Boston College Law Review

Volume 10
Issue 2 *Number 2*

Article 14

1-1-1969

CATV and Copyright Infringement

Judith E. Ciani

CATV AND COPYRIGHT INFRINGEMENT

I. THE *Fortnightly* CASE

In *Fortnightly Corp. v. United Artists Television, Inc.*,[1] United Artists was the owner of copyrights in certain motion pictures. Licenses to broadcast the films were issued to five television stations located in Pittsburgh, Pennsylvania, Steubenville, Ohio, and Wheeling, West Virginia. All of these licenses were limited to a showing on the stations' facilities for reception by the public without charge; some explicitly prohibited broadcast or exhibition through community antenna television (CATV) systems.[2] Without plaintiff's consent, Fortnightly, a private business corporation operating its two CATV systems commercially and for profit, received such broadcasts by antenna and amplified, modulated and transmitted them over coaxial cables to the television sets of its 15,000 subscribers in and about Clarksburg and Fairmont, West Virginia. No local stations could be received in the area served by defendant's CATV systems until 1957, and, because of hilly terrain outside stations usually cannot be received through ordinary rooftop antennas.

United Artists brought suit in the United States District Court for the Southern District of New York[3] claiming that Fortnightly had violated its exclusive rights under the Copyright Act of 1909, Sections 1(c) and (d).[4] The district court declined to adjudicate all of the issues raised under the statute[5] and narrowed its inquiry to whether defendant's activities resulted in an

---

[1] 392 U.S. 390 (1968).

[2] CATV is defined at 47 C.F.R. § 74.1001(e)(1) as "any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service."

[3] 255 F. Supp. 177 (S.D.N.Y. 1966).

[4] 17 U.S.C. § 1 (1964) provides:

> Any person entitled thereto . . . shall have the exclusive right:
>
> . . . .
>
> . . . .
>
> (c) To deliver, [or] authorize the delivery of . . . the copyrighted work in public for profit if it be a . . . nondramatic literary work . . . and to play or perform it in public for profit . . . in any manner or by any method whatsoever . . . .
>
> (d) To perform . . . the copyrighted work publicly if it be a drama . . . and to exhibit, produce, or reproduce it in any manner or by any method whatsoever. . . .

[5] 255 F. Supp. at 199. The court noted some merit, however, in one of plaintiff's alternative theories. Id. at 199 n.9. Both sections 1(c) and 1(d) grant an exclusive right "to make or procure the making of any transcription or record . . . (of the copyrighted work) by or from which, in whole or in part, it may in any manner or by any method be exhibited . . . produced, or reproduced." The assertion that Fortnightly's equipment made such transcriptions or records is supported by the court's finding that "[s]ince an electronic reproduction or replica of the input signals takes place, the output signals received by the television set are similar, but not identical, to the original broadcast signals." Id. at 193. The language of the statute indicates that merely making a transcription capable of being exhibited constitutes infringement, whether or not it is so used. Had the district court rested its finding of liability on this ground rather than on a finding of performance, the precedent might have extended to innocent activities in the field of electronics which involve reproduction in a purely metaphorical sense.

unauthorized "performance" of the copyrighted works.[6] The court's test of performance was whether defendant had contributed a "substantial part" to the ultimate reception of the copyrighted material by the public. In holding for the plaintiff, Judge Herlands relied on the technological characteristics of Fortnightly's CATV systems to support his finding of a performance. After an elaborate analysis, he rejected defendant's contention that the equipment is passive like that of an ordinary rooftop antenna and found, rather, that it is "sophisticated, complex, extremely sensitive, highly expensive equipment, especially constructed and designed to reproduce the electromagnetic waves . . . and to . . . transmit the new electromagnetic waves through an elaborate network of coaxial cables."[7] The Circuit Court of Appeals for the Second Circuit affirmed[8] the finding of a performance, but rejected the technological analysis of the district court. The circuit court employed a "result" criterion under which defendant's activities were found to constitute performance because they resulted in the simultaneous viewing of the programs by its subscribers.[9]

In holding that Fortnightly performed the copyrighted material of United Artists, the district and circuit courts relied on a rationale developed in two early cases which broadly construed the technological concept of performance in radio retransmissions. In *Buck v. Jewell-LaSalle Realty Co.*[10] defendant hotel owner provided radio headsets in guest rooms and loud speakers in public rooms over which a single radio station was transmitted. The station broadcast plaintiff's copyrighted musical composition without a license. Defendant submitted that as the retransmission was simultaneous with the infringing broadcast, there was but one actual performance, and one infringement each time that a copyrighted song was rendered. The Court, speaking through Justice Brandeis, defeated this argument by establishing a "multiple performance doctrine." Defendant's acts in "(1) installing, (2) supplying electric current to, and (3) operating the radio receiving set and loudspeakers"[11] which distributed the signal were found to constitute a per-

---

[6] 255 F. Supp. at 199.

[7] Id. at 195. In holding that Fortnightly infringed, the court stated that it believes that it adopts a construction of section 1 that recognizes contemporary scientific realities, takes into consideration the current technologies of the television industry, effectuates the predominant purpose and policy of the statute, and gives the language of the Act a meaning consonant with the trend of interpretative decisions in cognate fields.

Id. at 214.

[8] 377 F.2d 872 (2d Cir. 1967).

[9] Id. at 879.

[10] 283 U.S. 191 (1931).

[11] Id. at 201. Justice Brandeis reached his conclusion by analogy to a phonograph record. This reasoning has been questioned on the basis that

> [i]t is not the reproduction *per se* of sound waves which justifies the conclusion that "playing" a phonograph record constitutes a separate performance. It is rather the express statutory language which provides that the copyright owner shall have the exclusive right to "play" and to "perform" a "record" which warrants this conclusion. Yet when this statutory language is applied to radio or television broadcasts it can hardly be argued that the person receiving such

formance separate from the original broadcast. This application of the statute was in part based on the finding of a "reproduction" in the literal sense that the inaudible radio waves were converted into audible signals within the equipment under the control of the hotel.[12] Thus, the *Jewell* holding appears to have turned on the total control of the actual reproduction by defendant for the benefit of the public invited to the hotel.

The second case relied upon by the district and circuit courts in *Fortnightly* was *Society of European Stage Authors & Composers (SESAC) v. New York Hotel Statler Co.*,[13] in which a performance was found to be public where less than total control over the reproduction was exercised. The facts varied from *Jewell* in two respects. First, the original broadcasters were licensed. Thus, in *SESAC* the multiple performance doctrine was made applicable where there was no contributory infringement. Second, and more significantly, a choice of two stations was provided, the selection and actual production of sound being controlled by the guest. The hotel controlled only a metaphorical reproduction[14] which was found to occur within the amplifying equipment. Clearly, if a hotel guest provided and operated his own receiving set, any resulting performance would be private. Thus, the conclusion to be drawn from *SESAC* is that merely supplying the central antenna and receiving set is a sufficient contribution to the hearing to constitute an infringing public performance of the copyrighted work.

