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REBROADCAST RIGHTS

By Harlan R. Schreiber

F

orty years ago, television programs offered a simpler view of the world. Ward taught Wally and the Beaver lessons of life, and Ralph

and Alice Kramden were a relatively happy couple. All was well with the world.

Indeed, the television industry itself was similarly uncomplicated. Networks gave

programs to affiliates who in turn gave viewers access to the programs. Much like

the more complicated family lives of today, however, the relationship between the

networks and affiliates is no longer as simple and familiar as it was in the 1950s.

Due to technological changes, their once-symbiotic relationship now has turned into

an ongoing war. The networks' battle plan is to minimize affiliates' role in provid-

ing network programming. Their first salvo has been an attempt to

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reach viewers via cable in addition to their over-the-air

Coming

broadcasts. The affiliates, in turn, have

Battle in the

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principal programming disseminator. The latest battle in this war takes place on the minefield of network cable rebroadcasts of prime-time programs.

In March 1997, MSNBC, an NBC cable television station, began re-airing *Dateline NBC*, one of NBC's prime time programs. This cable rebroadcast strained the relations between NBC and its affiliates. The affiliates maintain that the re-airing of the *Dateline NBC* and other programming violates the exclusivity clauses that they have been granted by NBC for prime time programming. Indeed, the controversy over the exclusive right to broadcast network programming is not limited to NBC. ABC, CBS, and FOX all have entered into the cable market, and their affiliates have expressed similar concerns over the how cable networks might infringe on the viewership of local affiliates.

The network-affiliate dispute did not begin with rebroadcasting. Rather, it is only the newest growing pain in the evolving television industry. As cable has entered American homes, the networks have begun to examine alternative methods of distribution, which would minimize the affiliates' role in providing programming to viewers. The resulting clash will establish each side's role and bargaining power in defining future industry changes. Because this tension ultimately will be resolved in negotiation, it is important that the parties guard their rights and exercise all the bargaining power now available.

This Note will analyze the present rebroadcast dispute, examining the legal and practical issues that will arise and recommend how the parties should proceed in the controversy. The analysis will place this controversy within the larger context of

how networks and affiliates are attempting to redefine their roles in the television industry.

The first section will address the history of networks and affiliates and how their relationships have changed as technology has advanced. The second section will then place the present controversy regarding cable rebroadcasts within the framework of the larger industry. It will also address how the present controversy could be resolved in negotiation, litigation, or settlement. The third and fourth sections will examine respectively the viability of the parties' legal claims and remedies. Finally, this Note will draw conclusions based on the direction the television industry is moving and how such trends affect the parties' strategy in the present controversy.

TIES OF TRADITION: NETWORKS AND AFFILIATES

The three major television networks are NBC, CBS, and ABC.¹ All three operate similarly, supplying programming with the goal of providing their products to the most possible viewers. A large audience will encourage sponsors to invest in the network's programming. In order to disseminate its product to as many viewers as possible, the networks contract with local affiliates, which broadcast the programs to specific regions. The local stations, in turn, need programming to fill their schedules, which the networks supply.

In a typical network-affiliate agreement, the network provides the affiliate with a schedule of programs and commercials, compensating the affiliate for the airtime it allocates.² The affiliate may run the programs as it chooses, subject to contractual guarantees. If the affiliate chooses not to air a particular show, however,

another station in the market may gain access to it.³ If the affiliate does air the network's program, the network pays a fee based primarily upon the strength of the specific affiliate and the size of the market.⁴ The payment comprises a small amount of a large affiliate's revenues but can make up to 30 percent of a smaller affiliate's revenue.⁵ In return for the programs and fees from the networks, the affiliate retains only a limited amount of local airtime.

Each of the major networks has approximately 200 affiliates nationwide. In order to guarantee airtime, the networks own the affiliates in a few of the major markets, such as New York and Los Angeles. The majority of affiliates are independent stations that have established relationships with their network since as early as the 1950s. Affiliates rarely change the network with which they have contracted⁶—although this has changed somewhat in the last ten years with the emergence of new networks, such as FOX, WB, and UPN. These new networks have provided affiliates with alternatives in contract negotiations, but they have not significantly altered the senior networks' affiliate rosters because their programming is not popular enough to prompt audience shifts. Since the affiliates have little other recourse, their bargaining power against the networks is limited.

Traditionally, network-affiliate agreements lasted an average of two years. This changed in 1994 when some CBS affiliates defected to FOX because the National Football League transferred its broadcasting rights from CBS to FOX.⁷ The affiliates profited from the flexibility inherent in short-term contracts, as they were able to shift networks to access desired sporting events and

other valuable programming. CBS, meanwhile, was left to scramble for new affiliates. In an effort to combat this affiliate freedom, networks have changed their affiliate agreements to run generally from five to ten years.⁸

CABLE INVASION

In the days of *The Honeymooners*, the networks were the only source of programming. By the 1980s, however, cable television emerged as a major competitor for viewers.⁹ Cable television's strength in diverting viewers from network television rests in its ability to offer many single-themed channels. While a network offers news, movies, sports, sitcoms, and dramas, most cable channels focus on only certain content.¹⁰ ESPN is solely dedicated to sports, for example, CNN to news, and HBO to movies. Provided viewers are interested in their themes, cable channels are guaranteed a favorable market share in their given niche because viewers can depend on consistent, tailor-made programming.

Network television has lost a significant number of viewers and a parallel amount of advertising revenue as a result of cable television. Network television's prime time ratings share has dropped steadily from 93 percent in 1977 to 61 percent in 1996.¹¹ Correspondingly, the percentage of total television advertising revenues spent on network television also has dropped, from 60 percent in 1979 to 30 percent in 1997.¹² In an effort to recapture this lost market share, networks have entered the cable television business. The networks began by purchasing previously existing cable

channels. ABC, for example, has purchased ESPN, Lifetime, and A & E. Generally, networks have not used their formidable name recognition or programming to boost their cable channels' ratings. As always, viewers were drawn to these cable channels for their single-themed programming, not because the viewer might identify the cable channel with the network that owns it.

