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THE CABLE TELEVISION PROVISIONS OF THE REVISED COPYRIGHT ACT

*Susan C. Greene**

Copyright law is founded upon the premise that, for a limited period of time, authors and creators of intellectual works have the exclusive right to their products. This right can be sold or distributed as the creators wish, and those seeking use of copyrighted material must negotiate a satisfactory royalty payment with the copyright owner. As a result of judicial interpretations of the Copyright Act of 1909,¹ the cable television industry was not obligated to make royalty payments to copyright owners for the privilege of carrying their programs to subscribers in other television markets.² For twenty-five years, the cable industry has flourished by picking up broadcast signals from distant television markets and retransmitting them by wire to subscribers who pay a monthly fee for this service.³ Historically, the cable industry has been almost entirely

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1. Copyright Act of 1909, ch. 320, 35 Stat. 1075 (1909).

2. The inapplicability of the 1909 Act was determined by *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968) and *Teleprompter Corp. v. CBS*, 415 U.S. 394 (1974). See notes 30-40 & accompanying text *infra*.

3. The first commercial cable television system is generally believed to have started operation in 1950 in Lansford, Pennsylvania. Early systems flourished in rural areas by bringing television signals from distant television markets to communities with little or no local broadcast service. By mounting a large antenna on the highest point in the area, the cable system could pick up broadcast signals, strengthen them, and deliver them to subscribers who paid a monthly fee for this service. Today distant signals are available off-air, by microwave relay or by satellite distribution. For example, WTCG-TV, Channel 17, Atlanta, now sells its programing to cable systems throughout the country and distributes the signal by satellite.

Initially, the technology of a cable system permitted a maximum channel capacity of five channels. In recent years capacity in a new system has expanded to 20 or more channels, thereby permitting cable systems to develop nonbroadcast services such as pay TV, shopper's guides, and public access. Future services may include security alarm services and digital communications hookups with computers. The cable television regulations of the Federal Communications Commission (FCC) are concerned in part with

dependent upon the retransmission of broadcast signals for its service,⁴ and it is this carriage of distant broadcast signals which is at the center of the ongoing cable-copyright controversy.

In October 1976, Congress passed a comprehensive revision to the 1909 Copyright Act.⁵ The revised Act, which became effective on January 1, 1978, is the result of a thorough reevaluation of the contemporary shortcomings of the former Act.⁶ The revision was necessitated by the development of radio, broadcast television, photocopying, and other electronic technology which, by making access to information rapid and convenient, precipitated a crisis in copyright law. The fundamental goal of copyright—to institutionalize the balance between the author's right to control the use of his property and the public's right of access to information—was rendered ineffective by the former statute's inapplicability to new forms of distribution. The revised Act will require cable television systems to make royalty payments for the privilege of retransmitting distant broadcast signals. Although this change will resolve a long-standing dispute between the copyright owners and original broadcasters on the one hand, and the cable television industry on the other, the revised Act promises to generate extensive litigation as a result of

encouraging the development of nonbroadcast services. See Cable Television Report and Order, 36 F.C.C.2d 143 (1972). The scope of this article, however, is limited to the copyright implications of the signal carriage function of cable television systems.

4. The economics of broadcast television are best understood by reference to the concept of "television market." A television market is a theoretical allocation bounded by a radius of 35 miles from a television station or from some specified point in the community. Markets are delineated by size and roughly correlate with the size of urban metropolitan areas (e.g., New York is the first market, Los Angeles is the second market. The fiftieth market is Little Rock, the one hundredth is Columbia, S.C.). Ninety percent of all television households reside in the top 100 markets. When a cable system carries (or "imports") signals from a distant market it makes available signals which probably cannot be picked up in the cable system's home market. Through attraction to viewers, these additional signals compete with the local broadcast stations.

5. Copyright Law Revision, Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified at 17 U.S.C. §§ 101-810 (1976)) [hereinafter referred to as the revised Act].

6. Creators of intellectual property have long been protected by copyright laws. The first American copyright law, passed in 1790, was based upon the specific Constitutional requirement "to promote the Progress of Science and useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8. Major revisions to the copyright law were promulgated in 1891 and 1909. Recently, the United States Register of Copyrights characterized the 1909 legislation as "essentially a 19th century copyright law, based on assumptions concerning the creation and dissemination of authors' works that have been completely overturned in the past 50 years." *Civil Liberties and the Administration of Justice: Hearings on H.R. 2223 Before the Subcomm. on Courts of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 99 (1975) [hereinafter cited as *1975 Subcommittee Hearings*]. Basically, the 1909 Act did not anticipate the spectacular growth in communication technology which occurred during the twentieth century.

ponderous implementation procedures and the creation of a new conflict between copyright law and national communications policy.

I. THE CABLE TELEVISION EXEMPTION UNDER THE COPYRIGHT ACT OF 1909

Traditionally, the Copyright Act of 1909 has been interpreted in such a way as to confer copyright liability on the broadcast media.⁷ The courts have never read the Act, however, to make cable television systems similarly liable.⁸

Both broadcasters and copyright owners have challenged the cable industry's exemption from copyright liability. Their contentions can best be understood in the context of the program distribution market. Local television stations may be either network affiliates⁹ or independent stations.¹⁰ An affiliate fills most of its broadcast day with programing supplied by a network. The networks obtain most of their programing from independent producers and pay royalty fees to the producers based upon such factors as the number of affiliates expected to broadcast the program. Independent stations purchase programs directly from the pro-

7. This liability stemmed from judicial interpretation of the meaning of "performance" within the meaning of the 1909 Copyright Act. 17 U.S.C. § 1(e) (1970). See *Jerome H. Remick & Co. v. American Auto. Accessories Co.*, 5 F.2d 411 (6th Cir. 1925). A radio station was sued for playing a copyrighted work without a license. In holding the station liable, the court stated:

A performance . . . is no less public because the listeners are unable to communicate with one another, or are not assembled within an enclosure, or gathered together in some open stadium or park or other public place. Nor can a performance . . . be deemed private because each listener may enjoy it alone in the privacy of his home. Radio broadcasting is intended to . . . reach a very much larger number of the public at the moment of rendition than any other medium of performance. The artist is consciously addressing a great, though unseen and widely scattered, audience, and is therefore participating in a public performance.

Id. at 412. See also notes 25-40 & accompanying text *infra*.

8. See, e.g., *Teleprompter Corp. v. CBS*, 415 U.S. 394 (1974); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968). See notes 30-40 & accompanying text *infra*.

9. A full network station is defined by the FCC as "[a] commercial television broadcast station that generally carries in weekly prime time hours 85 percent of the hours of programing offered by one of the three major national television networks with which it has a primary affiliation (i.e., right of first refusal or first call)." 47 C.F.R. § 76.5(l) (1976). Of the 960 commercial broadcast stations in operation in 1976, 701 are network affiliates. 46 TELEVISION FACTBOOK 67-a (1977).

10. An independent station is a commercial television broadcast station which generally carries not more than 10 hours of programing per week offered by the three major national television networks during prime time. 47 C.F.R. § 76.5(n) (1976).

ducers in the syndication market.¹¹ Network affiliates also purchase programs in the syndication market to fill nonnetwork time. The program producer sells the local broadcast station the exclusive rights to the program in the particular television market during the life of the contract. In return, the station pays a royalty fee based on market size, potential audience, and desirability of the program.

When a cable system retransmits a program televised by a local station, no economic harm ensues. The local broadcast station has purchased exclusive rights in the same market from the copyright owner, and the cable system merely enhances this programming by bringing a better quality picture to a larger local viewing audience. The improved picture and larger audience is reflected in the ratings for the local station, and it is thus able to command higher advertising rates from its sponsors. The copyright owner, in turn, is able to negotiate a higher royalty fee from the local station. The problem occurs with programming from distant markets. When a cable system carries programming from a broadcast station in a distant market, it undermines the exclusivity of the local contract agreement. For the copyright owner, the retransmission of a distant signal by a cable system diminishes the value of the program in the local market since the owner receives a reduced royalty fee from the local broadcast station because he can no longer guarantee an exclusive right to transmit the program in the local market.

Copyright owners asserted that the cable industry must pay royalties for the use of television programs because the cable industry's nonpayment amounted to commercial piracy and that use of programming from broadcast stations in distant markets violated the exclusive nature of copyright contracts.¹² On the other hand, the cable industry insisted that

11. A syndicated program is "any program sold, licensed, distributed or offered to television station licensees in more than one market within the United States for non-interconnected (i.e., nonnetwork) television broadcast exhibition, but not including live presentations." 47 C.F.R. § 76.5(p) (1976). Programs enter the syndicated market in one of two ways. Traditionally, a series completes its network run and is then sold on a market-by-market basis, as, for example, *The Mary Tyler Moore Show*. A more recent development is the syndication of new programming without ever using the networks, as, for example, *Mary Hartman, Mary Hartman*.

12. 1975 Subcommittee Hearings, *supra* note 6, at 704-14. Jack Valenti, President of the Motion Picture Association of America, summarized the copyright owner's position as follows:

Cable television does something else to attract viewers away from local television stations. It imports signals—programs—from distant television stations to its cable subscribers in its own local market. Thus cable television is not only using local signals free of any cost, but by importing distant signals free of charge it fragments the market of the local television station with which it is competing for audience. In so doing, it not only competes unfairly with the television station

it was not liable for copyright under the judicial interpretation of the 1909 Copyright Act.¹³ It further argued that since it merely expanded the viewing audience for broadcast programming, the copyright owner could seek greater compensation from broadcast stations rather than from the cable industry.¹⁴ The broadcast industry, concerned with the ability of a cable system to fragment the local viewing audience and thereby affect station revenues, seized upon the copyright issue as an additional weapon with which to seek restrictions on the cable television industry.¹⁵ Additionally, the broadcasters argued that the cable industry's resistance to royalty payments amounted to an unfair method of competition since the broadcast industry, and not the cable industry, was liable for copyright payments.¹⁶

The broadcasters were the earliest litigants. Local stations attempted to seek sole control of the use of their signals on the basis of the exclusive contracts which the station held. Had they been successful, the broadcast stations could then have restricted the use of their signals by a

which must pay for programming, but it destroys, or at the very least impairs, the copyright owner's ability to sell his product to the television station in that market. In short, if cable television is not subject to copyright liability, the Congress would not only be giving cable a free ride, but it would, in effect, be subsidizing cable at our expense and to our subsequent economic disadvantage. In so doing, the Congress would legitimize unfair competition against television—an unsubsidized free market enterprise.

