster and by Fortnightly, the court found no merit in Fortnightly's contention that nothing audible or visible was produced in its studios.[34]

> Both forms of energy function as technological equivalents in the sense that each represents a "manner" in and "method" by which one may "perform," within the meaning of section 1 (c) and (d) of the Copyright Act.[35]

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casts and every person is free to receive such broadcasts by the equipment of his choice." Fortnightly argues that if it is required to pay a royalty to copyright holders, such amount would have to be passed along to its subscribers and consequently they would be charged for reception of commercial television, a result which is proscribed by the above mentioned legislative scheme. Also, by absorbing the royalties, the subscribers would be paying twice for the opportunity of seeing the protected material, the first payment being indirectly made when subscribers buy the products advertised on the commercial broadcasting stations. This defense was dealt with quite quickly in both lower court decisions and therefore will not be discussed further in this paper.

31. *Transduction*—process by which sight/sound has been converted into its electronic counterpart or replica, the video/audio signal—a form of electrical energy. *See* United Artists Television Corp. v. Fortnightly Corp., 255 F. Supp. 177, at 189 (S.D.N.Y. 1966).

32. *Id.* at 196.

33. *Id.*

34. *Id.* at 191-93.

35. *Id.* at 205.

The court thus found Fortnightly liable for copyright infringement. In language strikingly similar to the holdings in *Buck* and *SESAC*, the district court held:

> [W]hen a CATV system, for profit plays so substantial a part in a reproduction of a broadcast being seen and heard by the public that the only act necessary to transduce the electromagnetic waves it has processed and transmitted to subscribers into an audible and visible production of the broadcast performance is a minor, albeit essential one—such as "turning the knob" on a homeowner's television set the CATV system must be said to have infringed upon the exclusive right to "perform" . . . [within the meaning of the Copyright Act].[36]

Thus, here, as in *SESAC*, the court decides as immaterial the issue of who performed the "last act."

In rejecting Fortnightly's contention that there was an implied in law license, the court said the question is not one of the existence of such a license, but rather whether public policy warrants the creation of one. The court decided it does not.[37]

2. *Fortnightly at the Circuit Court of Appeals*

The circuit court of appeals, in affirming the district court decision, chose not to rely as heavily upon the analysis of the highly technical functions carried out by Fortnightly.[38] The court instead relied more expressly upon the approach of the radio cases. As was the case in *Buck* and *SESAC*, the court here was primarily concerned with the *extent* of Fortnightly's activities: "How much did the petitioner [Fortnightly] do to bring about the viewing and hearing of a copyrighted work?"[39] The court found that Fortnightly had done more to bring about viewing of the motion pictures than the hotels in the radio cases had done to provide radio programing for their guests. The court, therefore, on the strength of the radio cases, held that Fortnightly's CATV systems publicly performed the motion pictures which they carried on their systems because such carriage resulted in the simultaneous viewing of the programs by its subscribers.[40]

In its treatment of the issue of an implied in law license, the court explicitly recognized the confusion that had arisen as to which type of implied license was intended by Justice Brandeis' footnote.[41] Apparently, the issue was formulated

36. *Id.* at 214.

37. *Id.* at 211: "The question being not whether there is an implied in law license to perform publicly for profit but whether there should be, this court holds that there should not." The court speaks specifically of a license implied in law.

38. The court found ". . . that the result produced by defendant's systems constitutes a public performance, and that the technical means by which the result is produced are irrelevant to this issue." *See* United Artists Television, Inc. v. Fortnightly Corp., 377 F.2d 872, n.9 at 879-80 (2d Cir. 1967).

39. *Id.* at 877.

40. *Id.* at 879.

41. *See* text accompanying note 18 *supra*. It is difficult to ascertain why Mr. Justice Brandeis raised the issue at all, for in the body of his opinion he seemed to deal with the question quite conclusively: "And since the public reception for profit itself constitutes an

in these terms: can a license implied in law make unenforceable the prohibiting terms of a licensing agreement? The court decided that the agreement of the parties must control in this case:

> In an age of motion pictures and radio and television broadcasting . . . a copyright proprietor must be allowed substantial freedom to limit licenses to perform his work in public to defined periods and areas or audiences.[42]

The answer reached by the court serves to illustrate how a decision regarding a license implied in law turns ultimately upon a determination of what result the court deems that public policy warrants.