The district and circuit courts in *Fortnightly* concluded that *Jewell* and *SESAC* indicated a quantitative test: how much did defendant do to bring about the hearing (viewing) of the copyrighted material?[15] If it has contributed a "substantial part" in the retransmission to the public so that "the only act necessary . . . is a minor, albeit essential, one—such as 'turning the knob,' "[16] it has performed. As to the quantity of defendant's physical control, the facts of *Fortnightly* departed further from the precise holding of *Jewell* than had *SESAC*, for Fortnightly supplied only the antenna and cable, not the ultimate receiving equipment. If control over only the metaphorical reproduction in *SESAC* is an acceptable variation of *Jewell*'s requirement of control over the literal reproduction,[17] the quantitative test would seem to be applicable in *Fortnightly*. The district court in *Fortnightly* set forth a meticulous technological analysis to establish that CATV creates such a reproduc-

broadcasts performs "any form of record in which the thought of an author may be recorded and from which it may be read or reproduced."

M. Nimmer, Copyright § 107.42 (1968) [hereinafter cited as Nimmer].

12 283 U.S. at 199-200.

13 19 F. Supp. 1 (S.D.N.Y. 1937).

14 Nimmer § 107.44 n.216c.

15 See 255 F. Supp. at 214, 377 F.2d at 879.

16 255 F. Supp. at 214.

17 The district court in *Fortnightly* felt that such a variation was acceptable:

> The problem presented in SESAC differs from the problem presented for adjudication in the case at bar only in degree and not in kind. This court must likewise decide whether the acts of defendant—despite the fact that they stop short of producing an audible and visible reproduction of the broadcast performance—are sufficient to constitute a performance within the meaning of the Act.

255 F. Supp. at 209.

tion, which together with control of the antenna and cable constitute a "substantial part" in bringing about the ultimate viewing. The circuit court's rejection of the technological analysis in favor of a result criterion, therefore, does not appear to be a faithful application of *Jewell* and *SESAC* because these two cases seem to require a finding, however tenuous, of some technological reproduction of the original signal by the defendant. The circuit court, however, is correct in that the policy of the Copyright Act contemplates primarily the effect of the activity—the effect contemplated being the unauthorized distribution of copyrighted property to the public. However, the language of the 1909 statute seems to require the use of the *Jewell* construction which makes the finding of a "reproduction" an essential element of an infringing performance.

The Supreme Court granted certiorari in *Fortnightly* and *reversed*[18] the circuit and district courts. The Court refused to apply the *Jewell* and *SESAC* precedents and the quantitative test of the lower courts under which a conclusion of liability would have been irresistible.[19] In discarding these interpretations of the statute, the Court reasoned that if merely the extent of the contribution to the ultimate viewing were conclusive, the owner of an apartment house antenna would incur the same liability as a CATV system.[20] This rationale is not persuasive. If an apartment house owner were to use the passive type of antenna, it could be held under the *Jewell-SESAC* reasoning that there was no reproduction sufficient to constitute performance. In those two cases, as well as in *Fortnightly*, the defendant's equipment amplified or modulated the signal as would not be done by an ordinary rooftop antenna. Even if a non-passive master antenna were used by an apartment house, the resulting performance could be construed to be private. Under the *Jewell* theory, reception of a broadcast in a private home or club is a performance, though it usually lacks the public nature required for infringement.[21] In such cases the test for a *public* performance appears to be whether effective and meaningful restrictions are placed on those who have a right to attend.[22] Thus, it is likely that retransmission to the permanent residents of an apartment house, unlike transients in a hotel, would not be considered public. The test for profit is a broad one requiring only that the performer receive direct or indirect commercial advantage.[23] Though it can be argued that an antenna is one of the inducements to patronize an apartment house, the purpose of supplying the antenna is usually not commercial, but merely "to keep the building's roof free of the jungle of antennas it would otherwise sprout."[24] The fact that a CATV operator is an entrepreneur in the business

---

[18] 392 U.S. 390 (1968).

[19] Id. at 396-97 n.18, 400-01.

[20] Id. at 397.

[21] See Nimmer § 107.21.

[22] Id.

[23] Id. at §§ 107.31, 107.32; see also Herbert v. Shanley Co., 242 U.S. 591 (1917); Associated Music Publishers, Inc. v. Debs Memorial Radio Fund, Inc., 141 F.2d 852 (2d Cir. 1944), which is criticized by Nimmer at § 107.32 as extending the concept of "for profit" too far.

[24] Respondent United Artists' Petition for Rehearing at 33, reh. denied, 189 S. Ct. 65 (1968).

of supplying retransmissions for profit might be an essential difference, but was not considered important by the Court.[25]

As a substitute for the *Jewell* interpretation, the Court constructed a disarmingly simple dichotomy, analogous to exhibitors and members of a theater audience:

> Television viewing results from combined activity by broadcasters and viewers. Both play active and indispensable roles in the process; neither is wholly passive. . . .
> . . . Broadcasters perform. Viewers do not perform. Thus, while both broadcaster and viewer play crucial roles in the total television process, a line is drawn between them. One is treated as an active performer; the other, as a passive beneficiary.[26]

To determine how CATV should be treated in this context, the Court applied a functional test: what function does CATV play in the total process of television broadcasting and reception?[27] As did the district court, the Court professed to rely on an analysis of changing technology. However, rather than focusing on whether the equipment of CATV creates a reproduction, the Court reasoned that by virtue of the original broadcast a program is "released to the public" who have a right, using any means, including CATV, to receive the program simultaneous with its original transmission.[28] The position of the statutory copyright holder faced with this new freedom for CATV retransmission approaches that which he would occupy under common law copyright, whereby a work is deemed "dedicated to the public" at the moment of its first publication, cutting off the exclusive rights of the creator. The only difference is that under *Fortnightly* the dedication to the public is only for purposes of simultaneous retransmission. Potentially, CATV could wire every television set in the nation, pick up the signal of one local station, and simultaneously carry it to markets across the continent. Local stations in these other markets would otherwise have paid royalties to the copyright holder for license. The single royalty received could not be set high enough to compensate for this loss unless the licensee could find an advertiser willing to pay for national coverage. Frequently, however, advertisers with a national market for their products prefer to tailor their appeal to regional tastes. Such a transcontinental retransmission of a local station's signal would seem to be permissible under the reasoning of the Court, though under the present Federal Communication Commission restrictions on distant signal importation so extreme a case could not develop.[29]

It is significant that the Court rejected the theory of implied-in-law license which might have excused the liability of Fortnightly in the case at bar without a complete departure from precedent. Although there is no defin-

[25] 392 U.S. at 400.

[26] Id. at 397-99 (footnotes omitted).

[27] Id. at 397.

[28] Id. at 400-01. This reasoning is similar to that employed in Buck v. Debaum, 40 F.2d 734 (S.D. Cal. 1929), wherein the court stated, at 736, that when the copyright owner consents to a broadcast "he must be held to have acquiesced in the utilization of all forces of nature that are resultant from the licensed broadcast."