Id. at 708.

13. See text accompanying notes 25-40 *infra*.

14. 1975 *Subcommittee Hearings*, *supra* note 6, at 849-56. The cable industry's position was that cable service enlarged the audience of a broadcast station in two situations: first, when cable serves communities with no television stations; and second, when cable provides two or more additional channels to communities that have only one channel. The industry asserted that cable carriage expanded audiences by over five million households and that the copyright owner's product was therefore more valuable. *Id.* at 853. For additional discussion of these themes, see Blair, Book Review (reviewing S. LADAS, PATENTS, TRADEMARK, AND RELATED RIGHTS—NATIONAL AND INTERNATIONAL PROTECTION (1975)), 17 *IDEA*, Summer 1975, at 59.

15. Commercial broadcasting is economically based upon the size of the viewing audience which the station can deliver to advertisers. The greater the viewing audience, the higher the advertising rates which the station can charge. By bringing additional stations from other markets to the viewing audience, the broadcast industry contended, the cable systems fragmented the local audience and reduced station profitability. This issue is now the subject of an economic inquiry at the Federal Communications Commission. See Notice of Inquiry in Docket No. 21284, 4 *RAD. REG. DIG.* (P-H) ¶ 85:325 (released June 28, 1977).

16. The National Association of Broadcasters asserted that, according to FCC figures, the typical television station paid 33% of its total revenue for nonnetwork program material. 1975 *Subcommittee Hearings*, *supra* note 6, at 775. In 1973 the broadcasting industry paid approximately 25% of its entire gross revenues of \$4 billion for copyrighted material. *Id.* at 709.

cable system, thereby maintaining some control over the growth of the cable television industry. Nevertheless, the broadcasters failed to establish their exclusive right to copyrighted broadcast programming in two interrelated cases.

In *Intermountain Broadcasting & Television Corp. v. Idaho Microwave Inc.*,¹⁷ three Salt Lake City network affiliates sued an Idaho microwave company and the Twin Falls, Idaho cable system for carrying their signals to Twin Falls subscribers when the local Twin Falls broadcast station held exclusive contracts to carry programming from the three Salt Lake City signals. The plaintiffs' argument, based on unfair competition and unjust enrichment, rather than copyright theory, was rejected at the district court level. The court stated that the plaintiff broadcasters received their profit from the sponsors of the program and "do not and cannot charge the public for their broadcasts."¹⁸ The public was entitled to receive the broadcasts directly and indiscriminately. The court went on to hold that the defendants' cable system was, in principle, no more than an antenna. It "is simply a more expensive and elaborate application of the antenna principle needed for all television reception. It does not otherwise differ from what the owners could do for themselves."¹⁹ The court did note, however, that if the action had been brought by the local Twin Falls broadcast station, the holding might have been in its favor.

Subsequently, in *Cable Vision, Inc. v. KUTV, Inc.*,²⁰ when the Twin Falls cable system brought suit against the local broadcast station for antitrust violations and the broadcaster counterclaimed for tortious interference with contractual rights and unfair competition, the district court found that the cable system was interfering with the exclusive nature of the broadcaster's contract with the Salt Lake City stations.²¹ The implication of this decision was that a cable system could not import distant signals to a market in which the local broadcaster held an exclusive contract to import the same signals into the same market.

While this case was on appeal, the Supreme Court decided *Sears Roebuck & Co. v. Stiffel Co.*²² and *Compco Corp. v. Day-Brite Lighting Inc.*,²³ two patent cases which settled certain issues relevant to the *Cable*

17. 196 F. Supp. 315 (S.D. Idaho 1961).

18. *Id.* at 325.

19. *Id.* at 327.

20. 211 F. Supp 47 (S.D. Idaho 1962), 335 F.2d 348 (10th Cir. 1964).

21. *Id.* at 56.

22. 376 U.S. 225 (1964).

23. 376 U.S. 234 (1964).

Vision case. *Sears and Compco* held that anyone may copy an unpatented design subject only to the limited protections provided the creator by federal patent law. Applying the *Sears-Compco* rationale to a copyright setting, the Tenth Circuit in *Cable Vision* reversed the district court and noted that "only actions for copyright infringement or such common law actions as are consistent with the primary right of public access to all in the public domain will lie."²⁴ Thus, the broadcast industry was left with no legal rights against the use of distant signals by cable television systems.

Copyright owners have also had their day in court against the cable industry. Interestingly enough, the issue of liability for retransmission of copyrighted programs predates the development of cable systems by over thirty years. The issue first arose in *Buck v. Jewell-LaSalle Realty Co.*²⁵ when the owner of a copyrighted song sued the management of a Kansas City hotel for distributing the program from a central radio to all public and private rooms by means of a wire distribution system. Finding that the hotel's distribution constituted a "performance" within section 1(e) of the Copyright Act, the Supreme Court held that the retransmission violated the Copyright Act. The Court's analysis was based upon the function which the hotel served. By "(1) installing, (2) supplying electric current to, and (3) operating the radio receiving set and loudspeakers,"²⁶ the hotel went beyond the limits of mere reception of the signal. This "reproduction" was deemed a performance. The Court also indicated that the fact that the hotel had no knowledge of the copyright violation by the radio station was immaterial. The risk of a copyright violation was assumed by the hotel when it distributed the broadcast signal for its own commercial purposes.²⁷ In a footnote, the Court hinted that if the radio station had not violated the copyright law, an implied license for its reception and further distribution might have arisen in favor of the hotel.²⁸ That particular issue was never clearly decided, and

24. 335 F.2d at 350.

25. 283 U.S. 191 (1931). In this case, neither the radio station nor the hotel had obtained a license to perform the copyrighted song.

26. *Id.* at 201.

27. *Id.* at 198-99.

28. *Id.* at 199 n.5. Cf. *Buck v. DeBaum*, 40 F.2d 734 (S.D. Cal. 1929) (a radio played for the enjoyment of customers in a cafe held not to be an infringement). In *Buck*, the radio station had obtained a license for the use of the copyrighted piece. The court noted that "when the plaintiffs licensed the broadcasting station . . . they impliedly sanctioned and consented to any 'pick up' out of the air that was possible in radio reception." *Id.* at 735. The performance occurs in the radio station, and the voluntary playing of the radio is "far from 'performing' the copyrighted work." *Id.*

Jewell-LaSalle set the precedent for copyright liability of programing retransmitted by wire for forty years.²⁹

The *Jewel-LaSalle* standard was severely limited in *Fortnightly Corp. v. United Artists Television, Inc.*,³⁰ the first case that specifically challenged the cable industry's asserted exemption from copyright liability. In *Fortnightly*, copyright owners sued two cable television systems for retransmitting motion pictures which had been licensed exclusively to local television stations. United Artists argued that the cable systems performed the same function as the hotel in the *Jewell-LaSalle* case, and therefore should be liable for infringement of the Copyright Act. Both the district court and court of appeals found the cable systems liable under the *Jewell-LaSalle* doctrine. The Supreme Court, however, in a surprisingly unsophisticated analysis of the functions of the cable television system, reversed the lower courts. Justice Stewart, writing for the majority, reasoned that a "performance" takes place only when the broadcaster transmits electronic signals over the air. The viewer who merely converts to sight and sound with his receiving equipment can not be said to be "performing." In sum, he explained: "Broadcasters perform. Viewers do not perform."³¹ The Court decided that cable's function is most like that of a viewer.³² Acknowledging that a cable system, unlike a viewer's rooftop antenna, is a complex electronic system, the court nonetheless concluded that "the basic function the equipment serves is little different from that served by the equipment generally furnished by a television viewer."³³ The *Jewell-LaSalle* doctrine was distinguished in a series of footnotes as a "questionable 35 year old decision" which should be limited to its facts.³⁴ In the sole dissent, Justice Fortas castigated the majority for its ready abandonment of precedent and for the "disarmingly simple" analysis which the Court

29. Melville B. Nimmer, one of the foremost commentators on copyright law, has stated that:

[T]he two major performing right societies, ASCAP and BMI, do not choose to enforce the *Jewell-LaSalle* doctrine to its logical extreme in that they do not demand performing licenses from commercial establishments such as bars and restaurants which operate radio or television sets for the amusement of their customers. However, such demands are made of hotels which operate in the manner of the La Salle Hotel.

1 M. NIMMER, NIMMER ON COPYRIGHT § 107.41 n.204 (1976).

30. 392 U.S. 390 (1968).

31. *Id.* at 398.

32. *Id.* at 399.

33. *Id.*

34. *Id.* at 401 n.30.

adopted, and warned of the "disruptive consequences" in copyright law outside the area of CATV.³⁵

Fortnightly established that cable television systems carrying only local broadcast signals were not liable for copyright payments for retransmitting local signals. In a subsequent case, *Teleprompter Corp. v. CBS*,³⁶ the Court determined that under the 1909 Copyright Act, cable systems were not liable for copyright infringement for importing distant broadcast signals, even though the cable television system provided services which were arguably more similar to a broadcaster than a mere retransmitter. The court of appeals in *Teleprompter* had determined that a cable system which distributes distant signals which are beyond the capabilities of any local antenna should be held to have performed the works so provided to its subscribers.³⁷ The rationale of the appeals court was obviously to limit the effect of *Fortnightly* and to revive the *Jewell-LaSalle* doctrine with respect to distant television signals.