3. *Fortnightly at the Supreme Court*

The circuit court, through its decision, easily accommodated CATV to the doctrine of the radio cases. The Supreme Court, however, was not so inclined. By an 8-1 majority, the Court reversed the decision of the circuit court of appeals and held that Fortnightly did not "perform" the movies in question, and was therefore not liable for copyright infringement.[43]

a. *The Precedent of Buck*

In its attempt to insulate the CATV industry from the authority of the radio cases, the Court challenges the vitality of *Buck* by characterizing it as "a questionable 35-year old decision that in actual practice has not been applied outside its own factual context."[44]

The Court expressly rejects *Buck's* quantitative test, which was used by the court of appeals, on the ground that it is not "the proper test to determine copyright liability in the context of television broadcasting."[45] Its reasons for not extending *Buck* are not stated explicitly in the body of the opinion; however an attempt to justify its finding is presented in the footnotes. The most revealing is the one which simply implies that the decision in *Buck* was not correct when it was decided, and therefore, it would be unwise for the Court to extend what it feels to be a "questionable" decision into a new factual context merely on the weight of precedent.[46]

After saying that *Buck* was not applicable, the Court added a superfluous line of support when it distinguished *Buck* on its facts. In stating the *Buck* should be limited to its own circumstances the Court raised the footnote statement of Justice Brandeis which suggested that a different result possibly would

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infringement, we have no occasion to determine under what circumstances a broadcaster will be held to be a performer or the effect upon others of his paying a license fee." *See* Buck v. Jewell-LaSalle Realty Co., 283 U.S. 191, at 198 (1931).

42. United Artists Television, Inc. v. Fortnightly Corp., 377 F.2d 872 at 882 (2d Cir. 1967).

43. Fortnightly Corporation v. United Artists Television, Inc., 392 U.S. 390 (1968).

44. *Id.* at 401 n.30.

45. *Id.* at 397.

46. *Id.* at 401.

have been reached if the original broadcast had been licensed. Noting that the original broadcasts transmitted by Fortnightly were licensed, the Court held *Buck* not to be binding precedent.[47]

b. *The Functional Test*

Once the Court had removed the instant case from the authority of *Buck* it offered a new test for determining the question of performance. The Court characterizes its new test as one which depends upon "a determination of the function that a CATV systems play in the total process of television broadcasting and reception."[48] This "functional" test seemingly represents a point of departure from the *Buck* or "quantitative" test. In the *Buck* test, the primary concern was the *extent* of the rebroadcaster's activities, whereas the "functional" test seems to require an analysis of the *nature* of the rebroadcaster's acts.

c. *Functional Analysis—The Court's Test Applied*

The initial step taken by the Court in its analysis was to divide the television broadcasting process into two separate segments: one side including the broadcasters, who perform;[49] the other side including the viewers, who do not perform.[50] The court had to decide into which segment Fortnightly fell. In arriving at its decision the Court appraised the function served by CATV in the overall television broadcasting process. It found that although the equipment that a CATV system uses is highly powerful and complex, its basic *function* is little different from that of the normal equipment furnished by the television viewer (*i.e.*, rooftop antennas, boosters, etc.).[51] In support of this position, the Court offered that in the case of several neighbors combining to set up their own antenna system there would be no liability for performing copyrighted material. The only distinction between that situation and CATV is that in the latter an entrepreneur would assume the undertaking. An additional consideration is the great difference in the functions served by CATV as opposed to broadcasters. In its finding that CATV systems have, functionally, little in common with broadcasters, the Court dealt with the procurement of marterial to be broadcast, the assembly of programs, and the editing of programing. The Court

47. *Id.* at 398 n.23. Had this been the only basis for not following *Buck*, the court's disregard of the express prohibition against sub-licensing would have raised anew the issue of implied in law and implied in fact licenses and perhaps called for some discussion of *SESAC*. But the whole discussion is better viewed as an attempt to get away from *Buck* without expressly overruling it.

Mr. Justice Fortas' dissenting opinion urged the court to follow the precedent of *Buck* and *SESAC* so as to do as little damage to existing copyright-broadcaster relationships until Congress enacts curative legislation. The dissent would be satisfied with abandoning *Buck* and *SESAC* if the majority would have substituted an interpretation of "perform" that was as clear and workable as the *Buck* interpretation. *Id.* at 404.

48. *Id.* at 397.

49. *Id.* at 398 n.23.

50. *Id.* at 398 n.24.