[29] See text accompanying note 63 infra.

itive precedent in the area of radio and television broadcasting for a license implied-in-law, Justice Brandeis had suggested that if the original broadcast in *Jewell* had been authorized by the copyright holder such license might have been implied for the hotel's retransmission.[30] Fortnightly had advanced this argument throughout the litigation. It was rejected by the district court,[31] but the court of appeals explicitly reserved the question whether such license might be permitted where a CATV system transmits to viewers who could have received the original broadcast by use of a normal rooftop antenna.[32] In fact, the circuit court's "result" criterion appears to have been designed to keep that question open by conditioning performance on a finding that, but for defendant's activities, the viewer could not have viewed the broadcast. Before the Supreme Court, Fortnightly was joined by the Solicitor General in an amicus curiae brief in advocating extension of the area in which a license might be implied to the "Grade B contour" of the original broadcaster, which is a theoretical standard of the FCC defining an area in which the residents could expect to receive some signal were it not for the interference of buildings or terrain.[33] It was argued that using the Grade B contour would be consistent with both copyright and communications policy. When a broadcaster negotiates with a copyright holder, the amount of the royalty is determined with reference to this anticipated area of reception, not the area of actual reception suggested by the circuit court. Although none of Fortnightly's subscribers could receive any of the retransmitted stations by ordinary rooftop antenna so as to fall within the circuit court's limitation, those in Fairmont are within or on the Grade B contour of four of the five stations carried, and those in Clarksburg within the Grade B contour of one station.[34]

Use of the implied-in-law license theory would have preserved the practice of exclusive licensing whereby a copyright proprietor is permitted to limit performance of his work in public to defined periods and areas or audiences.[35] It is reasoned that in doing so he permits a license to be implied to those members of the public for whom the broadcast is intended. This is an obvious fiction, for the copyright holder can license only his right to perform, having no exclusive right to the viewing. The Solicitor General concedes that it is "not a license at all, but is simply a rule of law fashioned by the courts in order to take care of practicalities, equities, and other factors in a given situation."[36] This suggested compromise of policy and economic interests was

---

[30] 283 U.S. at 199 n.5.

[31] The district court stated:

> No useful purpose would be served by including in this opinion a detailed exposition of the court's analysis. . . . The court finds no basis for concluding that defendant is the beneficiary of any license implied in law.

255 F. Supp. at 212.

[32] 377 F.2d at 884.

[33] See 47 C.F.R. § 73.684 (1968); F.C.C. Sixth Report and Order on Television Allocations, 17 Fed. Reg. 3905, 3915 (1962).

[34] 377 F.2d at 883.

[35] The circuit court in *Fortnightly* recognized this right of the copyright holder and indicated that it was desirable that he retain it. 377 F.2d at 882.

[36] Memorandum for the United States as Amicus Curiae at 5-6, Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968).

summarily rejected by the Court.[37] In addition, under the *Jewell* and *SESAC* precedents, a finding of a public performance would seem to have been inevitable in *Fortnightly*. However, application of the implied-in-law license theory would render this public performance non-infringing. That it is improper for the Court to take such liberties in matters of statutory construction was clearly expressed by the district court: "Once the court has determined . . . that a defendant's activities constitute a public performance for profit within the meaning of the Copyright Act, it has no discretionary power to except that defendant from the coverage of the Act. Only Congress can legitimately do that."[38] Thus, the *Fortnightly* Court had only two alternatives: to affirm the finding of a performance and full liability, or to place CATV on the viewer's side of the line so that there can be no performance and no liability. In choosing the latter, the Court goes much farther than the proposed implied-in-law license theory. By refusing to recognize the validity of geographical boundaries in an exclusive license, it holds that licensing exhausts the copyright holder's monopoly as far as reception of that broadcast is concerned. Though the Court may have intended that there be some spatial limits on the viewer's right to employ CATV,[39] none are indicated. Also, the problems presented by other CATV activities such as program origination are expressly reserved.[40] Thus, the Court refrains from drawing any useful distinctions among types of CATV activity. The answers to these questions would have been helpful both to courts which might be called upon to apply the *Fortnightly* ruling, and to the Congress which had deferred consideration of the CATV provision in the new copyright bill pending the outcome of the case.[41]

The dissent of Justice Fortas, though impliedly questioning the legal soundness of *Jewell*, objects to the abandonment of that precedent without the substitution of a "new, equally clear, and workable interpretation."[42] The practical advantage of the multiple performance doctrine over the *Fortnightly* holding had been its universal scope. By establishing that nearly every transmission is a performance, the "public" and "profit" qualifications effectively separate as infringers those who are being unjustly benefitted through their use of the copyrighted material. Although Justice Fortas asserts that the majority has overruled *Jewell*,[43] the Court—noting that this "questionable 35-year old decision . . . in actual practice has not been applied outside its own factual context"[44]—claims merely to limit its application to those facts. This view will permit the music performing right societies, American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI), to continue their practice of demanding licenses from hotels which operate in the manner of the defendant hotel in *Jewell*. Even though these societies do not presently enforce *Jewell* "to its logical extreme in that they do not de-

37 392 U.S. at 401.

38 255 F. Supp. at 215.

39 See 392 U.S. at 399 n.25.

40 Id. at 392 n.6.

41 ABA Section of Patent, Trademark and Copyright Law, 1968 Committee Reports, 128 (1968).

42 392 U.S. at 405.

43 Id. at 406.

44 Id. at 401 n.30.

mand performing licenses from commercial establishments such as bars and restaurants which operate radio or television sets for the amusement of their customers."[45] *Fortnightly* may prevent them from demanding such licenses in the future. It is not certain whether the Court intends to limit the *Jewell* principle to musical compositions protected by Section 1(e) of the Copyright Act,[46] or to the use of properties protected under sections 1(c) and (d) in the precise fact situation presented in *Jewell*. ASCAP has expressed a belief that *Fortnightly* applies only to the types of property protected by subsections (c) and (d), and will not be held to apply to any transmission of musical compositions which are protected by Section 1(e) of the 1909 Copyright Act.

The dissent does not propose any positive alternative rationale, and admits that its only guidelines are doing "as little damage as possible to traditional copyright principles and to business relationships, until the Congress legislates and relieves the embarrassment which we and the interested parties face."[47] This embarrassment springs from an awareness that the existing statute and case law are inadequate to deal with the character and magnitude of the issues raised by CATV and other modern technology.[48] A compromise such as the implied-in-law license proposal appears to be the only equitable solution, but it cannot be accomplished under the 1909 Act. Clearly the Court could have rationalized an application of *Jewell*. Justice Fortas suggests that, in choosing not to do so, the majority was motivated by a desire to foster the growth of CATV.[49] That such was in fact the case would appear to be supported by the Court's statement that if applied here, *Jewell* "would impose [retroactively] copyright liability where it has never been acknowledged to exist before."[50] A holding of retroactive liability would undoubtedly have been disastrous for many small CATV systems, even though it is not unreasonable to charge them with some liability for future operations.

The effect of *Fortnightly* is to destroy the "established business relationships" which the practice of exclusive licensing had created among program suppliers, broadcasters and advertisers. The majority might well have reasoned that the detrimental effect on these interests would be mollified by the FCC restrictions on CATV, and that the three major broadcast networks and seven movie studios which contract for most of the programming could better absorb the economic loss. The Court's decision may also be explained in part by its awareness of the efforts of Congress to reach a fair legislative

---

[45] Nimmer § 107.41 n.204.

[46] Address by Herman Finkelstein, General Counsel, American Society of Composers, Authors and Publishers (ASCAP), NCTA Legal Seminar, Washington, D.C., Sept. 11, 1968.

[47] 392 U.S. at 404.

[48] Justice Fortas stated that "[a]pplying the normal jurisprudential tools . . . to the facts of the case is like trying to repair a television set with a mallet." Id. at 403.

[49] Id. at 404-05.