The Supreme Court flatly rejected these efforts. Instead, it applied the *Fortnightly* analysis to determine that the distance between the broadcast station and the ultimate viewer is irrelevant to the determination of whether the retransmission is a broadcaster or viewer function.³⁸ The Court concluded that "a CATV system does not lose its status as a nonbroadcaster and thus a 'nonperformer' for copyright purposes when

35. *Id.* at 405. Those "disruptive consequences" were realized in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975), in which the *Fortnightly* analysis was applied for the first time to a radio case. The Court considered whether the reception of a radio broadcast of a copyrighted musical piece which was transmitted through a speaker system in a fast-food restaurant was an infringement of the Copyright Act. Although the *Jewell-LaSalle* decision seemed the appropriate precedent, the Court limited it to "a factual situation like that in which it arose," *id.* at 160, and instead adopted the *Fortnightly* distinction between broadcaster and viewer functions. *Id.* at 161. The Court reasoned that if there was no finding of copyright infringement when sophisticated communications technology was involved, there could be no finding of liability by the mere activation of a radio. In addition, the Court stated that merely holding that a listener had "performed" the copyrighted piece would not result in enforcement because of the futility of policing all business establishments, and would be "inequitable" since a listener could never know if the broadcaster had obtained a license to perform the work. *Id.* at 162. The Court also concluded that to require individual licenses for listeners would exact multiple tribute for what was basically a single rendition of a public work. In a concurring opinion, Justice Blackmun argued that *Fortnightly*, which had been decided 5-1, should be limited to its facts, while *Jewell-LaSalle*, which had the unanimous backing of the Court and had served as the basis for radio licensing agreements for 40 years, should have been granted precedential effect.

36. 415 U.S. 394 (1974). CBS sued several Teleprompter systems, all of which imported broadcast signals from distant markets. At the same time, these cable systems performed additional services such as the origination of local programming.

37. 476 F.2d 338, 349 (2d Cir. 1973).

38. 415 U.S. at 408.

the signals it carries are from distant rather than local sources."³⁹ Although the Court chose to adhere to a superficial analysis, it clearly indicated the necessity for a congressional remedy in its recognition that the Copyright Act never contemplated the technology at issue in the cable television cases.⁴⁰ Thus, *Teleprompter* effectively denied copyright holders any cause of action against the cable industry under the 1909 Copyright Act.

II. THE FCC CABLE RULES: THE LINK TO THE COPYRIGHT ACT

At the same time that the cable industry's exemption from copyright liability was being formulated in the courts, the broadcast industry was pressing its case against cable at the Federal Communications Commission (FCC). As a result of those efforts, the FCC promulgated a series of regulations through which it asserted increasingly more control over the retransmission of broadcast signals by cable systems. This exercise of jurisdiction by the FCC over cable remains significant today because of the relationship of the FCC rules to the revised Act. The applicability and scope of several of the revised Act's provisions are expressly tied to the content of the FCC rules and there is a distinct possibility of a conflict between those rules and both policy statements and the intended effect of the revised Act.

Because cable television started in 1950 as a master antenna service, providing television signals to communities without local broadcast stations, it was initially perceived by broadcasters as a boon since it increased the size of viewing audiences. In the 1950's and 1960's, however, as both the broadcast and cable industries prospered, it became apparent that cable television was a potential economic threat to the broadcast industry.⁴¹ As cable systems began to carry broadcast signals from beyond the local television market, these distant signals competed with other broadcast signals for the available viewing audience. The greater the number of signals carried, the greater the fragmentation of a given viewing audience. Under these circumstances, local broadcasters argued that their stations lost much of the former viewing audience, thereby affecting advertising rates and, ultimately, station revenues. This economic injury was presumed to be most severe in small communities which had only one or two local broadcast stations and a small potential audience.

39. *Id.* at 409.

40. *Id.* at 414.

41. See notes 12-16 & accompanying text *supra*.

When this threat to local broadcasters became apparent, the broadcast industry petitioned the FCC for rulemaking to regulate the cable industry, particularly the unrestricted carriage of distant signals. Initially, the Commission refused to assert jurisdiction because it presumed that its authority under the Communications Act of 1934⁴² was doubtful and because the broadcasters were able to offer no demonstrable proof of economic harm.⁴³ Shortly thereafter, however, the Commission reconsidered this policy due most probably to a few new appointments to the FCC.⁴⁴ Its first act was to assert jurisdiction over a particular cable system which used a microwave relay system to bring distant signals into a community with one local broadcast signal. In *Carter Mountain Trans-*

42. 47 U.S.C. §§ 151-155 (1970).

43. Report and Order in Docket No. 12443, 26 F.C.C. 2403 (1959). This inquiry was the first federal attempt to evaluate the economic consequences of competition between media in small markets. On the basis of its own research and comments filed, the FCC determined that, "of the 96 stations which have gone off the air since 1952, 89 UHF and 7 VHF, in only three cases has the existence of an auxiliary service . . . been mentioned as a factor." A factor in the FCC's decision was the holding in *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940), in which the Court found that the Communications Act "does not essay to regulate the business of the licensee. The Commission is given no supervisory control . . . of business management or of policy." *Id.* at 475. The Court continued, "resulting economic injury to a rival station is not, in and of itself, . . . an element which [the FCC] must weigh . . . in passing on an application for a broadcast license." *Id.* at 473. The Court reasoned: "If such economic loss were a valid reason for refusing a license this would mean that the Commission's function is to grant a monopoly in the field of broadcasting, a result which the Act itself clearly negatives" *Id.* at 476.

However, in a more recent decision, the United States Court of Appeals for the District of Columbia stated that potential economic injury was a factor which the FCC must consider:

[W]hether a station makes \$5,000, \$10,000 or \$50,000 is a matter in which the public has no interest as long as service is not adversely affected. . . . But if the situation in a given area is such that available revenue will not support good service in more than one station, the public interest may well be in the licensing of one rather than two stations.

Carroll Broadcasting Co. v. FCC, 258 F.2d 440, 443 (D.C. Cir. 1958).

The question of the FCC's jurisdiction over cable was finally resolved in *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968) in which the Court sustained FCC restrictions on the use of distant signals by a San Diego cable system, stating, "the authority which we recognize . . . is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting" *Id.* at 178.

44. The Commission's about face seemed to be due mostly to a change of commissioners, including the addition of a new chairman, Newton Minnow. *Hearings on H.R. 7715 Before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce*, 89th Cong., 1st Sess. 138-39 (1965).

mission Corp. v. FCC,⁴⁵ the FCC imposed regulations on the types of signals which the cable system could carry and the manner in which they could be carried in order to protect the local broadcaster from economic injury. The purpose of the regulation was to protect local broadcasters and, to a more limited extent, the owners of copyrighted program material. Although *Carter Mountain* was limited to the regulation of distant signals in this one cable system, shortly after this initial decision the FCC chose to assert jurisdiction over all microwave-fed cable systems.⁴⁶ Finally, in 1966, the Commission took jurisdiction over all cable systems whether or not microwave was actually used.⁴⁷

Having assumed cable jurisdiction, the FCC proceeded to promulgate, between 1966 and 1970, three regulatory structures designed to control distant signal carriage by cable system.⁴⁸ These regulations were developed primarily to protect the local broadcaster and the exclusivity of the local market, but because copyright is also based on the concept of local markets, the FCC regulations also had the secondary effect of protecting the copyright owner as well. In 1966, the FCC promulgated procedures whereby cable systems in the top one hundred markets⁴⁹ could carry a distant television signal only with the consent of the Commission upon a showing that cable service would not injure the local broadcast stations.⁵⁰ The result of this policy was to impede significantly the growth of cable television since a cable system could commence service only after going through a costly and time consuming hearing before the FCC. Many systems chose not to enter local markets for this reason.

Therefore, the Commission reversed its policy in 1968. Not only were too many cable systems prevented from entering markets, but the backlog of cases for FCC action was too great. As an alternative, the FCC

45. 32 F.C.C. 459 (1962), *aff'd*, 321 F.2d 359 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963).

46. First Report and Order in Dockets Nos. 14895 & 15233, 38 F.C.C. 683 (1965).

47. Second Report and Order in Dockets Nos. 14895, 15233 & 15971, 2 F.C.C.2d 725 (1966).

48. For a general review of the regulatory history of cable television see KRASNOW & LONGLEY, *THE POLITICS OF BROADCASTING* (1973); LEDUC, *CABLE TELEVISION AND THE FCC: A CRISIS IN MEDIA CONTROL* (1973); SEIDEN, *CABLE TELEVISION U.S.A.: AN ANALYSIS OF GOVERNMENT POLICY* (1972).

49. The top 100 television markets is frequently used as a cut-off point for the applicability of FCC rules and provisions under the revised Act. Ninety percent of the nation's television viewing audience lives in the top 100 markets. See note 4 *supra*.

50. Notice of Proposed Rulemaking and Notice of Inquiry in Docket No. 18397, 15 F.C.C.2d 417 (1968). It had generally been believed by Commission staff that the Supreme Court, in *Fortnightly*, would find cable liable under the 1909 Copyright Act. To the surprise of the staff, the Court held that cable was not liable. Interview with Henry Geller, former FCC General Counsel, in Washington, D.C. (February 10, 1977).

proposed the "retransmission consent plan" which replaced the hearing with a requirement compelling cable systems to seek retransmission consent on a program-by-program basis from the broadcast station which transmitted the program.⁵¹ This plan was doomed from the outset. Because broadcasters and cable systems were bitter enemies, it was extremely unlikely that consent would ever be granted. Accordingly, this plan was never implemented.

In 1970 the Commission tried once again, initiating the "public dividend plan."⁵² Under this policy, cable systems would be permitted to carry four distant nonnetwork stations. In exchange, the cable systems were required to pay five percent of their subscription revenues to public broadcasting. Furthermore, they were forced to substitute local broadcasters' advertisements for the advertisements from the distant stations. This plan was never implemented due largely to its great complexity.