51. *Id.* at 399.

found these areas to be completely within the domain of the broadcasters, and outside the function of most CATV systems.[52]

In a footnote, the Court offers another difference between CATV systems and broadcasters: the latter sell their broadcasting time and facilities to sponsors, not to the public, whereas CATV systems sell antenna service to certain segments of the public.[53] The Court concluded its findings by stating:

> CATV systems do not in fact broadcast or rebroadcast. Broadcasters select the programs to be viewed. CATV systems simply carry, without editing, whatever programs they receive. Broadcasters procure programs and propagate them to the public; CATV systems receive programs that have been released to the public and carry them by private channels to additional viewers. We hold that CATV operators, like viewers and unlike broadcasters, do not perform the program that they receive and carry.[54]

d. *The Court's Refusal to Expressly Balance Competing Interests*

The Court was urged in an *amicus curiae* brief, submitted by the Solicitor General, to render a decision that would accommodate various competing considerations of copyright, communications, and antitrust policy. The Court declined because it felt that it must work within the Copyright Act of 1909, and that adjustment of these competing interests cited by the Solicitor General was a job incumbent upon the Congress.[55]

IV. The Supreme Court Opinion—Analysis

Two questions about the Fortnightly decision itself should be considered: (1) did the majority properly consider *Buck*; and (2) assuming that *Buck* was properly considered, is the functional test substituted by the majority of any analytical value beyond its use in the instant case?

A. *The Radio Cases*

1. *Buck*

As was discussed previously, the Court, in part, held *Buck* to be inapplicable to *Fortnightly* on the ground of a factual distinction: the original broadcast in *Fortnightly* was licensed, while that was not the case in *Buck*.[56] The Court's attempt to limit the authority of *Buck* by distinguishing it from *Fortnightly*

52. *See* text accompanying *infra* note 92 for discussion of how proposed rules by the F.C.C. would require CATV systems to originate programing.

53. Fortnightly Corporation v. United Artists Television, Inc., 392 U.S. 390 at 400 n.28 (1968).

54. *Id.* at 400-01. The Court summarily disposed of the question of an implied in law license by stating in a footnote:

> [S]ince we hold that the petitioner's systems did not perform copyrighted works, we do not reach the question of implied license.

Id. at n.32.

55. *See infra* notes 69-79 and accompanying text for a discussion of proposed legislation in the CATV-copyright area.

56. *See supra* note 47 and accompanying text.

on the basis of an originally licensed performance appears to be wide of the mark, for the determination of the question of performance, which is what the *Buck* test resolves, does not turn upon the existence of a license; rather, the existence of a license is raised as a defense to copyright liability, only after performance has been established.[57] This dichotomy is pointed out by the Court itself. "Since we hold that the petitioner's system did not *perform* copyrighted works, we do not reach the question of implied license."[58] Thus the distinction between *Buck* and the *Fortnightly* case regarding the licensing of the original broadcast does not in itself justify the abrogation of the quantitative test developed in *Buck*.[59]

2. *The Functional Test*

a. *Implied in Law License*

In essence, the result reached by the Court, through the application of its "functional test" very closely matches the result that was urged upon the Court by Fortnightly on the theory of an implied in law license. Fortnightly argued that when a copyright holder licensed the original broadcast, he also licensed the private segment of the audience to receive the broadcast. Flowing from this license to the private set owners, Fortnightly contended that an additional license should be implied allowing CATV systems to aid the public in receiving programing which they have the right to receive. Clearly, the Court has moved

57. This argument is concisely stated by Mr. Justice Fortas in a footnote to his dissenting opinion. *See* Fortnightly Corporation v. United Artists Television, Inc., 392 U.S. at 406 n.5 (1968).

58. *Id.* at 400.

59. The other reason offered by the court for not extending the radio cases is that *Buck* is at best a questionable 35-year old decision which should therefore not be extended beyond its factual context. This seems to be the basic and primary reason for the court's derogation from *Buck's* authority. Although the court was not very expansive in enumerating factual distinctions that may exist between *Buck* and the *Fortnightly* situation, one can readily see two factual distinctions which could prove a plausible basis for distinguishing *Fortnightly* from *Buck*: (1) when the "multiple performances" occurred in the radio cases, they all occurred within the defendant's physical plant, which is considered a public facility (*see* Society of European State Authors and Composers, Inc. v. New York Hotel Statler Co., 19 F. Supp. 1. 5 (S.D.N.Y. 1937)), whereas the alleged "multiple performances" which occurred in *Fortnightly* occurred in the private homes of the subscribers, and, (2) the equipment through which the performance was made audible in the radio cases was owned by the defendants, whereas in *Fortnightly*, the television receiving sets were owned by the subscribers. Although these contentions were unsuccessfully raised by the defendant in the lower courts they could be the factual differences which the court might have considered as sufficient grounds for removing the instant case from the authority of the radio cases. If these considerations did motivate the court's reasoning, it is tantamount to saying that although there may be "multiple performances" by CATV systems, they are not in fact, public performances, for they occur within the private residence of the set owner and on his private set. However, the court in the *Jerome H. Remick & Sons v. American Auto Accessories Co., Inc.* case anticipated this problem:

> Nor can a performance, in our judgment, be deemed private because each listener may enjoy it alone in the privacy of his home . . . . The [performer] is consciously addressing a great, though unseen and widely scattered audience, and is therefore participating in a public performance.

See Jerome H. Remick & Sons v. American Auto Accessories, 5 F.2d 411 at 412 (6th Cir. 1925).

in this direction when it characterizes a CATV system as serving basically the same functions as equipment used by set owners, despite the fact that the CATV system's equipment is far more powerful and sophisticated.

To support this, the Court points out that individual viewers who might combine to establish their own CATV system would incur no copyright liability, and, therefore, by analogy, there is no logical basis for holding liable an entrepreneur who undertakes the same enterprise. Further the Court points out that the programs received by CATV systems have been released to the public and are carried by private channels to additional viewers.[60] By conceptualizing a CATV system as an adjunct to the viewers' home receiving set and concluding from that basic premise that no performance has occurred, what the Court has done is to give effect to the result sought to be achieved by the imposition of an implied in law license, but, the manner chosen by the Court to achieve the result was a process of explicit legal reasoning leading to a legal conclusion, rather than merely stating a legal conclusion under the expression of a license implied in law.

b. *The Functional Test and Its Effect on The Radio Industry.*

One of the dissenting opinion's objections in that it is wrong to replace the "quantatitive" test, which although not completely satisfactory, has been the settled test for the last 40 years, with the "functional" test, which it feels will not provide sufficient guidance for future construction of the Copyright Act.[61]

A reading of the instant case should assuage any fear entertained by the radio industry that the *Fortnightly* holding will erode the foundations upon which they have established their business arrangements. The Court clearly indicates, first, that the decision in *Fortnightly* is made with reference to its particular facts,[62] and, second, that the radio cases are limited to their own facts and implicitly affirms them to the extent they have been adopted by the radio industry.[63] Thus it seems eminently clear that the Court has not attempted to emasculate the authority of the radio cases where they have established the basis for present relationships in the radio industry.

Another point may be offered to alleviate the fear that the *Fortnightly* decision will upset long standing relationships in the industry. Even if we were to assume that the *Fortnightly* decision would overrule *Buck*, it seems a reasonable assumption that *Buck* would have been decided the same under the "functional" test as it was under the "quantitative" test, i.e., an infringement would have been established.[64]

60. ". . . CATV systems receive programs that have been released to the public and carry them by private channel to additional viewers." Fortnightly Corporation v. United Artists Television, Inc., 392 U.S. 390 at 400 (1968).

61. *Id.* at 405.

62. *Id.* at 399 n.25.

63. *Id.* at 401 n.30.

64. Based on the manner in which the "functional test" was applied to the facts in *Fortnightly*, the first question to ask in its application to *Buck* is: Was the hotel an active

c. *Possible Ambiguity of the Test.*

Another problem with the functional test is raised by the possible ambiguity that may result in future attempts at applying it. The problem, foreseen by Mr. Justice Fortas,[65] can be illustrated within the history of the *Fortnightly* litigation. The holding in the district court was characterized as being strongly phrased in terms of the radio cases; yet, that decision was ultimately premised upon a detailed study of the "functional" aspects of Fortnightly's equipment. More precisely, the court did examine the *nature* of Fortnightly's operations. The different conclusions reached in the district court and in the Supreme Court raise the problem of two courts analyzing the same situation in terms of "function" and arriving at drastically different results. This type of inconsistency is perhaps what Mr. Justice Fortas fears will result from future applications of the "functional" test.

In the district court decision, Judge Herlands, on the basis of an exhaustive comparison of the technical functions served by television broadcasting systems and CATV systems, concluded that the two processes were so similar that the CATV systems did "perform" within the meaning of the Copyright Act, and thus were liable for infringement.