[50] Id. at 401 n.30. Fortnightly argued in the Supreme Court that the imposition of retroactive liability for CATV would result in the takeover of CATV by the few large copyright owners, because the amount of such back liability would exceed many times the cost of the systems. See Petitioner's Reply Brief at 14. 17 U.S.C. § 101 (1964) provides a statutory minimum damage of $250.00 for each infringement of a copyrighted motion picture.

solution to the CATV-copyright problem. A judicial compromise which the parties could have tolerated might have delayed or unduly influenced such a legislative solution. However, permitting CATV to enjoy a "free ride" in the interim might stimulate an earlier resolution.

Though the majority opinion is defensible as a technical reading of the statute, principles of statutory construction forbid reading the statute in a vacuum. The scope of a court's inquiry is limited to the "ordinary sense" of the language and its legislative history.[51] As the Congress of 1909 could not have foreseen even the situation presented in *Jewell*, its intentions vis-à-vis both radio and CATV retransmissions have to be inferred in the light of drastic technological change. The majority's functional view of technological change seems to ignore the impact of that change on the value of copyrighted property. In setting the bounds of the copyright monopoly which Congress granted, the Court should not extend the limits "to include privileges not intended to be conferred . . . (nor narrow them so) as to deprive those entitled to their benefit of the rights Congress intended to grant."[52] The history of case law under the Copyright Act records a continuing debate as to whether the principal purpose of the Act is to reward the copyright holder, or to encourage authors and artists to release their works to the public.[53] Generally, it is accepted that the author should have an exclusive right except where it conflicts with the public interest.[54] By analogy, if an author chooses to publish his work in a limited edition, it cannot be argued that there is a national interest in the dissemination of that particular work which would override his right so to limit publication. However, public interest overrides the author's right to compensation for every reproduction of his property to the extent of permitting "fair use."[55] The same policy would ordinarily apply to individual dramatic works protected under Section (1)(d) of the Act. The copyright holder is granted the exclusive right to perform. Were he to license a performance of a copyrighted work in a theater, the royalty could be commensurate with the exposure anticipated. Similarly, with television broadcasts, the practice of the market place has been to limit performance to a specified area for a definite period. The ordinary sense of performance in 1909 conceived of an activity separate in time and place;[56] simultaneous retransmissions were impossible. The *Jewell* Court determined that, had they been possible, the Congress would have wished the copyright holder to be compensated for such use of his musical property. Thus the multiple performance doctrine was devised as a way to read this inferred intention into the statute. As to the use of dramatic and literary property by CATV, the intention

[51] White-Smith Music Publishing Co. v. Apollo Co., 209 U.S. 1, 16 (1908).

[52] Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 346 (1908).

[53] See Mazer v. Stein, 347 U.S. 201, 219 (1954), Marks Music Corp. v. Vogel Music Co., 42 F. Supp. 859, 865 (S.D.N.Y. 1942). Article I, § 8 of the Constitution provides that the Congress shall have power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

[54] See General Talking Pictures Corp. v. Western Elec. Co., 304 U.S. 175 (1938).

[55] See C. Gosnell, The Copyright Grab-bag, in Hearings on S. 597 Before the Subcommittee on Patents, Trademarks and Copyrights of the Senate Committee on the Judiciary, 90th Cong., 1st Sess., at 597, 601 (1967).

[56] See H.R. Rep. No. 2222, 60th Cong., 2d Sess. 4 (1909).

would seem to have been the same. Therefore, only a compelling public interest would justify limiting the right of the copyright holder. Apparently, the Court in *Fortnightly* felt that the public has an interest in the development of broadcast technology such as CATV by private enterprise. A holding of liability would at this time have impeded that development because of the relative strengths of the parties and the present structure of the broadcast industry. Had the Court adhered to the inferred intent of Congress that the copyright holder be compensated in this situation, an exception on the basis of public interest in CATV would not seem justified. Furthermore, the exemption of a particular industry would be assailable as judicial legislation. Also, had the Court pronounced CATV to be protected by the public interest, Congress would have had to contradict the Court in drafting a revision which would prescribe the proper pattern of liability for future CATV operations. Therefore, it would appear that the Court cannot justify as policy its desire to protect CATV from retroactive liability. Under the *Jewell* reasoning, a conclusion of liability in *Fortnightly* would have been avoidable only by an artificial exemption or implied-in-law license. By contrast, *Fortnightly* places CATV on the viewer's side of the line, and precludes the possibility of an offending performance. Consequently, there can be no infringement regardless of the public or profitable aspects of CATV. In light of the fact that a finding of retroactive liability would have had a destructive impact on the CATV industry, and that Congress would appear to be better equipped to strike an equitable balance between the competing interests, the result reached by the Court in *Fortnightly* seems desirable, though its reasoning is less than sound.

II. The Future of CATV

The significance of both the 1909 Act and the *Fortnightly* decision to the CATV-copyright problem is certain to be transient. The Federal Communications Commission, the Copyright Office and Congress have been attempting for several years to resolve a profusion of interrelated questions presented by CATV operations. Of these, CATV copyright liability is only one, but as the solutions begin to emerge it is generally regarded as the crucial issue. While congressional action has been pending, the FCC has become deeply involved in the regulation of CATV. The proper line between copyright and the Commission's jurisdiction is not yet entirely clear. However, possible copyright revision should not be considered without regard to communications policy.

A. *The FCC and CATV*

Since its inception in 1950, CATV had enjoyed a period of unrestrained growth. The FCC had declined to regulate CATV as late as 1959,[57] but by 1962 the fear that local stations would be forced out of business moved the agency to assume jurisdiction.[58] At first only those CATV systems fed by

[57] See In the Matter of Inquiry Into the Impact of Community Antenna Systems, TV Translators, TV "Satellite" Stations, and TV "Repeaters" on the Orderly Development of Television Broadcasting (No. 12443), 26 F.C.C. 403, 428-29 (April 1959).

[58] Carter Mountain Transmission Corp. (No. 12931), 32 F.C.C. 459 (1962). See also Carter Mountain Transmission Corp. v. FCC, 321 F.2d 359 (D.C. Cir.), cert. denied, 375 U.S. 951 (1963).

microwave relay were deemed to be regulable. Regulations were promulgated in 1965 dealing with those systems and the microwave facilities serving them.[59] Systems which transmit by wire were not brought within the Commission's jurisdiction until 1966.[60] The regulations promulgated in that year and made applicable to all CATV systems display three features: (1) *carriage*—CATV systems must carry the signals of all local stations which request carriage, and without degrading their signals;[61] (2) *non-duplication*—CATV systems are forbidden to duplicate the programming of a local station on the same day unless the local station broadcasts in black and white and the CATV in color;[62] (3) *100-markets rule*—CATV systems not already established by February, 1966, are forbidden to import outside signals into the top 100 markets without a hearing and approval by the Commission.[63]

CATV challenged the power of the FCC to assume such sweeping jurisdiction over its operations without any specific legislative authorization. In the companion cases of *United States v. Southwestern Cable Co.* and *Midwest Television v. Southwestern Cable Co.*,[64] decided only a week before *Fortnightly*, the Supreme Court held that the FCC has authority to regulate CATV by virtue of its jurisdiction over "all interstate communications by wire or radio."[65] There would appear to be a fundamental inconsistency between *Southwestern* and *Fortnightly*. While CATV systems performing similar functions are held to be vehicles of communication for purposes of FCC regulation, they are characterized as passive antennas for purposes of copyright liability. Each case is questionable on its own merits, but viewed together the two are irreconcilable. The outstanding similarity, however, is that both can be said to be motivated by expediency. A legislative grant of authority for FCC control of CATV is necessary,[66] and will probably emerge during the 91st Congress. The form of such legislation, as well as changes in present regulations, will depend upon the outcome of current studies both within and without the Commission[67] and upon the recommendations of the Commissioners them-

[59] First Report and Order, Rules re Microwave served CATV, 38 F.C.C. 683 (1965).