In 1971, under the leadership of a new chairman, the Commission again reviewed the problem of cable television regulation. Chairman Dean Burch attempted to develop a new set of regulations to permit the entry of cable television into the top one hundred markets while neutralizing the broadcast and copyright opposition. Burch's plan was unveiled in a letter submitted in response to a request from then Senator John Pastore, Chairman of the Senate Subcommittee on Communications. This "letter of intent" outlined the proposed FCC cable television regulations which were to go into effect in 1972.⁵³ It indicated that the FCC believed cable regulation and copyright should be considered separately. The Commission stated that, although it was competent to handle the economic ramifications of the cable problem, it felt that "copyright policy is most appropriately left to the Congress and the courts."⁵⁴

Copyright interests objected to the letter of intent because it left the cable industry's liability completely unresolved. Chairman Burch attempted to reach a compromise among the cable, broadcast, and copy-

51. See Notice of Proposed Rulemaking and Notice of Inquiry in Docket 18397, 15 F.C.C.2d 417 (1968). The retransmission consent plan was promulgated shortly after the *Fortnightly* decision. The Commission's action, in effect, circumvented the *Fortnightly* holding by imposing procedures which protected copyright interests.

52. Second Further Notice of Proposed Rulemaking in Docket No. 18397-A, 24 F.C.C.2d 580 (1970). The FCC indicated that comments regarding cable's copyright liability would be accepted but stated that only Congress could act on copyright legislation.

53. For the full text, see Cable Television Report and Order, App. C, 36 F.C.C.2d 140, 260-84 (1972). The proposed regulations are divided into four areas: television broadcast signal carriage; access to, and use of nonbroadcast cable channels; technical standards; and federal versus state local jurisdiction.

54. *Id.* at 261.

right interests in order to minimize opposition to his plan, but the negotiations soon broke down.⁵⁵ Burch then turned to the White House Office of Telecommunications Policy which proved successful in developing an agreement acceptable to all interests.⁵⁶

This document, known as the Consensus Agreement,⁵⁷ satisfied both copyright owners and broadcasters basically because of the added "syndicated exclusivity" rules.⁵⁸ These rules were developed in the Consen-

55. Burch, in a concurring statement, explained his behavior as follows:

[I]t seemed to me that the time was right for another try. Broadcasters were understandably nervous that this program would go into effect and the Teleprompter [sic] case might go against them; cable was equally concerned about the outcome of litigation and the need to put itself on a solid base; and copyright owners were anxious to protect their major source of revenue in the top television markets. Then, too, the Office of Telecommunications Policy had a cable study underway, and all the principals were pressing their viewpoints in that forum.

Id., App. E at 291.

56. In the early and mid-1970's several major studies, funded by foundations, private industry, the White House, and Congress, looked at the growth potential of the cable industry. The studies were unanimous in recognizing a copyright obligation on the part of the industry. Thus, while it was not legally bound to copyright liability, the general institutional and government support for copyright payments helped persuade the industry to "voluntarily" agree to a copyright obligation. See SLOAN COMMISSION ON CABLE COMMUNICATIONS, ON THE CABLE: THE TELEVISION OF ABUNDANCE (1971); CABINET COMMITTEE ON CABLE COMMUNICATIONS, CABLE: A REPORT TO THE PRESIDENT (1974); COMMITTEE FOR ECONOMIC DEVELOPMENT, BROADCASTING AND CABLE TELEVISION: POLICIES FOR DIVERSITY AND CHANGE (1975); STAFF OF HOUSE SUBCOMM. ON COMMUNICATIONS OF COMM. FOR INTERSTATE AND FOREIGN COMMERCE, 94TH CONG., 2ND SESS., CABLE TELEVISION: PROMISE VERSUS REGULATORY PERFORMANCE (Comm. Print 1976).

57. See 36 F.C.C.2d at 284-86.

58. The syndicated exclusivity rule reads as follows:

(a) No cable television system, operating in a community in whole or in part within one of the first 50 major television markets shall carry a syndicated program pursuant to § 76.61(b), (c), (d), or (e) for a period of 1 year from the date that program is first licensed or sold as a syndicated program to a television station in the United States for television broadcast exhibition;

(b) No cable television system, operating in a community in whole or in part within a major television market, shall carry a syndicated program, pursuant to §§ 76.61(b), (c), (d), or (e), or 76.63(a) (as it refers to § 76.61(b), (c), (d), or (e)), while a commercial television station licensed to a designated community in that market has exclusive broadcast exhibition rights (both over-the-air and by cable) to that program: *Provided, however*, that if a commercial station licensed to a designated community in one of the second 50 major television markets has such exclusive rights, a cable television system located in whole or in part within the market of such station may carry such syndicated programs in the following circumstances:

(1) If the program is carried by the cable television system in prime time and will not also be broadcast by a commercial market station in prime time during the period for which there is exclusivity for the program;

(2) For off-network series programs:

(i) Prior to the first nonnetwork broadcast in the market of an episode in the series;

sus Agreement to protect the market exclusivity of copyright owners and to reflect programing market patterns. They constituted the heart of the Consensus Agreement and even today remain the core of the FCC's copyright rules. They are, as well, the most complex, least understood, and most controversial provisions of the cable rules.⁵⁹

(ii) After a nonnetwork first-run of the series in the market or after year from the date of the first nonnetwork broadcast in the market of an episode in the series, whichever occurs first;

(3) For first-run series programs:

(i) Prior to the first broadcast in the market of an episode in the series;

(ii) After two (2) years from the first broadcast in the market of an episode in the series;

(4) For first-run, nonseries programs:

(i) Prior to the date the program is available for broadcast in the market under the provision of any contract or license of a television broadcast station in the market;

(ii) After two (2) years from the date of such first availability;

(5) For feature films:

(i) Prior to the date such film is available for nonnetwork broadcast in the market under the provisions of any contract or license of a television broadcast station in the market;

(ii) Two (2) years after the date of such first availability;

(6) For other programs: 1 day after the first nonnetwork broadcast in the market or 1 year from the date of purchase of the program for nonnetwork broadcast in the market, whichever occurs first.

Note 1: For purposes of § 76.151, a series will be treated as a unit, that is:

(i) No episode of a series (including an episode in a different package of programs in the same series) may be carried by a cable television system, pursuant to §§ 76.61(b), (c), (d), or (e) or 76.63(a) (as it refers to § 76.61(b), (c), (d), or (e)) while any episodes of the series are subject to exclusivity protection.

(ii) In the second 50 major television markets, no exclusivity will be afforded a different package of programs in the same series after the initial exclusivity period as terminated.

Note 2: As used in this section, the phrase "broadcast in the market" or "broadcast by a market station" refers to a broadcast by a television station licensed to a designated community in the market.

47 C.F.R. § 76.151 (1976).

59. In addition to the syndicated exclusivity provisions, the FCC signal carriage rules developed in the Consensus Agreement for cable systems included restriction on the number of signals a cable system could import from network affiliates, independent stations, and educational stations, all based on the market size of the cable system location, known as the signal carriage rules. See 47 C.F.R. §§ 76.57, .59, .61, .63 (1976). The rules also restricted the carriage by cable systems of network programing when a network affiliate in the same market as the cable system planned to air that programing. 47 C.F.R. § 76.91 (1976). These rules are of note because the revised Act provides that violation of the FCC rules constitutes a copyright infringement.

The syndicated exclusivity rule encourages broadcasters in the top 50 markets to seek longer exclusive contracts, simply to keep products off the cable system. In addition, the cable system, which is only permitted to import two distant signals, is required to black out any programing for which there is a contract between the local broadcaster and the copyright owner. Thus, the attractiveness of a distant signal may be severely diminished. Finally, the cable system must comply with a cumbersome and time consuming procedure requiring knowledge of local contracts, distant signal program schedules, and the like.

The rules prohibit the cable system from retransmitting certain programs from distant markets if they would interfere with exclusive contracts held by local broadcasters for the same programming. Specifically, the rules establish a graduated scheme of restrictions on the retransmission of distant signals based on the size of the local market. The rules for the top fifty markets are the most rigorous, imposing an absolute ban on cable retransmission of new syndicated programming for one year. After that, the cable system can import the program only if a local broadcast station does not hold an exclusive contract for the specific program. The practical effect of these rules is to curtail the importation of syndicated programming into the largest markets, because the most attractive programs will have exclusive contracts in those markets.

In markets fifty-one to one hundred, the rules, though less restrictive, are more complex. Depending on the nature of the programming, the prohibition on importation may last from one to two years. Syndicated programming, however, may not be imported during prime time if a local station with an exclusive contract for the program also plans to broadcast the program in prime time. The rules do not apply in the markets above one hundred. Thus, the syndicated exclusivity rules provide substantial copyright protection for local broadcasters in the largest television markets.

Although the amended Copyright Act is designed to remedy the objections of programmers and broadcasters, the issue is far from resolved. The FCC recently issued an inquiry to reassess the need for its syndicated exclusivity provisions.⁶⁰ The response has been typical of the controversies between the broadcast and cable industries, and both sides have taken diametrically opposed positions.⁶¹ The FCC syndicated exclusivity rules were designed to appease the intransigent copyright and broadcast interests. The cable industry believed, not unreasonably, that the passage of new copyright legislation would eliminate the need for the FCC syndicated exclusivity rules, and thus the rules themselves could be discarded. In reality, however, the cable industry is presently saddled with both a new copyright law and with the FCC exclusivity provisions. The difficulty posed by this situation results from areas of conflict in the operation and purposes of the FCC rules and the amended copyright act.⁶² Thus, instead of equitably resolving long-standing disputes be-

60. First Report and Order in Docket No. 20553, 58 F.C.C.2d 422 (1976).

61. Notice of Inquiry in Docket No. 20988, 61 F.C.C.2d 746, (1976).

62. See, e.g., BROADCASTING, March 7, 1977, at 59-60. Broadcasters argue for greater exclusivity in markets 51-100 in order to protect the quality of local broadcast services. Program suppliers also seek additional exclusivity protection to ensure high quality

tween copyright owners and broadcasters with the cable industry, the new Act may have multiplied the possibilities for continued controversy.