THE TELEVISION INDUSTRY EVOLVES

In response to the growth of cable, the networks have tried to redefine their traditional position. In 1992,

AFFILIATES SHOULD MOBILIZE AND INSIST ON PROTECTION FROM THE NETWORKS TO ASSURE THAT AT LEAST THEIR IMMEDIATE FUTURE IS SECURE. SUCH A RESOLUTION, HOWEVER, MAY REQUIRE LITIGATION.

NBC made the first network endeavor to reshape network-affiliate roles. NBC owned the right to broadcast the 1992 Summer Olympic Games in Barcelona, Spain. Instead of offering the traditional range of events to its affiliates, NBC launched a "triple-cast." For the triple-cast, NBC aired some events on its affiliates and created three pay-per-view cable channels to air uninterrupted coverage from 5 a.m. to 5 p.m.¹³ Though the affiliates were given the same quantity of coverage as in years past, NBC reserved some of its most attractive events, like basketball, for the triple-

cast in an attempt to lure subscribers.¹⁴ The affiliates were outraged by the triple-cast, fearing that their audience would be diluted by viewers splitting their loyalty between the affiliate and the cable stations.¹⁵ Furthermore, the network signal disseminated by the affiliates contained advertisements for the triple-cast, thus forcing the affiliates to promote a product against which they were competing. The affiliates' fears about the triple-cast were not realized, as the triple-cast was not well received by viewers—it lost \$100 million.¹⁶ Still, the triple-cast was significant because it represented the

first network offensive to diminish the affiliates' involvement in disseminating programs to viewers. Indeed, networks have only expanded their campaign on the cable market since the failure of the triple-cast.

Recently, the networks have created their own cable stations that bear their names and logos. In 1992, NBC bought the FNN channel, which it converted to CNBC. Since its inception, CNBC has been used

simply to provide public information, much like C-SPAN. In 1996, however, NBC launched MSNBC and CBS created CBS Eye on People, both of which were designed to supplement the existing network channels.¹⁷ The networks use their name recognition and extensive resources to promote these cable channels, sharing recognized anchorpersons and reporters across the channels. Dave Keneipp, Vice President of Legal Affairs for FOX Television, comments that "[NBC news personalities] cross over all the time. Jane Pauley has *Dateline* and [Tom]

Brokaw hops over.”¹⁸

These network cable channels are primarily, but not entirely, news-themed channels. They are a response to the current trend of viewers flocking to news-themed stations when news breaks.¹⁹ In fact, network nightly news viewership has dropped 22 percent in the last five years while cable news channels' viewership has risen.²⁰ This phenomenon may occur for two reasons.

First, the viewers can be assured of immediate coverage on the cable channel because news is that channel's primary goal. Second, the cable channel may occupy such a strong niche as a news provider that viewers now reflexively tune into the station for all their news. Cable news channels have enjoyed much higher ratings than the networks when covering breaking news stories such as the chase of O.J. Simpson, the death of Princess Diana, and the Monica Lewinsky scandal.²¹ This trend spurred the networks to enter the cable news fray. Michelle Dube, Programming Director of WKRN in Nashville, Tennessee, notes that “broadcasters lose viewers to cable every year, [so entering] cable allows them to recapture viewers.”²²

Although these network cable channels are available for news 24 hours a day, they generally do not provide reporting around the clock. CNBC and MSNBC have offered talk shows such as *Rivera Live* as well as a video-recorded rebroadcast of the *Don Imus Radio Show*. NBC has also used the cable channels to rebroadcast some network programming, including reruns of *Late Night with Conan O'Brien* and *Dateline NBC*.²³ To date, there have been few network cable rebroadcasts, so affiliate ratings have not yet markedly suffered.

“WHAT IS GOOD FOR THE NETWORK IS GOOD FOR THE AFFILIATES”

Currently, rebroadcasts are limited mostly to news magazines, as networks attempt to regain their lost market share of the news. MSNBC's recent excursion into rebroadcasting late-night programming, however, may mark a significant change in the use of network cable channels because entertainment programming has held stronger with network viewers. Network cable channels may shift their focus from supplementing the networks' low-rating news coverage to instead focusing on the dependable entertainment shows that are the lifeblood of the affiliates. Indeed, NBC may have manifested this intent when it began rebroadcasting *Late Night with Conan O'Brien*. If network cable channels engage in widespread rebroadcasting of entertainment shows, it will significantly change broadcast television by redefining the roles of networks and affiliates.

While networks and affiliates have long worked together to reach as many viewers as possible, the end result of a network venture into entertainment rebroadcasting could create a network conglomerate of multiple, independent channels. The purpose of this arrangement would be to capture as many viewers as possible for the overall entity. The distribution of viewers within the conglomerate would not matter to the network, which would target only the aggregate viewership of all its channels. In such a framework, the affiliates' specific viewership could diminish greatly or disappear entirely. Discussing whether network cable rebroadcasts posed a threat to affiliates, Michael Gartner, former president of NBC, maintains that

“network cable allows NBC to get more viewers and that is good for the network. ... What is good for the network is good for the affiliates.”²⁴

But this is not always the case.