[60] Second Report and Order, Community Antenna Television Systems, 2 F.C.C.2d 725 (1966) [hereinafter cited as Second Report and Order]. For the rules promulgated in 1966, see 47 C.F.R. §§ 21.710, 21.712, 21.714, 74.1101, 74.1103, 74.1109, 91.557, 91.559, 91.561 (1968).

[61] See id. § 74.1103(a).

[62] See id. § 91.559.

[63] See id. § 74.1107. The top 100 markets are ranked by the Commission on the basis of net weekly circulation of the largest station in the market. Second Report and Order at 782.

[64] 392 U.S. 157 (1968).

[65] The CATV interests had contended that this phrase in Title I of the Communications Act of 1934, 47 U.S.C. 3153(a) (1964), describes the outline and does not confer jurisdiction. CATV thus became the only communications enterprise which the commission regulates without licensing. It has been suggested that "Congress intended that the Commission's regulatory authority under Title III be limited to the holders of licenses issued under its provisions." Comment, CATV Regulation—a Complex Problem of Regulatory Jurisdiction, 9 B.C. Ind. & Com. L. Rev. 429, 439 (1968).

[66] On June 17, 1966, H.R. 13286, a bill specifically authorizing regulation of CATV by the FCC, was reported favorably by the House Committee on Interstate and Foreign Commerce. H.R. Rep. No. 1635, 89th Cong., 2d Sess. (1966).

[67] The President's Task Force on Communications Policy is an independent interim unit appointed in August, 1967, and chaired by Eugene Rostow, former Undersecretary of

selves. *Southwestern* endorses a kind of unstructured control in order to slow the rapid growth of CATV until the evolution of an orderly scheme of regulation.

Another recent case, *Black Hills Video Corp. v. FCC*,[68] rejected CATV's challenge that the 1966 regulations were "promulgated without adequate notice . . . unreasonable and discriminatory in their operation and therefore invalid."[69] The United States Court of Appeals for the Eighth Circuit found that the rules were both reasonable and constitutional. Even after losing the jurisdictional argument in *Southwestern*, the CATV interests held out hope that with a favorable decision in *Black Hills* they might have participated in a new FCC proceeding on detailed rules.[70] The regulations are currently being reviewed in the light of the Commission's mixed experience with them during the last two and one-half years. Applications for waiver of the top-100-markets rule and the time consuming hearings which they require have imposed a ponderous administrative burden on the Commission.[71] Though it is likely that this rule will be retained, the burden may be eliminated by a total freeze on all or on some of these markets.[72] Such action is not unreasonable, though admittedly the top 100 markets encompass a significant sector of the viewing public. Before 1966, when the FCC "grandfathered" these markets (permitting only established distant signal operations to continue), there was little CATV activity in the top 100 markets. Under a freeze, they would not be closed to new CATV operations except those involving distant signal importation. The balance of the markets in which long-distance importation is permitted are largely rural ones where inadequate service or none at all is available. An entrepreneur would find it no more profitable to establish a CATV system than a broadcast station in these sparsely populated areas. However, the FCC has provided some stimulus to CATV by granting special microwave authority in those localities.

In addition to the historic role of CATV as a "fill-in" carrying signals only to viewers within the station's normal broadcast area, and as a carrier of distant signals, other activities such as program origination and pay-TV are

---

State for Political Affairs. The report, which was scheduled for issue in November, 1968, has not been published at this writing. The FCC Task Force on CATV under Sol Schildhause, Chief, also has issued no formal report at this writing. "A Report on Cable Television and Cable Telecommunications in New York City" was published on September 14, 1968, by the Mayor's Advisory Task Force on CATV and Telecommunications under Chairman Fred W. Friendly. Among its recommendations, the New York Task Force proposes that cable television service be made available to every home in New York City wishing to subscribe, and that each authorized CATV company be required to provide a minimum of eighteen channels. Of the eighteen stations to be carried, eleven would be local stations, three would be reserved for the exclusive use of the city government at no cost to the city government, and four would be used for program origination, particularly public service programs. Id. at 2-4.

[68] 399 F.2d 65 (8th Cir. 1968).

[69] Id. at 68.

[70] Broadcasting, Aug. 12, 1968, at 60.

[71] See id. at 58.

[72] See Preliminary Remarks by Sol Schildhause, NCTA Legal Seminar, Washington, D.C., Sept. 11, 1968. See also Address of Thomas C. Brennan, ABA Copyright Symposium, 15 Bull. Copyright Soc. at 28 (1967); Broadcasting, Nov. 11, 1968, at 2.

becoming more prevalent.[73] The Commission is undertaking to redefine its goals for the entire broadcast industry and to evaluate the potential contributions of CATV as well as its anti-competitive effects on ultra-high frequency (UHF), very high frequency (VHF) and educational television (ETV) broadcasters.[74]

Certain conclusions can be made at this time. First, it is apparent that the Commission favors full copyright liability for CATV.[75] Liability would equalize the cost of program material to both CATV and local stations. Thus it would permit the forces of the market place to temper the present economic advantage of CATV over local broadcasters and lessen the need for vigilant regulation by the Commission. Second, the Commission has indicated that the "question of 'originations with or without commercials' . . . will be further considered in an appropriate rulemaking proceeding,"[76] but seems already to have sanctioned the practice.[77] Authority will probably be required to license CATV systems which originate programming, since these systems would be in direct competition with licensed broadcast stations. Third, the licensing of non-originating CATV systems will probably remain a function of the states and municipalities in which they operate.[78]

B. *CATV and the Copyright Law Revision*

Efforts to reach a legislative solution to the controversy between copyright holders and the CATV industry have not been successful. In response to the district court's finding of liability in *Fortnightly,* section 111 dealing with CATV was inserted into the copyright law revision bill (H.R. 2512) which was presented to the House on April 6, 1967.[79] Section 111 would have estab-

---

[73] It is estimated that more than 150 of the 1900 CATV systems in operation already originate programming. Broadcasting, July 1, 1968, at 20. H.R. 13286, 89th Cong., 1st Sess. (1966) would have permitted the FCC to ban CATV originations.

[74] The Commission's stated goals of broadcasting are listed in Comment, CATV and Copyright Liability, 80 Harv. L. Rev. 1514 (1967), at 1529-30 as (1) that all viewers have at least one source of programs, (2) that this source be a local station, (3) that there be a choice among a variety of programs and (4) to foster the growth of UHF, independent and educational stations. The primary purpose of the top-100-markets rule is to protect emerging UHF stations. The primary purpose of the top-100-markets rule is to protect emerging UHF stations. Schildhause, supra note 72, indicates a recent conclusion by the Commission that UHF is a top-50-market phenomenon at best and further that if CATV begins to pay copyright fees for distant signal importation, it will probably be permitted to import signals into even the top 50 markets at such time as UHF stations have become well established.

[75] See Schildhause, supra note 72.

[76] Broadcasting, Oct. 21, 1968, at 2.

[77] Midwest Television, Inc., 13 F.C.C. 2d 478 (1968).