III. THE REVISED COPYRIGHT ACT

The development of acceptable provisions to institutionalize copyright payments for the cable industry was a major obstacle to the passage of a revised copyright law.⁶³ For more than a decade, the battle over the copyright liability of the cable television industry had been fought in Congress,⁶⁴ the courts, and the FCC. In fact, passage of the revised Act in the 94th Congress was in serious doubt until the closing days of the session when the copyright interests and the cable television industry finally developed a mutually acceptable royalty fee schedule for cable.⁶⁵ Once the cable issue was resolved, the Copyright Act was enacted into law and became effective on January 1, 1978. For the first time the revised Act⁶⁶ addresses the copyright liability of the mass media and

programming in and to protect local markets. The cable industry seeks complete deletion of the rules since it now pays copyright fees. While it appears that exclusivity is a particular hardship for some cable systems (e.g., the Wauwatosa, Wisc., CATV system must black out 60% of its imported programming), there is some feeling that the rule is only enforced in 20 of the top 50 markets against 50 systems and it is generally not enforced in markets 51-100. Stengel, *Syndicated Exclusivity*, VUE, February 28, 1977, at 6-7.

63. See generally Brennan, *An Overview of Copyright and the Copyright Bill*, 17 IDEA, Fall 1975, at 5.

64. The progression of copyright bills has been as follows: H.R. 11947, S. 3008, 88th Cong., 2d Sess. (1964); H.R. 4347, 5680, 6831, 6835, 89th Cong., 1st Sess. (1965); S. 1006, 89th Cong., 2d Sess. (1966); H.R. 2512, 90th Cong., 1st Sess. (1967); S. 597, 90th Cong., 1st Sess. (1967); S. 543, 91st Cong., 1st Sess. (1969); S. 644, 92d Cong., 1st Sess. (1971); S. 1361, 93d Cong., 1st Sess. (1973); H.R. 8186, 93d Cong., 1st Sess. (1973); S. 22, H.R. 2223, 94th Cong., 1st Sess. (1975). For a comprehensive discussion of the legislative history of the copyright bill, see Brennan, *Legislative History and Chapter 1 of S. 22*, 22 N.Y.L. SCH. L. REV., 193 (1976).

65. See BROADCASTING, April 19, 1976, at 48 for a description of the last minute negotiations between the parties. This royalty fee schedule, with some modifications, is incorporated in the new Act. See BROADCASTING, August 2, 1976, at 28.

66. According to the United States Register of Copyrights:

The new Act is rather a completely new copyright statute, intended to deal with a whole range of problems undreamed of by the drafters of the 1909 Act [T]he new statute makes a number of fundamental changes in the American copyright system, including some so profound that they may mark a shift in direction for the very philosophy of copyright itself. Properly designated, the new act is not a "general revision," but is as radical a departure as was our own first copyright statute, in 1790.

Ringer, *First Thoughts on the Copyright Act of 1976*, 22 N.Y.L. SCH. L. REV. 477, 479 (1977).

extends copyright liability to the cable industry.⁶⁷ As the House Committee on the Judiciary indicated, "cable systems are commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program material and . . . copyright royalties should be paid by cable operators to the creators of such programs."⁶⁸ The revised Act provides a new and perhaps less ambiguous definition of a "performance," and defines a public performance as one which is open to the public, or to any "substantial" number of persons outside of a normal family or social circle. The means of display or performance, as well as the time and place at which all members of the public receive it are not factors in determining whether a performance has occurred.⁶⁹ Of particular note here is that the House Report specifically states that "a cable television system is performing when it retransmits the broadcast to its subscribers."⁷⁰

Under the framework of the revised Act, the copyright owner is granted five exclusive rights to his product. These include the right to reproduce and prepare derivatives of the work, to distribute copies, and to perform or display the work publicly.⁷¹ Thus, under section 106, the

67. For additional analyses of the cable television provisions, see Botein, *The New Copyright Act and Cable Television—A Signal of Change*, 24 BULL. COPYRIGHT SOC'Y 1 (1977), and Meyer, *The Feat of Houdini or How the New Act Disentangles the CATV-Copyright Knot*, 22 N.Y.L. SCH. L. REV. 545 (1977).

68. H. R. REP. NO. 94-1476, 94th Cong., 2d Sess. 89 [hereinafter cited as HOUSE REPORT], reprinted in part in [1976] U.S. CODE CONG. & AD. NEWS 5659, 5704.

69. Revised Act § 101 provides in pertinent part:

To "perform" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sound accompanying it audible.

...

To perform or display a work "publicly" means—

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

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

70. HOUSE REPORT, *supra* note 68, at 63.

71. See revised Act § 106, which provides that:

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

(1) to reproduce the copyrighted work in copies or phonorecords;
 (2) to prepare derivative works based upon the copyrighted work;
 (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

copyright owner can generally withhold or sell his product as he sees fit. To obtain the use of such materials, potential users must negotiate with the owner on an appropriate royalty or licensing fee based on the manner and number of times the work will be used. If an agreement is reached, the user receives a license stating the terms of use and the owner receives royalty fees. However, this "bundle of rights" is not without restrictions. As the House Report points out, these rights granted the copyright owner in section 106 are subject to limitations in subsequent sections which set forth exemptions from the Act and certain restrictions on the basic rights granted by section 106.⁷² What Congress gave in section 106 is, to some extent, taken away in the other sections.

One of the major limitations on the rights of the copyright owner is the imposition of the compulsory license, which will eliminate the market place determination of royalty payments for the cable industry. The mechanism requires the granting of a license in exchange for royalty payments as determined by a fee schedule. Accordingly, a copyright owner cannot withhold his material from a cable system as long as the system complies with the requirements for the license. To this extent, the compulsory license severely limits the copyright owner's control of his material and effectively removes the licensing process from the marketplace of supply and demand.⁷³ The use of a compulsory license

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

72. See HOUSE REPORT, *supra* note 68, at 61.

73. There is some feeling that the compulsory license concept is inappropriate in copyright law. The United States Register of Copyrights has stated:

[T]he interweaving of four full scale compulsory licensing schemes into the main fabric of the United States copyright system may have ominous implications for the future. Copyright has heretofore been considered a bundle of exclusive rights that can be withheld or sold as the owner sees fit. Does our experience in the development of the 1976 Act suggest that in the future, whenever a new right is granted by Congress, it will necessarily be subject to compulsory licensing? Does this mean that eventually compulsory licensing will supplant traditional copyright, and that all rights under a copyright law will in time consist entirely of the right to collect royalties?

Ringer, *supra* note 66, at 495.

There is disagreement among commentators over whether the compulsory license should have been used for cable television. One group believes that compulsory licensing for cable television will ultimately have negative economic consequences upon the program production market and increase the amount of program regulation. S. BESEN, W. MANNING JR. & B. MITCHELL, COPYRIGHT LIABILITY FOR CABLE TELEVISION: IS COMPUL-

was instituted for practical reasons. The House Report recognized the impracticality of requiring every cable system to negotiate with every copyright owner whose work was distributed by a cable system.⁷⁴ A compulsory license will be granted "for the retransmission of those over-the-air broadcast signals that a cable system is authorized to carry pursuant to the rules and regulations of the FCC."⁷⁵ Specifically, the Copyright Act focuses on cable system liability for the use of distant signal programs, which most severely affect the program distribution market.

Section 111 of the revised Act has gained a well-deserved reputation as the most prolix section in the statute. It outlines the requirements for a cable system to obtain a compulsory license, lists the exemptions from copyright liability, delineates the acts and omissions which are infringements of the Act, sets forth the statutory copyright fees, and establishes the reporting requirements for cable systems. Despite the comprehensive nature of this section, it can be divided into three relatively clear components: secondary transmissions exempted from copyright liability; secondary transmissions granted a compulsory license; and secondary transmissions subject to full copyright liability.⁷⁶

The revised Act legislates the obligations of cable television systems in arcane and confusing terminology. A "primary transmission" and a "secondary transmission"⁷⁷ are defined in relation to one another. A primary transmission is a transmission made to the public by a broadcasting facility such as a television or radio station. A secondary transmission is the simultaneous further carriage and distribution of the signal by

SORY LICENSING THE SOLUTION? v-vi (1977). Another observer states that any copyright liability for cable television is inappropriate. Since it affects national communications policy, regulation of cable is better left to the FCC. B. KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT, 106 (1967). The House Report recognizes the interplay between the copyright and the communications elements of the legislation but cautions

[t]he Federal Communications Commission, and others who make determinations concerning communications policy, not to rely upon any action of this Committee as a basis for any significant changes in the delicate balance of regulation in areas where the Congress has not resolved the issue. Specifically, we would urge the Federal Communications Commission to understand that it was not the intent of this bill to touch on issues such as pay cable regulation or increased use of imported distant signals. These matters are ones of communications policy and should be left to the appropriate committees in the Congress for resolution.

HOUSE REPORT, *supra* note 68, at 89.

74. *Id.*

75. *Id.*

76. See revised Act § 111(a)-(e).

77. See revised Act § 111(f).

a cable system.⁷⁸ The "local service area of a primary transmitter"⁷⁹ is defined to be the area in which, under FCC rules, the television station can insist that the cable system carry its signal. Secondary transmissions which are granted general exemptions are delineated in section 111(a).⁸⁰

78. A nonsimultaneous transmission, such as would occur if a cable system videotaped a program for later distribution, has traditionally been an infringement of copyright. *See* *Walt Disney Prod. v. Alaska Television Network, Inc.*, 310 F. Supp. 1073 (W.D. Wash. 1969). Under the revised Act, a nonsimultaneous transmission is permitted for a cable system located outside the continental United States, with the exception of Puerto Rico and to a limited extent, Hawaii, provided that the system also complied with § 111(e) which prescribes strict standards for retransmission of a primary transmission. Any retransmission which does not conform with § 111(e) is an infringement of the new Act. The complexity of these measures is necessary to accommodate cable television systems which are located at too great a distance from the continental United States to receive simultaneous programming. These systems generally experience a lag of up to several days until duplicate videotapes can be delivered for transmission on the cable system.