Despite assertions by the networks to the contrary, network and affiliate interests diverge on the issue of rebroadcasting. Rebroadcasting, like the triple-cast and network cable, represents another step towards phasing affiliates out of the television industry. While the elimination of affiliates may not be imminent, rebroadcasting is a first step in that direction because it demonstrates that viewers may be drawn to cable instead of the affiliates. In response to networks' motivations for rebroadcasting, Jim Waterbury, former president of NBC's network-affiliate relations board and General Manager of KWWL in Waterloo, Iowa, notes that “networks are always trying to find ways to change their partnership status with their affiliates.”²⁵ It is this attitude that pervades the issue of cable rebroadcasting. While triple-cast was a failure, rebroadcasting on cable networks may not be.²⁶

INDUSTRY WEAKNESS, BARGAINING STRENGTH

In order to resolve the issue of cable rebroadcasts, the affiliates must specifically delineate their complaints. The affiliates protest that rebroadcasts of network programs will erode their viewership because viewers will no longer rely on them for network programming.²⁷ While rebroadcasts have been isolated enough that no significant erosion has yet occurred, the affiliates should not wait until rebroadcasts become an industry standard. Some affiliates are particularly bothered by the cable rebroadcasts because they

interpret their affiliate agreements to grant them exclusive rights to the network programming within their broadcast areas.²⁸

The outcome of this dispute will be affected largely by the network's relative strength of bargaining position. Jim Waterbury states that "[the network] owns more affiliates now and now has greater leverage on the affiliates [in negotiations]."²⁹ Network executives agree with this position as well. Dave Keneipp of FOX points out, "There is not a lot of negotiating leverage on the part of the affiliates. ... The affiliates can do little to change their situation."³⁰ This point is further supported by FOX's network-affiliate form contract, which makes no mention of affiliate exclusivity.³¹ The form agreement demonstrates the strength that networks hold over the affiliates in bargaining.

But the affiliates are not without bargaining power. Industry executives are quick to note that the network still needs affiliates to reach the largest possible television audience. Dave Keneipp notes that no broadcast medium can "reach 100 percent of the country the way the over-the-air television does."³² Jim Waterbury further explains that "there are only a limited number of VHF stations in the country, and they are the only free [non-cable] television stations in the country."³³ In addition to the limited number of broadcast television stations, Keneipp says, "The highest cable penetration in any market in the country is still no greater than about low 70, maybe 75 percent. ... That's still 25 percent of the audience [with no viewing alternative but broadcast television]."³⁴ The affiliates' status as the only television providers in certain markets gives them enough leverage to conduct meaningful nego-

tiations with the network. However, network television loses more and more viewers to cable each year. This loss of viewership, as cable expands into more rural markets, continually undercuts the affiliates' status in bargaining. The affiliates need to assert more than their ever-dwindling status as broadcast television stations to negotiate effectively with the network.

The affiliates also have the recourse of preempting network programming in order to protest the network's behavior.³⁵ This strategy would hurt the network because it would lose patches of viewers to other networks when the affiliates cancelled their programs. However, the preemption strategy is not advisable because the affiliates would weaken themselves in the process. Preemption would place the network in the uncomfortable position of losing viewers, but the affiliates would also be harmed by their decreased audience. Furthermore, the affiliates cannot preempt as a group because that strategy may constitute an antitrust violation.³⁶ Even if the affiliates decided on a station-by-station basis to preempt, they are still at risk because, arguably, their actions could still amount to a collusive effort to control dissemination of network programming. Thus, the risks involved in punitive preemption outweigh any benefit.

ARGUMENTS AND REMEDIES

The affiliates seek to prevent the rebroadcasting of network programming on cable because they fear an erosion of viewership and a loss of advertising revenue. Kenneth Elkins, Chairman of NBC Affiliates and a member of Pulitzer Broadcasting, describes this tension when he "see[s] MSNBC as being a competitor

[to affiliates]."³⁷ Gary Chapman, President of NBC affiliate LIN Television, criticizes rebroadcasting because it causes networks to "cannibaliz[e] [their affiliates and, as a result, the affiliates] have the biggest audience defection [to cable networks]."³⁸

Whether through negotiation or litigation, the affiliates' first priority is to stop network rebroadcasting. The networks may offer to pay off the affiliates to continue this practice, but financial inducements will not offset the long-term losses that affiliates will experience as a result of viewer dilution. If the negotiations fail, the affiliates may be forced to threaten litigation. If so, they will marshal three arguments. First, the cable rebroadcasts violate the exclusivity clauses of the network-affiliate contracts. Second, rebroadcasting breaches the implied covenant of good faith and fair dealing. Finally, the affiliates may argue that the network's actions violate the Cable Act of 1992 ("Cable Act" or "the Act"), which prohibits cable rebroadcast of network programming without consent of the affiliates.

The networks can counter each claim. First, the exclusivity clauses may be too broad to apply in the present controversy. Second, the network can deny that the rebroadcasts demonstrably harm the affiliates, and, in the absence of injury, no implied covenant has been breached. Finally, the network will contend that the rebroadcast restrictions of the Cable Act do not apply because Congress did not anticipate this specific controversy in enacting that legislation.

THE LONG SHADOW OF LITIGATION

There are two viable alternatives for the affiliates: accept a cash settlement or attempt to obtain some

rebroadcast protection from the network. Regardless of whether the parties are in negotiation or in litigation, the same legal issues will pervade the debate because the affiliates may need the threat of litigation to loom over negotiations if the affiliates are to procure a favorable settlement.

Network-affiliate disputes often are settled through negotiations. In this dispute, the network might offer the affiliates a cash settlement to assuage their fears of lost revenue. This would not be in the long-term interests of the affiliates because it does not solve the affiliates' exclusivity problem, as exclusivity is the lifeblood of affiliates. Discussing exclusivity in the context of program duplication in *KCST-TV v. FCC*, the Court of Appeals for the District of Columbia noted that, without exclusive rights to programs, "a [broadcast] station's audience would be diluted ... which would diminish the station's advertising revenues and

which might threaten the quality of the station's programming or the very survival of the station."³⁹ Accepting cash and addressing future network-affiliate issues as they arise is not in the affiliates' best interests. Instead, they should mobilize and insist on protection from the network to assure that at least their immediate future is secure. Such a resolution, however, may require litigation as leverage.