[78] See, e.g., City of Waterville v. Bartell Tel. TV Systems, —— Me. ——, 233 A.2d 711 (1967), in which it was held that a franchise granted a telephone company in 1885 includes a built-in franchise for that company's CATV system. In Nugent v. City of East Providence, ——R.I.——, 238 A.2d 758 (1968), it was held that the state constitution granted no power to municipalities to license and regulate CATV. See generally Comment, Federal, State and Local Regulation of CATV—After You, Alphonse . . . , 29 U. Pitt. L. Rev. 109 (1967).

[79] See 113 Cong. Rec. H3610 (daily ed. Apr. 6, 1967). For general background on section 111, see Ringer, Copyright Law Revision: History and Prospects, in 114 Cong. Rec. E5261 (daily ed. June 11, 1968).

lished three categories of liability characterized as "black, white and grey," and classified by the extent of an activity's departure from a "fill-in" role. First, where the system would bring programs from an outside station to viewers "adequately served" by local stations carrying a preponderance of national network programs, there would be full liability, since the copyright holder's market for future licensing would have been diminished. Second, where the CATV system would act as a "fill-in" by serving viewers within the Grade B contour of the original broadcast, there would be no liability, since the copyright holder would not have been damaged by an increase beyond the audience contemplated in the license. Third, where an area is not "adequately served" by the three major networks and the imported program has not been exclusively licensed to a local station, the CATV system could present the program by paying only a reasonable license fee to be determined by the parties or the court.[80]

Even though the alternative to this solution seemed at the time to be full liability, the CATV interests were largely responsible for the deletion of section 111 on the House floor.[81] But, aside from CATV's substantive objections, a valid jurisdictional issue provided a focal point for the debate in the House.[82] In addition to the three categories referred to, the section included certain "trigger" provisions which would have automatically thrust a CATV system into the full liability category for indulging in any of a list of forbidden practices such as originating programming or altering program content. It was conceded that these provisions would have operated to regulate broadcasting through copyright, and constituted an infringement on the jurisdiction of the House Interstate and Foreign Commerce Committee. Although irrelevant to copyright, the trigger provisions had been inspired by broadcasters as a means to punish CATV for engaging in those activities which most directly compete with and injure local broadcasters. It would seem more appropriate for the FCC, through regulation, to protect the competitive position of local broadcasters as warranted by the public interest.

After deletion of section 111,[83] negotiations were begun among producers, CATV interests and several peripheral groups under the auspices of the Senate Subcommittee on Patents, Trademarks and Copyrights. Proposals for redrafting section 111 were submitted to the Subcommittee on November 1, 1968.[84] As expected, the parties were unable to reach agreement on the cru-

---

[80] See H.R. Rep. No. 83, 90th Cong., 1st Sess. 52 (1967).

[81] "When H.R. 2512 was before the House, the NCTA objected violently to Section 111 because it contained provisions designed to regulate and control CATV to an extent which would have been devastating in our young and expanding industry." Letter from Frederick W. Ford to Hon. John L. McClellan, Chairman, Subcommittee on Patents, Trademarks & Copyrights, Nov. 1, 1968.

[82] See 113 Cong. Rec. H3636-47 (daily ed. Apr. 6, 1967).

[83] H.R. 2512 passed the House on April 11, 1967. See 113 Cong. Rec. H3888. The Bill was then referred to the Subcommittee on Patents, Trademarks & Copyrights of the Senate Committee on the Judiciary. At the close of the 90th Congress, H.R. 2512, together with the Senate version, S. 597, which still contained section 111, was still being considered.

[84] Letters to the Hon. John L. McClellan, Chairman, Subcommittee on Patents, Trademarks & Copyrights of the Senate Committee on the Judiciary from Michael Finkelstein and Martin E. Firestone, All-Channel Television Society, Nov. 1, 1968; Leonard

cial issue of exclusivity—the ability of a broadcaster to buy and a program owner to sell exclusive broadcast rights within a specified area for a definite period.[85] From the thirteen proposals received, the Copyright Office is expected to draft three alternative sections which will form the basis for a final series of negotiations. Indications are that the three will probably be: (1)

H. Goldenson, President, American Broadcasting Co., Inc., Nov. 1, 1968; Pete Rozelle, Commissioner, American Football League, National Football League, Oct. 31, 1968; Ernest W. Jennes, Attorney for the Association of Maximum Service Telecasters, Inc., Nov. 1, 1968; Authors League of America, Inc., American Guild of Authors and Composers, American Book Publishers Council, Inc., American Educational Publishers Institute, Oct. 31, 1968; Sydney M. Kaye, Attorney for Broadcast Music, Inc. (BMI), Nov. 1, 1968; Douglas A. Anello, General Counsel, National Association of Broadcasters, Oct. 31, 1968; Robert V. Evans, Columbia Broadcasting System, Inc., Oct. 31, 1968; Frederick W. Ford, President, National Cable Television Association (NCTA) Inc., Nov. 1, 1968; Louis Nizer, Attorney for program suppliers, Nov. 1, 1968; Charles C. Woodard, Jr., Vice President, Westinghouse Broadcasting Co., Inc., Oct. 29, 1968; Evelyn F. Burkey, Executive Director, Writers Guild of America, East, Inc., Oct. 31, 1968; Finkelstein, supra note 46.

[85] As distinguished from the exclusivity question, there is virtual unanimity that CATV should honor the local "blackouts" of live sporting events. See Rozelle, supra note 84. The blackouts have previously been effected by contractual agreements with the television networks. The CATV retransmitters, not being a party to the contracts, were not bound. In order to formalize this exception to any compulsory license for CATV, the live broadcasts must first be copyrightable. The proposed provision would enable broadcasters to copyright all live broadcasts, and would prescribe remedial action for infringement before the material can be copyrighted. See Anello, supra note 84. At least in cases where a film record is being made at the time of the live broadcast there will be no time lapse between broadcast and the attachment of copyright protection. Section 101 of H.R. 2512, which will probably be included in the Bill for the 91st Congress, provides that a work is "fixed," and thus protectable by statutory copyright "if a fixation of the work is being made simultaneously with its transmission." The provision permitting live broadcasts to be copyrighted will also help to clear up for the broadcasters the uncertainty engendered by the holding in Cable Vision, Inc. v. KUTV, Inc., 355 F.2d 348 (9th Cir. 1964), that the pre-emptive effect of the federal copyright law will not permit a broadcaster to bring an action in a state court for unfair competition against a CATV system which retransmits works capable of protection under statutory copyright. The court relied on the principle established in Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 255 (1964), and Compco Corp. v. Day Bright Lighting, Inc., 376 U.S. 234 (1964), that state unfair competition laws cannot impose liability for the copying of an article which is protected by neither a federal patent nor a copyright. See 52 Va. L. Rev. 1505, 1506 (1966). Since live broadcasts are not now copyrightable by statute, the same pre-emption principle might apply to deny the unfair competition remedy to the broadcaster of such programs. See Gold, Television Broadcasting and Copyright Law: The Community Antenna Television Controversy, 16 ASCAP Copyright Law Symposium 170, 182 (1968). The broadcaster would thus have to rely on the also untested argument that a live program is not "published" so as to sever the creator's common law copyright. See Uproar Co. v. National Broadcasting Co., 8 F. Supp. 358 (D. Mass. 1934). See also Epstein, Copyright Protection and Community Antenna Television Systems, 12 Bull. Copyright Soc. 147, 152 (1965). The rationale for granting copyright to live sports broadcasts is to blackout retransmissions which would reduce spectator attendance, a commodity which, it is argued, cannot be replaced by money. As live broadcasts from a copyrighted script are already protected, the only other class of live broadcasts which would look to the new provision are those such as news or impromptu "talk" programs. As a practical matter, broadcasters of such material cannot be injured by CATV increasing their audience through simultaneous retransmission unless the broadcaster, with the intention of profiting from re-runs within the area serviced by the CATV system, made a tape during the original broadcast. Thus, the requirement of "fixation" which is generally met in sports televising should be a prerequisite to the right to maintain action for infringement.

across-the-board compulsory licensing, (2) a combination of compulsory and exclusive licensing, and (3) an intermediate proposal which will incorporate modifications making such a combination more palatable to the CATV interests.