79. *See* revised Act § 111(f). Under the FCC rules, a cable system in the first 50 television markets must carry the signals of:

- (1) Television broadcast stations within whose specified zone the community of the system is located, in whole or in part . . . ;
- (2) Noncommercial educational television broadcast stations within whose Grade B contours the community of the system is located, in whole or in part;
- (3) Television translator stations with 100 watts or higher power serving the community of the system . . . ;
- (4) Television broadcast stations licensed to other designated communities of the same major television market . . . ;
- (5) Commercial television broadcast stations that are significantly viewed in the community of the system. . . .

47 C.F.R. § 76.61 (1976). *See also* 47 C.F.R. §§ 76.57, .59, .63.

80. *See* revised Act § 111(a), which provides that:

(a) CERTAIN SECONDARY TRANSMISSIONS EXEMPTED.—The secondary transmission of a primary transmission embodying a performance or display of a work is not an infringement of copyright if—

(1) the secondary transmission is not made by a cable system, and consists entirely of the relaying, by the management of a hotel, apartment house, or similar establishment, of signals transmitted by a broadcast station licensed by the Federal Communications Commission, within the local service area of such station, to the private lodgings of guests or residents of such establishment, and no direct charge is made to see or hear the secondary transmission; or

(2) the secondary transmission is made solely for the purpose and under the conditions specified by clause (2) of section 110; or

(3) the secondary transmission is made by any carrier who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others: *Provided*, That the provisions of this clause extend only to the activities of said carrier with respect to secondary transmissions and do not exempt from liability the activities of others with respect to their own primary or secondary transmission; or

(4) the secondary transmission is not made by a cable system but is made by a governmental body, or other nonprofit organization, without any purpose of

The first set of exemptions applies to those apartment and hotel master antenna systems carrying local broadcast signals to the private rooms of the guests or residents of such buildings which do not impose a direct charge for this service.⁸¹ If the programing is distributed through the building by a cable television system, however, the exemption does not apply.⁸² The House Report makes clear that the exemption also does not apply if the transmission consists of anything more than the mere relay of broadcasts.⁸³ This exemption finally resolves the long-standing tension between the *Jewell-LaSalle* doctrine and the Supreme Court's recent holdings in *Fortnightly* and *Teleprompter*. The new Act limits the exclusion from liability to the distribution of signals to the private rooms in commercial establishments. Dining rooms, meeting halls, theatres, ballrooms, and similar places do not fit within the exemption.⁸⁴ Thus, if broadcast signals are transmitted in major public rooms, a hotel would once again be required to seek a copyright license. By this legislation, Congress has expressly rejected the recent decisions and has reestablished the vitality of *Jewell-LaSalle*. Section 110(5),⁸⁵ however, does provide an exemption from copyright liability for a small commercial establishment which provides radio or television entertainment to customers. Even though the transmission is public, as long as the receiving equipment is like that used in private homes, no direct charge is made to customers and the signal is not further distributed.⁸⁶ The distinction between this exemption and the liability provided in section 111(a)(1) appears to be principally predicated on the sophistication of the receiving equipment, a determination which must, by necessity, be made on a

direct or indirect commercial advantage, and without charge to the recipients of the secondary transmission other than assessments necessary to defray the actual and reasonable costs of maintaining and operating the secondary transmission service.

81. See revised Act § 111(a)(1).

82. *Id.*

83. See HOUSE REPORT, *supra* note 68, at 91.

84. *Id.*

85. The revised Act § 110(5) states:

Notwithstanding the provisions of section 106, the following are not infringements of copyright:

(5) communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless—

(A) a direct charge is made to see or hear the transmission; or

(B) the transmission thus received is further transmitted to the public; . . .

86. See HOUSE REPORT, *supra* note 68, at 87. See the discussion of *Twentieth Century Music Corp. v. Aiken*, note 35 *supra*, for those facts which constitute the outer limits of this exemption.

case-by-case basis. It is therefore likely that the courts will be called upon by copyright owners to clarify the boundaries of this exemption.

Section 111(a)(2)⁸⁷ provides a general exemption from copyright liability for secondary transmissions of instructional programing of any government or nonprofit educational institution which meets certain conditions.⁸⁸ The relatively narrow limits of this exemption reflect the well-established relationships between public television and copyright owners, since public television, the source of most instructional programing, has traditionally paid royalty fees tied to certain conditions relating to the nature of the broadcast.⁸⁹

A third group of exemptions relates to "passive" carriers which "provide wires, cables, or other communications channels for the use of others,"⁹⁰ such as leased telephone lines or other common carriers. A fourth category of exemptions includes boosters and translators which are operated on a nonprofit basis.⁹¹ An overriding proviso to all four categories of exemptions is that the transmission may not be limited but must be available to the general public, at least within the confines of the area permitted by any given exemption.⁹² Thus, any controls which restrict the viewing audience, such as scrambling a pay television signal⁹³

87. See revised Act § 111(a)(2).

88. See revised Act § 110(2), which provides that the following are not infringements of copyright:

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

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

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

(C) the transmission is made primarily for—

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

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

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

89. See revised Act § 118 for the copyright obligations of noncommercial television.

90. See revised Act § 111(a)(3). A common carrier is any communications medium which is available to the public at fixed rates on a first come, first served basis. The telephone is the most widely used common carrier. Other examples include domestic satellites and microwave relays.

91. See revised Act § 111(a)(4). A booster is an electronic device which strengthens a weak broadcast signal and retransmits it for off-air reception. A translator serves a similar function, but in addition it alters a signal from one frequency to another.

92. See revised Act § 111(b).

93. Pay television is a special program service which provides additional programs for a fee, such as first run films and major sports events, which are unavailable to the general

so that only special paying subscribers could have access to the program, would invoke full copyright liability.

Cable transmissions which do not qualify for the above exemptions are subject to full copyright liability. This liability, however, can be avoided by the cable system through the mechanism of the compulsory license, which is easily the most distinctive and controversial feature of the Copyright Act's regulation of cable television.⁹⁴ The filing and notice requirements for obtaining a compulsory license are delineated in section 111(d). Acts that are infringements of the compulsory license, which, in essence, are violations of the FCC's signal carriage rules are set forth in section 111(c).⁹⁵ The regulatory scheme permits a cable system to receive

viewing public. The operators of these services typically create interference, or "scramble" the picture, which only paying customers can unscramble.

94. See notes 73-74 & accompanying text *supra* for a discussion of compulsory licenses. The revised Act confers liability only upon secondary transmissions by cable companies. Therefore, it is critical to determine whether the retransmission systems falls within the definition of a cable system, which is defined as "a facility, located in any State, Territory, Trust Territory or Possession, that in whole or part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables, or other communications channels to subscribing members of the public who pay for such service" Revised Act § 111(f).

95. The revised Act §§ 111 (c)-(d) provide:

(c) SECONDARY TRANSMISSIONS BY CABLE SYSTEMS.—

(1) Subject to the provisions of clauses (2), (3), and (4) of this subsection, secondary transmissions to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work shall be subject to compulsory licensing upon compliance with the requirements of subsection (d) where the carriage of the signals comprising the secondary transmission is permissible under the rules, regulations, or authorizations of the Federal Communications Commission.

(2) Notwithstanding the provisions of clause (1) of this subsection, the willful or repeated secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and 509

(d) COMPULSORY LICENSE FOR SECONDARY TRANSMISSIONS BY CABLE SYSTEMS.—

(1) For any secondary transmission to be subject to compulsory licensing under subsection (c), the cable system shall, at least one month before the date of the commencement of operations of the cable system or within one hundred and eighty days after the enactment of this Act, whichever is later, and thereafter within thirty days after each occasion on which the ownership or control or the signal carriage complement of the cable system changes, record in the Copyright

a compulsory license for the secondary transmission of broadcast stations licensed by the FCC or the appropriate Mexican or Canadian authorities, so long as the carriage of the signal is permissible under FCC regulations and the cable system refrains from changing or altering the signal.⁹⁶

To obtain a compulsory license, the cable system must supply the Copyright Office with extensive information concerning the operations and ownership of the system. Specifically, each system must submit a statement account on a semiannual basis, specifying the number of channels retransmitted, the names and locations of each broadcast channel carried, the total number of subscribers served by the cable system, and the gross receipts which the system received for this retransmission service. The Register of Copyrights may require any additional information which it deems necessary by promulgating appropriate regulations.⁹⁷ The cable systems must also file both a special statement of account for any nonnetwork programs from distant signals which have been added or substituted under special circumstances permitted by the FCC,⁹⁸ and a notice listing ownership of the cable system, the signals carried, and their location.⁹⁹ In addition to these reporting requirements, the cable system must carry only FCC authorized signals¹⁰⁰ and may not alter, delete, or add to any advertising or station announcements.¹⁰¹ Finally, the system must deposit with the Register of Copyrights a royalty fee as computed by a statutory formula.¹⁰²

The prohibition against additions, changes, and deletions is based on the perceived economic impact which such content alterations have on

Office a notice including a statement of the identity and address of the person who owns or operates the secondary transmission service or has power to exercise primary control over it, together with the name and location of the primary transmitter or primary transmitters whose signals are regularly carried by the cable system, and thereafter, from time to time, such further information as the Register of Copyrights, after consultation with the Copyright Royalty Tribunal, shall prescribe by regulation to carry out the purpose of this clause. . . .

96. See revised Act § 111(c)(1).

97. See revised Act § 111(d)(2)(A). Regulations establishing the form, content, and filing requirements for cable television systems were adopted, effective February 10, 1978. See 43 Fed. Reg. 960-64 (1978) (to be codified in 37 C.F.R. §§ 201.11, 201.17).

98. *Id.*

99. See revised Act § 111(d)(1).

100. See revised Act § 111(c)(2)(A).

101. See revised Act § 111(c)(3). An exception is made for market research companies that have obtained the prior consent of the advertiser who paid for the commercial, the television station which broadcasts the commercial, and the cable system which carries the commercial, so long as no further income is obtained from commercial time used in this manner.