> The dominant, overall function and design of defendant's [Fortnightly's] system at all times—regardless of the individual instruments or specific equipment used from time to time—were and are aimed at the objective of propagating electromagnetic energy for the purpose of transmitting T. V. program material to a large number of subscribers, who are, in effect, their audience. In view of the foregoing characteristics, defendant's [Fortnightly's] systems are, in material respects, analogous to television stations, translator, and repeater stations.[66]

The Supreme Court, on the other hand, refused to give weight to the analysis of a function that is "virtually instantaneous,"[67] that is, the basic electronic functions carried out by both systems' equipment. Instead, the Court analyzed the functions of CATV systems first in comparison with the functions served by the homeowners' equipment, and then with the functions of television

broadcaster, who performed, or merely a passive receiver who did not perform. It would appear that the hotels were akin to broadcasters in that the function served by the rebroadcasts to the guest rooms was one which allowed the hotels to utilize these radio broadcasts as an alternative to performing copyrighted music through the hiring of live orchestras. Therefore, the function served by the rebroadcasts in *Buck* was not one of merely facilitating the reception of radio programing for the individuals for whom the original broadcasts were intended, but rather, it was an attempt by the hotels to use the original broadcasts for their own commercial purposes, as an alternative to hiring live entertainment, which would produce royalty revenue for the copyright holder.

65. Fortnightly Corporation v. United Artists Television, Inc., 392 U.S. 390 at 405 (1968).

66. United Artists Television, Inc. v. Fortnightly Corp., 255 F. Supp. 177 at 196 (S.D.N.Y. 1966). *See also supra* notes 30-37 and accompanying text regarding technical finding of the district court.

67. Fortnightly Corporation v. United Artists Television, Inc., 392 U.S. 390 at 401 n.27 (1968).

broadcasters. The Court concluded that functionally, CATV systems' equipment served the same purpose as the equipment used by home owners and secondly, that the operations of CATV systems differed radically from those operations of television broadcasters. The operations compared in the second analysis dealt with revenue raising and program make-up. Thus it can be seen that while the district court defined and applied "function" with respect to the method of performing copyrighted material, the Supreme Court applied "function" in terms of the results of the activities of the parties involved. It would appear that the district court more precisely addressed itself to the basic issue involved: Do CATV systems "perform" the motion pictures which they carry to their subscribers? Its analysis delved into the very manner in which the copyrighted motion pictures are performed, whereas the Supreme Court relied on differences that exist in the very general operations of the two industries, and these considerations appear to be peripheral to the narrow issue that was before the court for consideration.

V. Alternatives to Judicial Solution of the Problem

A. *The Court Will Not Resolve The Problem*

For almost as long as the present Copyright Act has been in effect, the Court has been faced with the problem of applying it to an ever-changing technology. This theme is well illustrated both in the radio cases and in the CATV situation. Concomitant with this problem of applying the Act to a mushrooming technology is the unavoidable presence of competing economic interests. It has been suggested that the decisions in the radio cases attempted to balance the conflicting interests involved therein while still working within the Copyright Act. The Court entertains a different attitude, however, in the *Fortnightly* case. The Court recognizes the conflicts that exist, but it refuses to adjust them by the method urged upon it by the Solicitor General in his *amicus curiae* brief. In doing so the Court made it clear that it must reach its decision on the basis of the Copyright Act of 1909 "as we find it," and if there is to be a change in this statutory framwork, it is a job incumbent upon the Congress, not the Court.[68] By its own admission of basing its decision upon the Copyright Act "as [they] find it," the Court raises an inconsistency in its logic. The Copyright Act which the Court applied to the facts in this case is certainly not the very same one which Congress passed in 1909, for it has not existed in a vacuum these many years, completely insulated from the effects of time and change. Indeed, as this comment has pointed out, from the time the Act was passed it has been undergoing constant judicial review which has the unalterable consequence of adding to the statute a "judicial gloss" which serves to define and refine the meaning of the statute. Thus, the Copyright Act which the Court had before it in 1968 included the "gloss" resulting from the Court's decisions

68. *Id.* at 401.

in the radio cases. Therefore, a decision based strictly upon the Copyright Act as found at the time of the *Fortnightly* decisions seems to point to a result diametrically opposed to that reached by the Court.

B. *Congressional Activity*

The intention of the Court to strictly apply the Copyright Act of 1909, taken in conjunction with its statement that Congress is the appropriate forum for establishing a new framework within which to settle copyright disputes, clearly forces the attention of those who are interested in affecting a change in this area to be focused on Congress rather than the courts. Congress, in fact, has begun to address itself to the problems of copyright in the CATV industry in two ways: (1) by proposed revision of the Copyright Act; and (2) by giving the FCC authority over the CATV industry through that body's rule-making power.