The proposal of the National Cable Television Association (NCTA) seeks to formalize the view expressed in *Fortnightly* that broadcast signals have been "released to the public." Under the proposed across-the-board compulsory licensing scheme, all exclusivity would be eliminated, but CATV would pay reasonable royalties as an incentive to creativity for any use of copyrighted programs where the entire schedule of a broadcaster is carried without alteration of program content. This system would require a single place to deposit royalties, which would be defined by statute and based on a percentage of the CATV system's gross receipts. Although the Copyright Office has been nominated as such a repository for fees, it would seem more desirable for the program suppliers to form a private performing right organization. A CATV system would then negotiate with that organization for non-discriminatory term licenses. A refusal to tender such licenses on request might be made to deprive the performing right organization of the right to maintain an action for infringement. The percentage of gross receipts should be calculated to yield a rate of return comparable to that enjoyed by the program supplier under the present system of exclusive licensing. Periodic adjustments would be made by formula, arbitration or court review. Such a system of across-the-board compulsory licensing has been successfully employed by the music industry through its performing right societies, ASCAP, BMI and SESAC. These agencies offer non-exclusive blanket licenses without clearance (*i.e.*, the license need not be obtained in advance of performance), and assume full responsibility for the distribution of royalties to their members.[86] As the NCTA proposal is essentially a codification of their existing trade practice, ASCAP and BMI are in full accord with it.[87] If ASCAP is correct in its belief that *Fortnightly* will be held not to apply to music under section 1(e), no change in the law relating to music would be required, since the NCTA has agreed to purchase licenses from the music societies. It is recognized that the complex problems of clearance and exclusivity which legitimately arise in other fields are wholly absent in the music industry. Thus, if the compulsory licensing plan cannot be as broadly applied to non-musical properties, it should be embodied in a separate provision applicable to music.

Following the *Fortnightly* decision, exclusive licensing is no longer effective to exclude CATV's use of copyrighted films. Some parties, however, advocate restoring exclusivity to some degree. The copyright holders which supply film programs for television broadcast endorse compulsory licensing only where CATV functions as a "fill-in" by retransmitting the output of local stations, or imports distant signals into an inadequately served market. However,

[86] CATV representatives have argued that it would be impractical for a system which carries up to twelve stations to obtain individual licenses for each program, even if it were possible to have adequate notice of each program to be broadcast on each channel received. See generally Meyer, The Nine Myths of CATV, 27 Fed. B.J. 431, 436-41 (1967).

[87] See Kaye, supra note 84; Finkelstein, supra note 46.

arguing that the extension of a station's audience is not adequate compensation for the loss of the exclusive licensing privilege, they advocate full liability for importation of distant signals into adequately served markets. This result would generally require a CATV system to negotiate directly with a program supplier on the same terms as an originating broadcaster where an area beyond that served by the broadcaster is served by the CATV system carrying his signal. A schedule of license fees based on percentages of gross revenue would provide some fee for every transmission although lesser fees would be stipulated for carriage of local signals and for transmission by small or isolated CATV systems.

The NCTA proposal above is a retreat to CATV's starting position in the negotiations. The CATV representatives had entertained the idea of combining some exclusivity with some compulsory license, but were unsatisfied with section 111's definition of an "adequately served" market as one served by three stations. They had suggested a standard of three network stations plus one independent station. Thus, the suppliers have submitted a compromise: liability for importation into the top 75 markets and any others with four stations, and a three-year compulsory license period, to be followed by full liability, for importation into a middle category comprised of at least the remainder of the top 100 markets and all three-station markets.[88] The few CATV systems which were importing distant signals into the top 100 markets before the FCC grandfathering would be the only systems fully liable at first. However, after the three-year period, and as more markets expand to three stations, an increasing number of CATV systems would be subject to full liability for distant signal importation. As the number of exclusive licensing markets increases, there might be incentive for suppliers to refuse to negotiate with CATV owners in order to weaken and thus control their systems.[89]

Westinghouse, as the owner of both broadcast stations and CATV systems, has offered a solution which will probably be incorporated into a more liberal version of the suppliers' proposed compromise.[90] CATV owners who begin operating in an inadequately served community would be protected by a grandfather clause against the possibility that future television stations, by entering the area, would render it "adequately served" and the CATV automatically liable. Another Westinghouse proposal worthy of consideration would grant the FCC authority to exclude certain classes of CATV from the obligation to recognize exclusivity. The smaller CATV systems which have little or no impact on copyright owners and for which the cost of complying with exclusivity would be prohibitive would be exempted. It is unlikely that the exercise of discretionary power by the FCC will be permitted to interfere with copyright law, but an automatic exemption based on conformity with some operative standard of the Commission would be feasible. A third proposal would define a station's primary coverage area by a standard 30-mile radius rather than the indefinite standards of the FCC. Finally, the "white" area of section 111 may be revived. This provision would exempt CATV from any

[88] See Nizer, supra note 84.

[89] See Brief for Petitioner at 63, Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968). Contra, Meyer, supra note 86, at 440.

[90] See Woodard, supra note 84.

payment where it performs only a fill-in function, and is similar in effect to the implied-in-law license urged upon the Court in *Fortnightly*.

Although in theory the program suppliers could receive equal compensation through compulsory licensing, they are not willing to sacrifice the independence and control which they enjoy under the present marketing system of exclusive licensing. As a piece of the copyright monopoly, as well as a practice of the market place, exclusivity should not be dealt with too rashly. The justification for its limitation is clearly presented by the public interest in facilitating technological progress in the broadcast industry. However, the justification for its elimination under compulsory licensing is not so clear. Whereas the copyright holder regards exclusivity primarily as a "right" and would not necessarily suffer any economic harm were he to lose it, the network and local broadcasters require its retention even in a limited form to sustain their competitive position. The broadcaster is less concerned with the extension of his own signal than the penetration of other broadcasters' signals into his market. Whether from a distant or a local source, each additional viewing alternative will proportionately reduce the fee which an advertiser will be willing to pay the broadcaster. Thus, in the negotiations the broadcasters have advocated exclusivity for protection against distant signals which might duplicate their programming and which might prevent them from charging the advertiser the higher fee which is commanded by exclusive "first-run" broadcasts. They also advocate sanctions, much like the "trigger" provisions of section 111, against CATV systems which originate programming and thereby compete for the viewer's attention, if not for the advertising dollar.[91] The broadcaster's need for exclusivity is already partly fulfilled by the FCC restriction on distant signal importation into the top 100 markets and, as noted above, the Commission intends to state a new policy on CATV originations which will doubtless take into consideration the detrimental effects of such activity on broadcasters. In making the choice between limitation or elimination of exclusivity, Congress should concentrate on the effects on the copyright holder and on the public interest in new technology as represented by the CATV interests.