Affiliates and networks rarely litigate. As former NBC President Michael Gartner notes, "I doubt any litigation will occur [between the networks and the affiliates]. ... Nobody usually goes to court in these situations because the stakes are too high."⁴⁰ Jim Waterbury of KWVL in Waterloo, Iowa is more open to the possibility of litigation but adds that even though "litigation is not impossible ... it is a long way down the road."⁴¹

Though the affiliates' role in the broadcasting industry is not strong

enough to obtain a favorable settlement up front from the networks, litigation or its threat may tip the scales. If the affiliates' case is initially successful, it could induce the networks to concede more than payments to the affiliates. The threat of litigation itself places pressure on the networks because bad publicity flowing from a lawsuit endangers goodwill with viewers and advertisers. Indeed, as Waterbury observes, "The networks fear bad press and bad publicity even more than the actual results of litigation."⁴² A threat of litigation could help the affiliates bargain for limited rebroadcasting in the future.

The new, longer affiliate agreements also encourage litigation. If the agreements only ran two years, an injunction would be impractical; the contract likely would have expired by the time the issue was adjudicated. But the new, longer affiliation agreements first arose in

INDUSTRYINSIGHT

"There will always be affiliates because the networks will want to get their content out by as many means as possible. The traditional structure will exist in one form or another."

—Dennis F. Hernandez, Vice President of Legal Affairs for FOX Television Stations, Inc.

"Networks could start to replace affiliates with broadcast cable within five years—if not sooner."

—Michelle Dube, Programming Director of WKRN in Nashville, TN

"The biggest factor is that cable doesn't reach 100 percent of the country the way that over-the-air television does. So, the audience has an inherent physical limitation."

—Dave Keneipp, Vice President of Legal Affairs for FOX Television Stations, Inc.

"The process is a creeping change, the change is not imminent. ... The networks tend to think short-term, they tend to forget that this is a symbiotic relationship and they need [the affiliates] to reach all their markets."

—Jim Waterbury, General Manager of KWVL in Waterloo, IA

"What do the affiliates care? ... An affiliate has 50 competitors on TV alone, and then there's newspapers and magazines, and walking the dog, and mowing the lawn, and watching videos and playing on the computer. This [dispute] is just a tiny little piece of their competitive situation. It's just a brush war, a brush fire that pops up every few years."

—Michael Gartner, former president of NBC

1995, just before the creation of modern network cable in 1996. Thus, these agreements still have significant life, which could make pursuit of an injunction a worthwhile goal. Still, the prospect of long and bitter litigation against a business partner may be against the best interests of the affiliates, despite their long-term agreements.

The networks, however, also have an incentive to litigate, at least to a preliminary stage. In fact, the network may be best served by initiating the suit. The affiliates could bring a number of different suits in different jurisdictions, which would be difficult and costly to defend. The network could sue in New York or California, depending upon where it is headquartered, seeking a declaratory judgment against all its affiliates. This preemptive move would consolidate the suit and place it in a court that might be more sympathetic to large commercial organizations. Consolidation

would make prosecution of the suit more efficient. Moreover, such a proactive stroke would reassure network stockholders, who would be alarmed by a highly-publicized rash of suits by individual affiliates across the country.

While litigation will probably not be played out to its fruition, it will affect the bargaining power of the parties during negotiations. The parties' relative bargaining power will be tied to the strengths and weakness of their respective legal positions. The affiliates cannot threaten litigation effectively if their legal claims have no basis. As such, the viability of the legal contentions of the affiliates must be examined, as

they are vital to bargaining position and power.

The Exclusivity Clause

The affiliates' first legal argument is based on the network-affiliate contract clause that provides the affiliates with exclusive rights to network programming within their broadcast areas. The rebroadcast of network programs on network cable arguably infringes this exclusive contractual right.

Although network-affiliate contracts are not uniform, their exclusivity clauses can generally be classified into two categories.⁴³ The first

IT SEEMS THAT THE QUESTION IS NOT WHETHER BROADCAST TELEVISION WILL BE ECLIPSED BY CABLE TELEVISION, BUT RATHER WHEN AND TO WHAT EXTENT.

type of exclusivity clause is limited to a right of first refusal on all network programs offered for the affiliate's broadcast area. This right grants an affiliate the ability to be the first television station within a broadcast area to air the network's programs. Such a clause, on its own, is probably not enough to demonstrate an intent by the parties to prevent network programs from being rerun on network cable stations. It merely provides that the affiliate has the first opportunity to air a program; it does not prevent others from later airing the same program within the affiliate's broadcast area. This advantage is distinctly different from the ability to restrict programming output.

Thus, the right of first refusal does not necessarily include the right to exclusive programming. Therefore, affiliates with such an exclusivity clause would not be able to argue breach by rebroadcasts.

The second category of exclusivity clauses is the kind typically granted by networks.⁴⁴ This exclusivity clause is general in its terms, providing that the affiliate will have exclusivity in network programming in the affiliate's broadcast area. It makes no mention of network cable rebroadcasts. In order to determine whether this type of clause can be invoked in this dispute, the intent of the parties at formation of the contract must be examined.

As noted above, many of the affiliates have been associated with their networks for 40 or 50 years, with periodic contract renewals.⁴⁵ Over the years, the exclusivity clause has always granted protection to affiliates within their broadcast area.

However, when the clause was first drafted, there was no threat of cable stations encroaching on the affiliates' viewership, and certainly no threat that the networks would enter the cable field. The issue then is whether the affiliates must specifically point to protection for today's situation or whether a general clause of exclusivity is sufficient to protect the affiliates against all broadcasts of network programming.

It can be argued that history is no guide in interpreting the exclusivity clause. Since the parties have regularly renewed the contracts, the meaning of the exclusivity clause has changed as new issues are raised in subsequent negotiations. Since the

most recent exclusivity clauses do not mention protection from network cable, it could be argued that such silence is deliberate and that the parties elected not to address the cable issue in their bargaining.

For this latter argument to be persuasive, an affiliate must have been aware of the network's competing cable station at the time of renewal. If on notice, the affiliate must protect itself when its interests could be infringed. In a majority of the cases, however, the affiliate's exclusivity clause has predated the network's cable stations. In such cases, the affiliate could hardly protect itself against an eventuality that it could not reasonably foresee.