102. See revised Act § 111(d)(2)(B).

the copyright owner. In the Committee's view, any willful alteration of the content of the broadcast material has a drastic effect on the nature of the cable retransmission, making the cable system function very much like a broadcaster. In particular, the substitution of advertising is believed to create the greatest harm because it injures the original advertiser, and this indirectly injures the copyright owner, whose compensation is dependent on the willingness of sponsors to pay for air time based on a particular audience size. Substitute advertising injures the broadcaster by forcing him to compete for advertising dollars with a cable system which does not have comparable programing costs.¹⁰³ Noncompliance with any of the above requirements or restrictions constitutes an infringement of the Act, provided, however, that the breach is "willful or repeated."¹⁰⁴ Accordingly, the cable system is protected from liability for unintended acts.

As noted above, in order to obtain a compulsory license, a cable system must pay a royalty fee to the Register of Copyrights. This fee is computed by using a formula based on the cable system's gross receipts and the number of distant signal equivalents. A distant signal equivalent (DSE) is a numerical value assigned to the secondary transmission of nonnetwork television programing beyond the local service area of the primary transmitter by a cable system.¹⁰⁵ In other words, a DSE is assigned only to the retransmission of distant signals. The value assigned a signal depends upon the nature of the station which originates the distant programing. The highest value is assigned to independent stations, and the lowest is assigned to network affiliates and noncommercial educational stations.¹⁰⁶ Although cable systems pay royalty fees only for retransmission of nonnetwork syndicated programing, network affiliates

103. See HOUSE REPORT, *supra* note 68, at 93-94.

104. *Id.* at 94.

105. See revised Act § 111(f).

106. See *id.* This provision also requires that fractional values be determined for any substituted programing or special program categories or part time retransmission as permitted under FCC rules. An independent station is allocated the highest value because its programing is comprised mostly of syndicated programing sold on a market-by-market basis. By retransmitting an independent signal beyond its local service area the cable system reduces the attractiveness of the program in its market since a local broadcaster will be less willing to pay for a program which has previously been viewed by retransmission on the cable system. In addition, the copyright owner's licensing fee does not reflect the additional viewers in distant markets who see the program on a cable system. A lower value is assigned to network as well as educational stations since copyright owners sell licenses for network programing on the basis of a national viewing audience. Therefore, the cable system need not compensate copyright owners for network programs. Network affiliates, however, also carry several hours per day of nonnetwork programing, which is reflected by the low value assigned to the network station.

are included in the computation of DSE's because they usually broadcast some nonnetwork programming.

Gross receipts include only those arising from the basic service of retransmission, and do not include receipts from other sources, such as pay cable or installation charges.¹⁰⁷ Royalty payments are made only for retransmission of distant signals composed of nonnetwork programming, because the economic harm caused by retransmission by cable systems essentially affects only copyright owners whose works are distributed in that manner. The copyright owner whose works are transmitted through network programming is not harmed by cable retransmission because he is compensated on the basis of a national (network) audience,¹⁰⁸ which is not increased by the cable retransmission. In the case of nonnetwork programming, however, the copyright owner is injured because he does not receive full compensation for his work. He is not credited with the increased audience size which results from presentation of his work by the cable system. Cable retransmission of a purely local signal is similar to the distant network programming. If the cable retransmission is to the same market audience for which the copyright owner is compensated by the primary transmitter, there is no economic injury to the copyright owner. Thus, cable systems do not make any royalty payments for local or network programming.

The procedure for determining royalty payments is set forth in section 111(d) of the revised Act.¹⁰⁹ First, the total number of distant signal

107. See HOUSE REPORT, *supra* note 68, at 96. Royalty payments are made only for secondary transmissions of distant signals, specifically, programs from independent stations and nonnetwork programs of network affiliates.

108. Revised Act § 111(f) defines a network station as a television broadcast station that is owned or operated by, or affiliated with, one or more of the television networks in the United States providing nationwide transmissions, and that transmits a substantial part of the programming supplied by such networks for a substantial part of that station's typical broadcast day.

This same section defines an independent station as "a commercial television broadcast station other than a network station."

109. Revised Act § 111(d)(2)(B) states:

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

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

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

equivalents carried by the cable system is determined. Then, each successive DSE, or any fraction thereof, is multiplied by a declining progression of fractional percentages of the system's gross receipts, and the sums thus obtained are added together to give the cable system's royalty payment. If a cable system is located partly within and partly without the local service area of a broadcast station, the fee is computed on gross receipts from subscribers outside the local service area.¹¹⁰

Due to the FCC's signal carriage rules, cable systems which are located outside all television markets are permitted to carry unrestricted numbers of distant signals¹¹¹ and are therefore required to pay a greater percentage of gross receipts as a royalty payment than are larger cable systems located in the major television markets where distant signal carriage is restricted. In order to minimize the financial burden on small cable systems, the revised Act includes two separate provisions which reduce the royalty fee for such cable systems. Section 111(d)(2)(C)¹¹² provides a special computation for systems with less than \$80,000 in semiannual revenues, and section 111(d)(2)(D)¹¹³ provides a formula for

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

(iv) 0.2 of 1 per centum of such gross receipts for the fifth distant signal equivalent and each additional distant signal equivalent thereafter; and in computing the amounts payable under paragraphs (ii) through (iv), above, any fraction of a distant signal equivalent shall be computed at its fractional value and, in the case of any cable system located partly within and partly without the local service area of a primary transmitter, gross receipts shall be limited to those gross receipts derived from subscribers located without the local service area of such primary transmitter;

110. It is estimated that total copyright fees from the cable industry will amount to only \$8.7 million or approximately \$.81 per subscriber per year. HOUSE REPORT, *supra* note 68, at 91.

111. 47 C.F.R. § 76.67 (1976).

112. The revised Act § 111(d)(2)(C) declares:

[I]f the actual gross receipts paid by subscribers to a cable system for the period covered by the statement for the basic service of providing secondary transmissions of primary broadcast transmitters total \$80,000 or less, gross receipts of the cable system for the purpose of this subclause shall be computed by subtracting from such actual gross receipts the amount by which \$80,000 exceeds such actual gross receipts, except that in no case shall a cable system's gross receipts be reduced to less than \$3,000. The royalty fee payable under this subclause shall be 0.5 of 1 per centum, regardless of the number of distant signal equivalents, if any.

113. The revised Act § 111(d)(2)(D) states:

[I]f the actual gross receipts paid by subscribers to a cable system for the period covered by the statement, for the basic service of providing secondary transmissions of primary broadcast transmitters, are more than \$80,000 but less than \$160,000, the royalty fee payable under this subclause shall be (i) 0.5 of 1 per centum of any gross receipts up to \$80,000; and (ii) 1 per centum of any gross

systems with semiannual revenues of between \$80,000 and \$160,000. Both formulas are based solely on a percentage of gross receipts without regard to the number of DSE's which the system carries.¹¹⁴

To administer the complexities of the compulsory licensing provisions and royalty fee schedules, the revised Act established the Copyright Royalty Tribunal.¹¹⁵ Its function is to consider adjustments in royalty rates for cable¹¹⁶ and certain other uses of copyrighted works, to distribute royalty fees¹¹⁷ to owners of copyrighted works,¹¹⁸ and to resolve conflicts over fee distribution.¹¹⁹ The Tribunal is an independent entity in the legislative branch¹²⁰ and is now composed of five commissioners appointed for seven-year terms by the President with the consent of the Senate.¹²¹ Unlike the substantive provisions of the new Act which became effective on January 1, 1978, the Tribunal was to be appointed within six months after the enactment of the law on October 19, 1976.¹²² It is anticipated that much of its work will be the reevaluation of cable royalty fees. Section 801(b)(2) sets forth in great detail the basis for these rate reevaluations.¹²³ The Tribunal may readjust royalty rates to reflect

receipts in excess of \$80,000 but less than \$160,000, regardless of the number of distant signal equivalents, if any.

114. Under § 111(d)(2)(C), systems with semiannual revenues of \$80,000 or less pay 1/2% of gross revenues as a royalty fee, with a minimum payment of \$30 semiannually; under § 111(d)(2)(D), systems with semiannual revenues of between \$80,000 and \$160,000 pay 1/2% of gross revenues on receipts below \$80,000 and 1% on gross receipts in excess of \$80,000 but less than \$160,000. In both cases no additional fee is assessed for DSE's.

115. See revised Act §§ 801-810. The United States Register of Copyrights calls the royalty tribunal an "ingenious" device for regulating compulsory licenses "without constant and unwarranted litigation and need for congressional action." Despite perceived benefits, the Register states that "the existence of a government body that is paying out royalties, settling disputes among copyright owners, reviewing royalty rates of licenses, seems an open invitation to further government control." See Ringer *supra* note 66, at 495.

116. See revised Act § 801(b)(2).

117. See revised Act § 801(b)(3).

118. See revised Act § 111(d)(3-5).

119. See revised Act § 801(b)(3).

120. See revised Act § 801(a).

121. See revised Act § 802(a).

122. See revised Act § 801(c). The appointments to the Tribunal were recently made. The appointees are Thomas C. Brennan, Douglas Coulter, Mary Lou Berg, Clarence L. James, Jr., and Frances Garcia.

123. The revised Act § 801(b)(2) provides:

(b) Subject to the provisions of this chapter, the purpose of the Tribunal shall be— . . .