The NCTA, viewing the concentration of economic power in a few suppliers and broadcast networks, has expressed the conviction that legislative perpetuation of exclusivity would seriously conflict with the laws designed to preserve free competition.[92] Admittedly, retention of exclusivity to the extent proposed by the program suppliers would inhibit the growth of new systems in adequately served markets. However, the proposed grandfather clause would help to encourage new CATV investment in inadequately served markets by removing the fear that growth of these markets will automatically make their investment obsolete. Objectively, it can be said that this result would conform to the public interest and to communications policy. Exclusivity would also help to further the long range desire of the FCC that CATV develop its potential to carry the benefits of future electronic service industries into the home.[93] By forcing CATV to rely less on retransmissions, exclu-

[91] See Evans, supra note 84.

[92] See Ford, supra note 84; see also Brief for Petitioner at 62-67, Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968).

[93] See Broadcasting, July 1, 1968 at 24. Among the services that may in the future

sivity would stimulate CATV to an earlier realization of its other uses. Unlike the direct and conflicting effects contemplated by the trigger provisions of section 111, the indirect effects of the exclusivity proposal on communications policy are not objectionable.

The Senate Subcommittee may lean, however, toward the compulsory licensing proposal because of several factors. First, having the percentage of gross receipts as its only legislative variable, compulsory licensing provides greater flexibility for the future. The proposal which is based on a differentiation of television markets as we know them today might be irrelevant to the market structure of the future. Second, compulsory licensing would require less control by the Copyright Office and create fewer opportunities for litigation. The simple matter of adjusting the percentage of gross receipts every five years contrasts sharply with the problems both of periodically redefining "adequately served" and of applying this standard to particular fact situations. The term requires not only setting the number of stations which is "adequate," but also the delineation of a "broadcast market" either in miles from a broadcast terminal, or by a theoretical but frequently inaccurate standard such as the Grade B contour. The phrase would seem to invite disputes as to whether a market or overlapping markets should be considered "adequately served." Section 111(d)(3) had provided that "[t]he Register of Copyrights may, by regulation, further particularize this definition [of "adequately served"], taking into account any pertinent definition in a Federal statute or regulation." Whether by such fiat of the Copyright Office or by periodic arbitration among interested parties, the regulations which would be needed to keep the standard operative might tend to transform the Copyright Office into another large rule-making authority. Where avoidable, this result is intrinsically objectionable. Third, it is likely that harm to the broadcasters will be compensated by continued FCC regulation of distant signal importation. Finally, there need be no economic loss to the program supplier under a compulsory licensing system, as is evidenced by the experience of the music industry.

The argument for limiting rather than eliminating exclusivity turns on a single point. When all of the above considerations are weighed, the ultimate question is whether the public interest which, it is agreed, justifies limitation can be said to justify a total retraction of the practice of exclusive licensing. Also, an overview of the FCC and copyright involvement in CATV clearly reveals that, should the copyright law adopt compulsory licensing for CATV, there would be less government control on the copyright side, but at the price of a complete breakdown of the exclusive licensing procedure evolved by the forces of the market place. Because the FCC would be forced to substitute government regulation for the marketplace solution, the result would produce greater total government regulation than if copyright were to retain some exclusivity.

CONCLUSION

The rapid growth of CATV in recent years has created unique problems of communications and copyright policy. Neither the Communications Act of

be rendered by the cable are selling merchandise, printing newspapers and making available a home communications and data transferral center.

1934 nor the Copyright Act of 1909 is endowed with the flexibility necessary for coping with this hybrid entity. The Supreme Court has tried an unorthodox but practical approach to the issues of statutory construction raised in *Fortnightly* and *Southwestern*.

Knowing that its treatment of the copyright law would not have any lasting consequences, the *Fortnightly* Court felt justified in disposing only of the problem of retroactive liability. In proclaiming a general amnesty for CATV's past activities, the Court has created the temporary state of law under which CATV is not liable for any retransmissions of copyrighted films. Although *Fortnightly*'s interpretation of the statutory intent of the Copyright Act retracts much of the copyright holder's exclusive right to perform, that construction need not unduly restrict pending legislation. If an across-the-board compulsory license scheme is adopted, the public and CATV will have the same unlimited access to copyrighted programming as under *Fortnightly*, but will have to pay a reasonable fee. It is not likely that exclusivity will be completely restored; the partial restoration suggested in the negotiations would approximate the result contemplated by the implied-in-law license theory. Whichever solution is adopted, an important consideration should be the scrupulous avoidance of potential conflict with communications policy. In the total life of CATV, the payment of copyright royalties is a thing apart which will remain relatively static while the FCC's policy continues to be fluid. The anticipated legislative authorization for the FCC to regulate CATV will probably be as broad as that of the 1934 Communications Act, empowering the Commission to make any regulations consistent with the public interest and to change them as frequently as the public interest warrants. As a vehicle of communication CATV is at this time merely approaching its adolescence. The present Commission study will doubtless result in some rule changes, but these will in no way be final. In the task of guiding the future development of CATV to assume its appropriate place among the interrelated media of communication, the Commission will have to make many periodic reassessments and adjustments of its policy toward CATV. The public interest will be better served if this process is not unduly encumbered by possible conflict with copyright law.[94]

JUDITH E. CIANI

[94] Since this writing, the FCC has proposed radical changes in its CATV regulations. Notice of Proposed Rule Making and Notice of Inquiry, No. 18397, FCC 68-1176-24195, released December 13, 1968. Most pertinent to the copyright revision proceedings is an amendment which would eliminate the present restrictions on distant signal importation and substitute a requirement that CATV systems within 35 miles of the main post office in any of the top 100 markets obtain the consent of the distant station whose signals it wants to import. See notes 71, 72 supra, and accompanying text. In effect, this amendment would preserve the exclusive licensing procedure in those markets, because ordinarily, the contractual arrangements between the copyright holder and broadcaster will require that the CATV operator deal directly with the copyright holder. The Commission voiced serious concern over the unfair competition effects of distant signal importation on local VHF and UHF broadcasters. The proposed rulemaking advises the Congress that if the copyright law revision does not address the unfair competition problem and thereby relieve the Commission of some of the burden, the above solution will be imposed by the FCC. Clearly, were across-the-board compulsory licensing adopted, it would be ineffective in those situations where the proposed regulation would be appli-

cable. In light of the FCC action copyright negotiations are expected to resume. See Broadcasting, Dec. 23, 1968, at 20. It would be premature to speculate on whether the drafters will submit to the Commission's strong suggestion and incorporate its standards into the revision.

Also included in the FCC proposal is a *requirement* that all but the smallest CATV systems originate programming to a significant extent. See note 77 supra, and accompanying text. The Commission proposes further study on the issue of financing such programming either through advertising or an increase in the CATV service charge to customers.

The Commission refrained from recommending FCC licensing of CATV, and intends to rely, at least initially, largely on local authorities to see that CATV meets the community's requirements and interests. See note 78 supra, and accompanying text. In the area of diversification, recommendations were made to forbid cross ownership of broadcast and CATV facilities within any market, to limit the number of CATV systems that one entity could own, and to require that systems file reports with the Commission.