1. *Copyright Revision*

A revision of the Copyright Act of 1909 was begun in 1955, but progress was slow until the 90th Congress, when revision bills were introduced in both the House and Senate.[69] As originally reported, the House bill contained a section dealing specifically with CATV systems.[70] This section divided CATV activities into three broad geographic areas which have been designated: black, white, and gray.[71] "Black" areas are those areas considered to be adequately served by existing television stations.[72] Under the proposed section, any transmission of a distant station into this "black" area by a CATV system would result in full copyright liability for the offending system.[73] The "white" area is described as that area that normally receives the stations carried by a CATV system.[74] Thus, the carriage of such stations by a CATV system in a "white" area would not result in copyright liability on the part of the CATV system. The "gray" area is an area that does not have adequate television service.[75] In these "gray" areas, CATV is to be given the benefit of a compulsory license to bring in distant stations in consideration of royalty payments agreed to by the interested parties.[76] In the event of a stalemate, the court is to determine a reasonable royalty.[77]

This section was originally added to repeal the district court decision which held CATV fully liable for copyright infringement.[78] However, when

69. *See* H.R. 2512, 90th Cong., 1st Sess., and S. 597, 90th Cong., 1st Sess. (1967).
70. *See* H.R. 2512, 90th Cong., 1st Sess. § 111 (1967).
71. *See* H.R. Rep. No. 83, 90th Cong., 1st Sess. 48-59 (1967).
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *See* 113 Cong. Rec. H. 3614-3625 (April 6, 1967).

the bill was before the House, it was decided that the matter more correctly belonged to the Interstate and Foreign Commerce Committee, which has jurisdiction over communication, and thus section 111 of the proposed bill was deleted, and subsequently, the bill as amended was passed by the House, and sent to the Senate.[79] The proposed section clearly represented an attempt to reconcile the competing interests of the copyright holders, the public, and the CATV systems. The major criticism of this proposed section is the relegation of the duty to the courts of establishing a "reasonable" royalty where such royalties are required in the "gray" area. A decision in this area requires the ability to analyze the economic effect of broadcasts on local markets, the determination of geographical areas based upon highly technical criteria, and other problems requiring an expertise in the technical-economic matrix of television broadcasting. A more realistic alternative would be to have the question of a "reasonable" royalty determined by an independent board possessing the requisite expertise in the field.

2. *Regulation by the Federal Communications Commission*

a. *Present Rules*

The other area where there is active extra-judicial activity is in the Federal Communications Commission. Originally, the Commission refused jurisdiction over the industry claiming that it did not have the requisite authority under the Communications Act of 1934.[80] As the CATV industry grew, and its impact was more widely felt, the FCC reversed its attitude, and in 1966, in a rule-making proceeding, it adopted rules governing CATV systems.[81] Under the "carriage" rule CATV systems are required to transmit to their subscribers the signals of any station into whose service area they have brought competing signals.[82] The second rule forbids CATV systems from duplicating the programing of such local stations for periods of 15 days before and after a local broadcast.[83] This is known as the "duplication" rule. The Commission also forbade CATV systems from importing distant signals into the 100 largest television markets; however, certain exceptions are provided for.[84] Finally, the Commission provided for summary non-hearing procedures for the disposition of applications for relief.[85] The Commission's position in this area has been enhanced by two recent cases. In *United States v. Southwestern Cable Co.*,[86] the Supreme Court held that under the Communications Act, the FCC has authority to

79. The Senate did not act upon the bill during the 90th Congress. However, on January 22, 1969, Senator John L. McClellan introduced the revision bill in its original form (*i.e.*, including § 111) to the new Senate. *See* S. 543, 91st Cong., 1st Sess. (1969).
80. 47 U.S.C. § 151 *et seq.* (1967), and 26 F.C.C. 403 at 427-28 (1959).
81. Second Report and Order, 2 F.C.C. 2d 725
82. 47 C.F.R. § 74.1103(a) (1969).
83. *Id.*
84. 47 C.F.R. § 74.1103(b) (1969).
85. 47 C.F.R. § 74.1109 (1969).
86. 390 U.S. 157 (1968).

regulate CATV systems. In *Conley Electronics Corp. v. F.C.C.*, the Supreme Court, by refusing to grant certiorari,[87] upheld a circuit court decision[88] which held the rule against non-duplication valid.

b. *New Rules Proposed*

On December 13, 1968, the FCC published proposed new CATV rules.[89] The Commission explains the need for new rule-making and inquiry on the basis of technological improvements in the CATV industry which will soon allow the process to expand to a twenty channel capacity.[90] The result of this expansion is the creation of new channels of communications for public and commercial use, which heretofore were not available due either to prohibitive cost or technical inadequacy. The objective sought by the Commission in this rule-making procedure is to insure that the expected benefits of the newly expanded capacity of CATV systems will inure to the public by assuring them the most efficient and effective communications service possible.