While the exclusivity clauses of the 1990s or even the 1980s are not exactly the same as those granted in the 1950s, the concept of protection of programming still pervades the clauses. Thus, the underlying interests of the affiliates still remain the same—the affiliates seek insulation from influences that might weaken their programming. This overriding interest is still applicable. If this general exclusivity clause protects the affiliate from rebroadcast by other channels, the same provision should apply equally to a network-authorized third party and to the network itself. The fact that the network may own rights to the programs themselves does not change the exclusivity issue. Rebroadcasts, whether they are aired by the network's cable stations or by a local competitor, equally injure the affiliate.

The general exclusivity clause should defeat rebroadcasting by the network cable stations as long as the affiliate negotiated for such protection while unaware of competition from the network cable channels like MSNBC. In future network-affiliate

negotiations, however, affiliates will have at least constructive knowledge of this phenomenon and therefore must require specific protection from the network. The network might then select its affiliates based on whether they are willing to forego such protection.

However, this potential development does not defuse the threat that litigation poses to the network. In this case, an injunction could be costly to the network. Any programming interruption would put the network behind its competitors in reaching viewers. The prospect of five to ten years' delay in developing a cable presence is threat enough to make the network respect any litigation that has a chance of winning on the merits.

The Implied Covenant of Good Faith and Fair Dealing

The common law of most states recognizes that "every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."⁴⁶ Good faith requires that the parties to a contract not undertake actions that, although not expressly forbidden by the contract, either effectively frustrate the purpose of the contract or destroy or materially impair the benefits of a contract.⁴⁷ The covenant must be shown to be "implicit in the agreement ... as a whole."⁴⁸

Good faith arises out of equitable principles that require a showing that the parties' behavior, while not in breach, emasculates the very purpose for creating the contract and therefore warrants judicial intervention.⁴⁹ The threshold for enforcing the implied covenant is quite high. The harm must be sufficient to obliterate the reason for making the contract and it "could not have been contemplated at the time of drafting."⁵⁰

The affiliates likely can invoke the implied covenant of good faith and fair dealing in two ways. First, the existence of network cable broadcast channels was not foreseeable at the time that affiliate agreements were negotiated. Second, the resultant harm of rebroadcasting would effectively sabotage affiliate viewership to such an extent that it threatens the affiliates' very viability.

The implied covenant protects only against risks that could not have been contemplated when the contract was signed.⁵¹ Thus, the affiliates must establish that they could not reasonably have anticipated that the networks would rebroadcast their programs on network cable. This contention is supported by the fact that network cable did not exist with its present goals when many of the affiliate agreements were signed. CNBC was in existence at the time these contracts were adopted, but its programming style diverges significantly from the journalistic content of the broadcast networks.

The networks have long been involved in cable, purchasing previously existing cable channels. This prior involvement arguably placed the affiliates on notice that network cable was the next logical step in a developing industry. In truth, however, the networks themselves did not realize that rebroadcasts might be advantageous to their cable channels for many years.⁵² Therefore, networks cannot convincingly argue that the affiliates have been on notice of an industry development when the networks themselves entertained no such plans of expansion until recently. Thus, the affiliates would satisfy the non-foreseeability requirement of the implied covenant.

The second requirement of the implied covenant of good faith and

fair dealing is that enforcement of the contract, in light of the unforeseeable event, would injure the affiliates to such an extent as to defeat the purpose of the contract.⁵³ Here, the affiliates need to demonstrate that they will suffer a dramatic loss in viewership, which would not have occurred had the parties addressed the cable issue in their contract negotiations.

The extent of future viewership loss is difficult to prove because what draws viewers to certain shows and how to interpret viewership trends are speculative inquiries.⁵⁴ Even those in the field can merely delineate patterns in viewership but cannot precisely attribute the trends to any specific cause or event.

James G. Webster, Professor of Communications Arts at the University of Maryland, bore out the speculative nature of the endeavor in his study of audience duplication. Webster found that there is “no special tendency for viewers of one program to watch another of the same type. ... All readily observable [viewership] patterns seem to be predicted by scheduling characteristics alone.”⁵⁵ Thus, it is difficult to prove how many viewers the affiliates might lose as a result of rebroadcasts.

The issue then becomes whether the likelihood of such loss constitutes sufficient harm to meet the standard that the implied covenant would require.

United Video, Inc. v. FCC addressed the issue of the likelihood of harm resulting from loss of programming exclusivity.⁵⁶ In the case, cable television companies challenged the FCC’s syndicated exclusivity rule. The Court of Appeals for the District of Columbia found that, while assessing injury caused by nonsimultaneous duplication of television shows is “novel and complex,”

the practice harmed the original source of programming.⁵⁷ The court reasoned that the practice of nonsimultaneous duplication of a program was injurious because “cable companies themselves regularly take advantage of their ability to obtain exclusive rights in programming.”⁵⁸

United Video was not grounded in a statistical study. Instead, the court reasoned that since all parties desire exclusivity, it must have value. But the fact that all parties desire exclusivity does not dictate that exclusivity is necessarily vital to solid ratings. It is conceivable that stations desire exclusivity because it might protect them and not because it conclusively protects their shows. Thus, United Video might not control the network-affiliate dispute because the basis of its conclusion could be questioned empirically.

However, the affiliates probably will prevail on the United Video rationale because its findings are supported elsewhere. Other cases also have recognized that “without [exclusivity], serious financial problems ... would befall local television stations.”⁵⁹ In re Blytheville TV Cable, an FCC agency hearing, also accepted this premise despite the absence of statistical studies.⁶⁰ In both cases, the FCC filed reports concluding that lack of exclusivity injured television stations.⁶¹

There is still a chance that a network could present statistical evidence that United Video, Blytheville, and the FCC were in error. This is not likely to occur because, to date, no such evidence has been offered in a case or study to contradict these judicial conclusions. Thus, the findings of these courts indicate a willingness to accept that loss of exclusivity will cause harm sufficient to meet the requirement of the implied covenant.