In order to achieve this objective, the Commission has proposed rules and invited comments thereon in several different areas: program origination, diversification of ownership, importation of television signals, reporting requirements, and technical standards.[91]

Program Origination. The proposal requiring program origination is new to the Commission's scheme of regulation over CATV. The timeliness for this rule follows directly from the expected increased expansion of channel capacity.[92] The Commission feels that the possibility of having 20 channels available for use will give CATV systems the technical flexibility to provide local outlets for community self expression and for augmenting the public's choice of programs and types of services. The presentation of these special interest programs on originating channels would have the added advantage of not forcing regular network presentations to go off the air in order to provide air time for these programs.

The Commission contemplates conditioning the CATV's use of broadcast signals upon a requirement that it originate programs, except in the case of the very smallest CATV systems. Unresolved is the cutoff point for determining who shall be required to originate and who shall not. Tentatively, the criteria

87. 393 U.S. 858 (1968).
88. Conley Electronics Corp. v. F.C.C., 394 F.2d 620 (10th Cir. 1968).
89. 33 Fed. Reg. 19028.
90. *Id.*
91. With respect to reporting requirements and technical standards, the Commission is not submitting formal rules. It feels that these areas are not ripe for present action, but it would entertain any suggestions for possible future rule making. The Commission would be interested in reports that would keep it abreast of the developments in the CATV industry. Information requested would probably include location of CATV systems, program origination, channel capacity, broadcast signals aired, as well as financial data and ownership interests.

The Commission also suggests the possible future need to establish minimum technical standards for equipment and signal output. *Id.* at 19032.
92. *Id.* at 19029.

will be established in light of the marginal cost of the equipment and personnel required for local origination.

Diversification of Ownership. The second area of rule-making is one which has caused a great deal of public concern. It is feared by many that unless there is some type of governmental intervention, that eventually the ownership of CATV systems would rest in the hands of a very few powerful corporations who may also own other communications media. The Commission has proposed rules to prevent such an occurrence. First, it would prohibit cross-ownership of CATV systems and television stations in the same area, thus minimizing the possibility of horizontal communications monopoly in any one area.[93] Second, the Commission proposes to limit on a nationwide basis the total number of systems to be commonly owned.[94] The basis for limitation would turn upon consideration of the number of subscribers, the size of the communities, and the regional concentration and other broadcast interests of the CATV operator.[95]

The third proposal in this area stems from the Commission's concern over the potential control a CATV system would have over program selection when the system reaches its twenty channel capacity. To mitigate against abuse of this power, the Commission proposes to limit CATV systems to one channel for program origination.[96] This limitation would not apply to channels used for presentation of weather reports, stock reports, etc. An additional proposal would encourage CATV systems to operate as common carriers on the unused channels. This, it is hoped, would result in programing that is not entirely regulated by the CATV owners.

Importation of Distant Signals. Most germane to this discussion are the proposed rules relating to importation of distant television signals by a CATV system. Under present regulations, no CATV system may carry a distant signal within the Grade A contour of any station in the 100 largest television markets.[97] The only time an exception is allowed is upon a showing in an evidentiary hearing that such carriage of distant signals is consistent with the public interest and, particularly, that it is consistent with the establishment and healthy maintenance of television broadcast service in the area.[98] At the time this rule was adopted, the Commission believed that the use of distant signals by CATV systems raised substantial questions of economic impact and unfair competition with respect to newly established UHF stations. The Commission characterized the situation whereby UHF stations had to pay for television programing while CATV system did not, as one of unfair competition. To gain more insight into this problem, the Commission established the evidentiary hearings. After two and one-half years of hearings, the Commission has decided,

93. *Id.* at 19031.
94. *Id.* at 19032.
95. *Id.*
96. *Id.*
97. 47 C.F.R. § 74.1107 (1969).
98. *Id.*

on the strength of the *Midwest Television, Inc.* hearings,[99] that CATV penetration in a major market will be significant, and that the impact on UHF broadcast stations of the unfair competition will correspondingly be significant and undesirable. Thus the Commission proposes to eliminate the evidentiary hearings and in its place set up a rule whereby importation of distant signals into the top 100 markets would be allowed, but only on the condition that the CATV system which desires to import the distant signals has obtained retransmission consent of the originating stations.[100] The Commission would limit their consent requirement only to importation of distant signals into the top 100 markets. It recognizes the need for such importation into the smaller markets which are characteristically underserved. The Commission would, however, establish a reasonable compulsory licensing fee system for the carriage of distant signals into these small or underserved areas.[101]

The Commission points out that it expects the new Congress to act upon the Copyright Revision Bill with a new appraisal of the CATV section which had been deleted by the House in the 90th Congress,[102] and had not been acted on by the Senate. The Commission will continue hearings on this proposed area of rule-making but will not act until Congress has more clearly shown its intention in the area.

The Commission, however, may not have to wait very long, for shortly after the Commission released its proposed rules, Senator McClellan introduced the Copyright Revision Bill to the Senate as it was originally drawn (S. 597), thus including the specific section on CATV.[103] Whether or not the Senate will delete the section as the House did is of course unknown; however, certain comments made by Senator McClellan when he introduced the bill lead one suspect that it is his feeling that the section should be deleted:

> The text of certain sections of the bill, notaby those relating to the copyright liability of operators of . . . cable television systems, has been, for all practical purposes, rendered moot by events subsequent to the original introduction of S. 597.[104]

It is not clear whether the Senator is referring to the decision in *Fortnightly*, or, since his remarks were made on January 22, 1969, that he feels the rules proposed by the FCC for CATV are the proper solution. In any event, it appears that the problem will not be resolved through revision of the Copyright Act.

VI. Conclusion

Fortnightly clearly indicates that many of the problems and conflicts inherent in the rapidly developing field of communication technology cannot be

99. 13 F.C.C. 2d 478 (1968).
100. 33 Fed. Reg. 19028 at 19035.
101. *Id.* at 19035.
102. *See supra* notes 69-79 and accompanying text.
103. *See* S. 543, 91st Cong., 1st Sess. (1969).
104. 115 Cong. Rec. S. 664 (daily ed., Jan. 22, 1969).

resolved by using a 60 year old statute whose operative terms have been defined largely in the anachronistic context of the radio industry. Nor, apparently, can there be any viable redefinition of such terms as "performance" so as to meaningfully update the Copyright Law.[105]

The questionable utility of the Court's new "functional test" is graphically apparent when viewed in light of the proposed F.C.C. rules.[106] The Court in *Fortnightly* found that originating and editing programing were not functions carried out by CATV systems, and this finding aided the Court in determining that there was no performance. One of the proposed F.C.C. rules, however, would require that CATV stations originate programs as a condition for federal licensing.[107] If a CATV system does comply with this licensing condition, would it not therefore follow that the carriage of copyrighted motion pictures by a CATV system would result in "performance" under the court's test?

At this point, two alternatives are available for resolving the question of the CATV system's status in the communications industry. The first is inclusion of a specific provision regarding CATV in the Revised Copyright Law.[108] While the substance of the section proposed in the present Copyright Revision Bill is basically desirable, the very fact that it is embodied in a copyright statute is undesirable for two reasons. First, any new statute, while adequate for present situations, will still be subject to application to future, unforeseen developments through judicial interpretation. The growing complexity of the communications industry demands technical expertise in the problem solving process and accordingly relegates the role of judicial interpretation to one of little utility.

Second, and perhaps more fundamentally, the copyright problem represents only one of the troublesome areas of an entire complex of interrelated problems. Approaching this one problem by use of the Copyright Law withdraws the issues from the very context in which they are defined and in which may lay their solution.

Regulation by the F.C.C., therefore, appears to be the most promising avenue to take in establishing harmony in the area. The most appealing virtue of F.C.C. regulation is its ability to act quickly and responsively to new developments in the industry as a whole. Rules and regulations would be developed by people who have the expertise required for analyzing problems and their implications. This point is demonstrated in the proposed F.C.C. rules for CATV systems. The Commission does not deal just with copyright problems, but it has established a scheme of regulation that is designed to encompass the many diverse problem elements in the industry with the ultimate aim

105. *See* text accompanying *supra* notes 65-67.
106. *See* text accompanying *supra* notes 89-104.
107. *See* text accompanying *supra* note 92.
108. *See* text accompanying *supra* notes 69-79.

of achieving the most equitable relationships for all involved. This approach is far better than a piecemeal attempt at resolving the various problems as though they existed independently of each other.

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