The Cable Act of 1992

All affiliates, whether or not protected by their exclusivity clause, may be able to invoke the Cable Act of 1992 to enjoin the networks from cable rebroadcasts. Section 325(b) of the Act contains a provision that prevents cable systems from retransmission of broadcast television signals without the express authority of the originating station.⁶² The affiliates could argue that the §325(b) of the Cable Act supports their case because network cable rebroadcasts constitute retransmission on a cable system without consent. The Act does prevent rebroadcast of network programming on cable and, in a general sense, this describes the conduct of the network cable station. But the substance of the Act does not support the affiliates’ argument.

First, §325(b) does not prohibit the networks but rather “cable systems” from retransmitting a broadcast television signal. The affiliates here are suing the network and its cable channel, not the cable systems that carry the channel. But this problem can be avoided by suing the cable systems themselves. For convenience, this discussion will only refer to the networks as the defendants in this section but it should be understood that the cable systems would be joined.

The more formidable textual problem for the affiliates to overcome is whether the cable system is actually “retransmitting” the broadcast channel’s “signal.” Here, the complaint is that the network cable channels rebroadcast shows that have already been seen on the affiliates’ stations. The network cable channel does not rebroadcast the affiliates’ actual signals, however, but rather the programming that was once on that signal. As such, the network’s actions are most likely out-

side the scope of §325(b).

Even though the text does not support the affiliates, the intent of the Act may. Through the Cable Act, Congress sought to prevent cable systems from using their monopolistic status to unfairly treat customers and television stations.⁶³ The Act explicitly stated that it intended to protect customers from unfair rates and to prevent the systems from controlling what television channels could carry.⁶⁴ Accordingly, the Act mandated retransmission consent. Congress found that most viewers subscribed to cable because of the availability of broadcast network television.⁶⁵ The Act created retransmission consent so that the cable systems could not retransmit as a “free rider,” thereby benefiting from added network viewers without compensating the broadcast stations.

Unsurprisingly, the Act contains no mention of this particular type of network-affiliate dispute. The Act was passed in 1992 and modern network cable did not begin until 1996. Furthermore, the Act cannot be cited by analogy. Nowhere does it distinguish the interests of the network and from those of its affiliates. The closest the Act comes to recognizing separate rights in broadcast signals is found in its legislative history. In the hearings of the House Subcommittee on Telecommunications and Finance, the President of the National Association of Broadcasters, Edward Fritts, noted that “there are two interests intertwined in a broadcast signal—the interest in the signal which belongs to the broadcaster, and the interest in the programs carried on that signal which belongs to

various copyright holders.”⁶⁶ This statement still does not separate clearly the broadcast rights of affiliates from those of the networks.

Such a divergence of interests is the essence of the present dispute, and its absence in the Act strongly suggests that the statute does not apply to this case. Because the Act does not specifically or implicitly anticipate the present controversy, nor even recognize the possibility that the network and its affiliates do not share the same interests, the Cable Act cannot be invoked to prevent network cable rebroadcasts.

Injunctive Relief and Sufficient Harm

The affiliates have a reasonable likelihood of success on their claims

NETWORKS CANNOT IGNORE THE THREAT THAT LITIGATION POSES. NOR CAN THE AFFILIATES IGNORE THE THREAT THAT REBROADCASTING POSES.

of exclusivity and the implied covenant of good faith. Although the litigation may not reach the point of imposing a remedy, it is still necessary to consider the probability that the affiliates can obtain an injunction. The affiliates will draw no bargaining power from the threat of litigation unless they could obtain an injunction as a result of their claims. Otherwise, the network has no reason to fear litigation.

Analysis of injunction is difficult in this case. Not only does it require speculation to a future point in the litigation, but this issue presents a novel and complex controversy that

has never been addressed by a court. However, the injunction is more valuable as a bargaining chip in negotiation than as a satisfactory resolution in court. Accordingly, the likelihood of an injunction matters more than its scope. If in the course of the litigation, the network concludes that the affiliates have a reasonable chance at obtaining an injunction, it will be more inclined to negotiate.

Under California and New York law, the likely jurisdictions of such disputes, injunctive relief is granted where a party proves “a likelihood of substantial and immediate irreparable injury” and the “party’s legal remedies are inadequate.”⁶⁷ In addition, the court “balances the conveniences of the parties and possible injuries to them according as they may be affected by the injunction.”⁶⁸ The court must also “pay particular regard for the public consequences in employing the extraordinary remedy of injunction.”⁶⁹

Injunctive relief is appropriate when a party will suffer irreparable harm.⁷⁰ Injunctions are granted only upon proof that damages are inadequate.⁷¹ This analysis of sufficient harm is the same as under the implied covenant. On one hand, Blytheville, United Video, and the FCC all found that loss of exclusivity will damage affiliates. On the other hand, these findings are not necessarily conclusive because they lacked statistical grounding. However, United Video and the FCC conclusions would raise a significant possibility that a court would grant an injunction to the affiliates. This possibility is reason enough for the affiliates to threaten litigation during negotiations.

Another factor to be weighed in granting an injunction is the burden on the enjoined party.⁷² Again, since harm has yet to occur, it is difficult to balance injury between the parties. But, as recognized in United Video, In re Blytheville, and the FCC's findings, the affiliates could be severely harmed by the rebroadcasts.⁷³ Conversely, since the network rebroadcasts have been isolated until now, it is difficult to argue that they have become integral parts of network cable programming. Thus, the affiliates have a viable argument that the balance of harm is in their favor.

Public Policy Implications

Public policy may be considered in deciding whether or not to grant an injunction.⁷⁴ Home Box Office, Inc. v. FCC dealt with public policy implications involved in television exclusive rights cases.⁷⁵ In that case, a cable company sought review of FCC limits on programming fares for pay cable channels. The Court of Appeals for the District of Columbia recognized that "as a matter of policy further restrictions should not be placed on the [cable television] industry."⁷⁶ The court's rationale for this policy was that restrictions on cable programming were "contrary to the public interest" because they did not "promote diversity of programs and sources" on cable television.⁷⁷ In accordance with this policy, the networks could argue that restricting its cable output will reduce program diversity on cable.

However, this argument is not likely to succeed because it frames programming solely in the context of cable television. It is true that the rebroadcasting does add new shows to cable television. However, in the scheme of television as a whole, the programs do not truly increase diver-

sity because the rebroadcasted shows are already available, for free, on the affiliates' stations. In fact, public policy would dictate that network cable has an obligation to offer programming that is truly diverse, not merely rerun what is already available to viewers. Thus, public policy would probably favor granting an injunction.

It is only necessary at this point to inquire whether the affiliates have a remedy that will make their threat of litigation potent. In the case of rebroadcasts, quantifying harm, assessing damages, and balancing injury are all difficult when harm has not occurred and the issue is new to the industry. However, the affiliates only need to demonstrate that their chance of winning in court makes negotiating out of court worthwhile for the networks. The possibility of injunction in this case will encourage the networks to settle. Additionally, when the networks' risk of losing in court is combined with the negative publicity that litigation will generate, the networks have great incentive to settle the controversy and concede meaningful protection to the affiliates.

Despite the fact that the affiliates might succeed at trial, any victory would maintain the status quo only until their old agreements expire. At that time, the networks would renegotiate for the right to rebroadcast through their own cable stations. If, on the contrary, the affiliates settled early to receive some protection from network-owned cable rebroadcasts, such protection could become part of the canon of affiliate agreements. This negotiated protection could set the terms for the future and allow the affiliates to redefine themselves at least as primary, as opposed to sole, providers of network programming. Even if technology proves that

affiliates have become obsolete in an era of viewer-tailored content, the protection could at least slow the affiliates' extinction.

SUBSCRIBING TO THE SUPER BOWL?

Despite the possible precedent of the Cable Act, Congress is unlikely to step in to resolve this dispute. Any intervention would be premised on the assumption that weak affiliates result in more programs on cable, thus restricting the range of programs for a significant number of viewers. Dave Keneipp, FOX Vice President of Legal Affairs, notes that if popular events such as the Super Bowl were aired on cable, "Congress would have something to say [because its airing outside of broadcast cable makes it] inaccessible to 35 percent of the country."⁷⁸ Indeed, Congress might act on the grounds that preventing a large number of viewers from watching a diversity of programming is against public policy.

However, Congressional action is premature at this point. Neither the Super Bowl nor any other nationally significant programming has been aired outside of broadcast television. Furthermore, for 50 years, networks and affiliates have been able to negotiate sufficiently fair agreements through all the changes in the marketplace. Absent proof otherwise, there is no reason to think that they will not be able to negotiate in the future. Even if the affiliates are in an inferior bargaining position, Congress may not deem them a party worth protecting. Indeed, if the affiliates are, in fact, destined for extinction like eight-track tapes and Betamax players, there would be no public interest in granting them Congressional protection.

Experts remain divided on the

question of whether affiliates will be necessary to the process of spreading network shows to the public in the future. Michelle Dube of WKRN states that networks will utilize cable over affiliates "within five years—if not sooner."⁷⁹ In contrast, in their article on the future of television, professors of communication James R. Walker of Saint Xavier University and Douglas A. Ferguson of Bowling Green State University, write that "it is difficult to see a near future without. ... broadcast television. ... [T]he wide coverage and low direct costs to consumers make it too attractive [to viewers]."⁸⁰ However, even Walker and Ferguson concede that "[broadcast television] will never return to the secure, insular competition of its first generation."⁸¹

It seems that the question is not whether broadcast television will be eclipsed by cable television, but rather when and to what extent. Dave Keneipp predicts that "over-the-air [affiliates may] just become another version of cable in the sense of specialty channels."⁸² Jim

Waterbury of KWVL in Waterloo, Iowa, recognizes that the industry is changing, but he says that "the process is a creeping change, the change is not imminent ... The networks tend to think short-term, they tend to forget that this is a symbiotic relationship and they need [the affiliates] to reach all their markets."⁸³ Eventually, affiliates may become but one part of a networked entertainment conglomerate. Or they may sign off altogether. Neither day has arrived. In the meantime, affiliates have a significant role in providing networks with viewers.

Still, the affiliates must address the issue of rebroadcasts now. How they resolve this issue will set the context for future disputes and establish their place in the next century. The affiliates need to extract some protection from rebroadcasts now because this will become the basis for their bargaining power when later disputes inevitably emerge. Litigation or the threat of litigation will best secure this position. The affiliates' role as disseminators of programming is not essential enough, by itself, to obtain a favorable settlement. Litigation is the hammer to force a settlement with the networks, the best tool to define limits to cable rebroadcasts. The affiliates stand on firm legal ground now because cable rebroadcasts were an unforeseen development and current contracts offer valid challenges to the practice. Furthermore, the networks fear the disruption and public hostility that litigation would create. Thus, networks cannot ignore the threat that litigation poses. Nor can affiliates ignore the threat that rebroadcasting poses. They must squarely address this invasion now to protect their status as the primary programming avenue for networks and viewers. To wait is to be remote-controlled into oblivion. ♦

1 The Federal Communications Commission (FCC) defines "networks" as companies that provide programming to fill prime-time hours for all seven days of the week. FOX, the fourth largest programming provider, does not meet provide sufficient programming to be subject to FCC regulations. HOWARD J. BLUMENTHAL & OLIVER R. GOODENOUGH, *THIS BUSINESS OF TELEVISION 21* (Margaret Sobel, ed., Billboard Books 1998).

2 *Id.* at 19.

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.* at 20.

7 *Id.*

8 *Id.*

9 JAMES WALKER & DOUGLAS FERGUSON, *THE BROADCAST TELEVISION INDUSTRY* 31-32 (Allyn and Bacon 1998).

10 BLUMENTHAL & GOODENOUGH, *supra* note 1, at 67-68.

11 *Id.* at 13.

12 *Id.*

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14 *Why NBC's 'Triplecast' Never Made A Run At The Gold*, BUS. WK., Aug. 17, 1992, at 34.

15 *NBC's TripleCast Promos Irk Stations*, ELECTRONIC MEDIA, Aug. 3, 1992, at 1992 WL 9857744.

16 *The High Cost of the TripleCast*, ELECTRONIC MEDIA, Jan. 4, 1993, at 1993 WL

7146940.

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20 *Id.*

21 *Id.*

22 Telephone Interview with Michelle Dube, Programming Director of WKRN in Nashville, Tenn. (Mar. 1, 1999).

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- 1997, at F1; Jon Lafayette, *NBC Cable Draws Affiliates' Ire*, ELECTRONIC MEDIA, Mar. 10, 1997, at 1997 WL 8289045.
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- 25 Telephone Interview with Jim Waterbury, General Manager of KWWL in Waterloo, Iowa (Mar. 9, 1999).
- 26 Despite its potential to injure NBC affiliates, MSNBC is currently struggling with its ratings. Peter Johnson, *Minus Scandal, MSNBC Faces an Identity Crisis*, USA TODAY, Mar. 10, 1999, at C5.
- 27 Notebook, TELEVISION DIGEST, Mar. 10, 1997.
- 28 Lafayette, *supra* note 23.
- 29 Waterbury, *supra* note 25.
- 30 Keneipp, *supra* note 18.
- 31 FOX Network-Affiliate Form Contract.
- 32 Keneipp, *supra* note 18.
- 33 Waterbury, *supra* note 25.
- 34 Keneipp, *supra* note 18.
- 35 Waterbury, *supra* note 25; Dube, *supra* note 22.
- 36 Waterbury, *supra* note 25.
- 37 *Affiliates Ask Protection*, TELEVISION DIGEST, Apr. 7, 1997.
- 38 Lafayette, *supra* note 23.
- 39 *KCST-TV v. FCC*, 699 F.2d 1185, 1188 (D.C. Cir. 1983).
- 40 Gartner, *supra* note 24.
- 41 Waterbury, *supra* note 25.
- 42 *Id.*
- 43 Waterbury, *supra* note 25; Dube, *supra* note 22.
- 44 *Id.*
- 45 BLUMENTHAL & GOODENOUGH, *supra* note 1, at 18-20.
- 46 *Jaco Elecs., Inc. v. Hitachi Am. Ltd.*, 205 A.D.2d 328, 328 (N.Y. App. Div. 1994); *Kirke La Shelle Co. v. Paul Armstrong Co.*, 188 N.E. 163 (N.Y. 1933); 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 7.17 (2d ed. 1998).
- 47 *Jaco Elecs., Inc.*, 205 A.D.2d at 328.
- 48 *Poley v. Sony Music Entertainment, Inc.*, 619 N.Y.S.2d 923, 927 (N.Y. Sup. Ct. 1994).
- 49 *Id.*
- 50 *Industrial Representatives v. CP Clare Corp.*, 74 F.3d 128, 129-130 (7th Cir. 1996).
- 51 *Id.*
- 52 Indeed, NBC did not create MSNBC and CNBC with the practice of rebroadcasting network programming in mind. The practice was not adopted until over a year after MSNBC was created. Lafayette, *supra* note 23.
- 53 *Industrial Representatives*, 74 F.3d at 129-30.
- 54 WALKER & FERGUSON, *supra* note 9, at 121-134.
- 55 JAMES G. WEBSTER, *Program Audience Duplication: A Study of Television Inheritance Effects*, 29-2 JOURNAL OF BROADCASTING & ELECTRONIC MEDIA 121, 123 (1985).
- 56 *United Video, Inc. v. FCC*, 890 F.2d 1173 (D.C. Cir. 1989).
- 57 *Id.* at 1176-80.
- 58 *Id.* at 1179.
- 59 *In re Blytheville TV Cable Co.*, 68 F.C.C.2d 1065 (1978) (petition for reconsideration).
- 60 *Id.*
- 61 *United Video*, 890 F.2d at 1179-80; *In re Blytheville TV Cable Co.*, 68 F.C.C.2d at 1065.
- 62 47 U.S.C. §325(b)(1)(a) (1994).
- 63 Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1463 (1992).
- 64 *Id.*
- 65 *Id.*
- 66 Cable Television Regulation: Hearings on H.R. 774 before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce, 102d Cong. (1991).
- 67 *La Habra Prod., Inc. v. Patio Indus.*, 220 B.R. 672, 679 (C.D. Cal. 1996); *New York State N.O.W. v. Terry*, 886 F.2d 1339, 1362 (2d Cir. 1989).
- 68 *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-12 (1982) (quoting *Yakus v. United States*, 321 U.S. 414, 440 (1944)).
- 69 *Id.*
- 70 *Weinberger*, 456 U.S. at 311-12; *United States v. County of Westchester*, 571 F. Supp. 786, 798 (S.D.N.Y. 1983).
- 71 *New York State N.O.W.*, 886 F.2d at 1362.
- 72 *Weinberger*, 456 U.S. at 311-12; *Winger v. SI Management L.P.*, 1998 WL 951695, at *9 (N.D. Cal. Sept. 24, 1998).
- 73 *United Video*, 890 F.2d at 1179-80; *In re Blytheville TV Cable Co.*, 68 F.C.C.2d at 1065.
- 74 *Weinberger*, 456 U.S. at 311-12.
- 75 *Home Box Office, Inc. v. FCC*, 587 F.2d 1248 (D.C. Cir. 1978).
- 76 *Id.* at 1251.
- 77 *Id.* at 1253.
- 78 Keneipp, *supra* note 18.
- 79 Dube, *supra* note 22.
- 80 WALKER & FERGUSON, *supra* note 9, at 39.
- 81 *Id.*
- 82 Keneipp, *supra* note 18.
- 83 Waterbury, *supra* note 25.