(2) to make determinations concerning the adjustment of the copyright royalty rates in section 111 solely in accordance with the following provisions:

(A) The rates established by section 111(d)(2)(B) may be adjusted to reflect (i) national monetary inflation or deflation or (ii) changes in the average rates charged cable subscribers for the basic service of providing secondary

national inflation or deflation or changes in the average subscriber fee charged for basic service "to maintain the real constant dollar level of the royalty fee per subscriber."¹²⁴ However, two limitations are imposed: first, if increases in the average subscriber rates for basic service exceed the inflation rate, any change in royalty fees cannot exceed the inflation rate. In addition, the royalty fee cannot be increased to reflect any reduction in the number of DSE's which a cable system may carry in

transmissions to maintain the real constant dollar level of the royalty fee per subscriber which existed as of the date of enactment of this Act: *Provided*, That if the average rates charged cable system subscribers for the basic service of providing secondary transmissions are changed so that the average rates exceed national monetary inflation, no change in the rates established by section 111(d)(2)(B) shall be permitted: *And provided further*, That no increase in the royalty fee shall be permitted based on any reduction in the average number of distant signal equivalents per subscriber. The Commission may consider all factors relating to the maintenance of such level of payments including, as an extenuating factor, whether the cable industry has been restrained by subscriber rate regulating authorities from increasing the rates for the basic service of providing secondary transmissions.

(B) In the event that the rules and regulations of the Federal Communications Commission are amended at any time after April 15, 1976, to permit the carriage by cable systems of additional television broadcast signals beyond the local service area of the primary transmitters of such signals, the royalty rates established by section 111(d)(2)(B) may be adjusted to insure that the rates for the additional distant signal equivalents resulting from such carriage are reasonable in the light of the changes effected by the amendment to such rules and regulations. In determining the reasonableness of rates proposed following an amendment of Federal Communications Commission rules and regulations, the Copyright Royalty Tribunal shall consider, among other factors, the economic impact on copyright owners and users: *Provided*, That no adjustment in royalty rates shall be made under this subclause with respect to any distant signal equivalent or fraction thereof represented by (i) carriage of any signal permitted under the rules and regulations of the Federal Communications Commission in effect on April 15, 1976, or the carriage of a signal of the same type (that is, independent, network, or noncommercial educational) substituted for such permitted signal, or (ii) a television broadcast signal first carried after April 15, 1976, pursuant to an individual waiver of the rules and regulations of the Federal Communications Commission, as such rules and regulations were in effect on April 15, 1976.

(C) In the event of any change in the rules and regulations of the Federal Communications Commission with respect to syndicated and sports program exclusivity after April 15, 1976, the rates established by section 111(d)(2)(B) may be adjusted to assure that such rates are reasonable in light of the changes to such rules and regulations, but any such adjustment shall apply only to the affected television broadcast signals carried on those systems affected by the change.

(D) The gross receipts limitations established by section 111(d)(2)(C) and (D) shall be adjusted to reflect national monetary inflation or deflation or changes in the average rates charged cable system subscribers for the basic service of providing secondary transmissions to maintain the real constant dollar value of the exemption provided by such section; and the royalty rate specified therein shall not be subject to adjustment.

124. Revised Act § 801(b)(2)(A).

order to compensate copyright owners for the consequent decrease in revenues.¹²⁵ The Tribunal is also free to consider any other factors deemed pertinent to the rate issue.

The Tribunal may adjust royalty payments if the FCC changes any of its rules on signal carriage.¹²⁶ In particular, the carriage of additional distant signals by cable systems based on changes in FCC regulations is a basis for reevaluating royalty rates. Upon any such change in signal carriage, the Tribunal is to assess "the economic impact on copyright owners and users."¹²⁷ In addition, it may consider rate revisions for changes in syndicated and sports exclusivity rules, but any adjustments will apply only to the broadcast signals affected by the change.¹²⁸

The Tribunal is to evaluate the royalty fees for cable television in 1985 and every five years thereafter.¹²⁹ During this time schedule any user or owner of copyrighted material may request a rate adjustment upon a determination by the Tribunal that the applicant has a "significant interest" in the proceeding.¹³⁰ In a similar vein, a copyright owner or user with a significant interest may petition for an adjustment of royalty rates upon any change in the FCC signal carriage, sports, or syndicated exclusivity rules.¹³¹ Any change made by the Tribunal may be reconsidered in 1980 and every fifth year thereafter.

The procedure for the collection and distribution of royalty payments is established by the Act through a joint operation of the Copyright Office and the Royalty Tribunal.¹³² Cable companies are to make semi-annual royalty payments to the Register of Copyrights, who will deduct the administrative costs for the Copyright Office and deposit the balance in the Treasury for later distribution by the Tribunal. The Register will

125. Copyright owners expressed concern that cable systems might reduce the number of distant signals as special services such as pay cable systems increased in number. This shift in revenue would reduce royalty fees. The House Report indicated "such shifts of revenue sources, if they do occur, should be taken into account by the [Tribunal] in adjusting the basic rates." HOUSE REPORT, *supra* note 68, at 175.

126. See revised Act § 801(b)(2)(B).

127. *Id.*

128. See revised Act § 801(b)(2)(C). The intent of this provision is to protect the copyright owner if the FCC deletes or modifies its syndicated exclusivity or sports program exclusivity rules. The exclusivity rules protect the copyright owner by restricting the carriage of certain types of programming from distant signals. In case of any rule changes, the royalty rates may be adjusted to "assure that such rates are reasonable in light of the changes to such rules and regulations." HOUSE REPORT, *supra* note 68, at 177. See notes 60-61 & accompanying text *supra* for a discussion of the recent FCC notice of inquiry on revising the syndicated exclusivity rules.

129. See revised Act § 804(a)(2)(A).

130. See revised Act § 804(a)(2).

131. See revised Act § 804(b).

132. See revised Act § 111(d)(3).

submit to the Tribunal semiannually a compilation of the statements of accounts which the cable systems have supplied, and the Tribunal will then distribute the fees among copyright owners. Those eligible for royalty fees are owners whose works were carried on distant nonnetwork programs, programs from distant signals carried because of special substitution rules permitted by the FCC, and distant nonnetwork programming consisting exclusively of audio signals.¹³³

To apply for compensation, a copyright owner must file a claim annually in July. The Act specifically preempts the antitrust laws and permits claimants to agree among themselves as to an appropriate division of compulsory licensing fees.¹³⁴ After August 1, the Tribunal decides if there is any disagreement regarding the distribution of fees.¹³⁵ If discord exists, the Tribunal must resolve it before the disputed fees may be distributed. Any licensing fees not in dispute may be distributed.¹³⁶ The Act does not specify the manner in which the Tribunal is to set an appropriate division of compulsory licensing fees, but leaves that determination to the Tribunal's discretion.¹³⁷

Even a brief glance at the foregoing material reveals an extensive laundry list of acts and commissions by a cable system which may constitute infringements of the Copyright Act. The possibilities for infringement are summed up in sections 111(b) and 111(c).¹³⁸ Violations include secondary transmissions not permitted by the FCC rules, failure to file the required reports and statements of account or to pay a royalty fee, willful alteration of program content or substitution of commercials, or any other act contrary to a command or prohibition of the Act.¹³⁹

Section 501 permits any legal or beneficial owner of a copyright to institute an action for breach of copyright.¹⁴⁰ In the case of the cable

133. See revised Act §§ 111(d)(4)(A)-(C).

134. See revised Act § 111(d)(5)(A).

135. See revised Act § 111(d)(5)(B).

136. See revised Act § 111(d)(5)(C).

137. See HOUSE REPORT, *supra* note 68, at 97.

138. See also, HOUSE REPORT, *supra* note 68, at 92.

139. See revised Act §§ 111(c)(2)(A), (B), 111 (c)(3).

140. The revised Act § 501 states:

(a) Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 118, or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright.

(b) The legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of sections 205(d) and 411, to institute an action for any infringement of that particular right committed while he or she is the owner of it. The court may require such owner to serve written notice of the action with a copy of the complaint upon any person shown, by the records of the

television provisions, the Act creates two additional classes of plaintiffs who may seek remedies for infringement of section 111. A television station located in the cable system's market which holds the copyright on a particular program is treated as a legal or beneficial owner, and has a cause of action against a cable system which willfully or repeatedly imports the same program into the broadcaster's local service area in violation of the FCC's signal carriage rules.¹⁴¹ In addition, a distant broadcast station originating a program, and any broadcast station in whose local service area the cable system's retransmission occurs, may sue a cable system which substitutes or otherwise changes the programs, commercials or announcements of the distant signal.¹⁴²

Both legal and equitable remedies are available for violations of the Copyright Act. The legal or beneficial holder of a copyright may seek an injunction, impoundment of illegal copies, actual or statutory damages, and recovery of costs and reasonable attorneys fees.¹⁴³ In addition, copyright owners and local broadcasters have available a special remedy in the case of willful alteration of programing by the cable system; namely, a court may deprive the cable system of its compulsory license for one or more distant signals, for a period not to exceed thirty days.¹⁴⁴ Finally, criminal penalties are available against willful infringement for commercial advantage or private gain, and are particularly severe for infringement of the copyright of a sound recording or motion picture.¹⁴⁵

Copyright Office or otherwise, to have or claim an interest in the copyright, and shall require that such notice be served upon any person whose interest is likely to be affected by a decision in the case. The court may require the joinder, and shall permit the intervention, of any person having or claiming an interest in the copyright.

(c) For any secondary transmission by a cable system that embodies a performance or a display of a work which is actionable as an act of infringement under subsection (c) of section 111, a television broadcast station holding a copyright or other license to transmit or perform the same version of that work shall, for purposes of subsection (b) of this section, be treated as a legal or beneficial owner if such secondary transmission occurs within the local service area of that television station.

(d) For any secondary transmission by a cable system that is actionable as an act of infringement pursuant to section 111(c)(3), the following shall also have standing to sue: (i) the primary transmitter whose transmission has been altered by the cable system; and (ii) any broadcast station within whose local service area the secondary transmission occurs.

141. See revised Act § 501(c). Such a television station may also sue when the cable system has failed to comply with the procedures for filing notice, statements of account, or royalty fees with the Register of Copyrights. *Id.*

142. See revised Act § 501(d).

143. See revised Act §§ 502-505.

144. See revised Act § 509(b).

145. See revised Act § 506.

IV. THE REVISED ACT: SOME PROBLEMS

Whether the revised Act provides a satisfactory resolution to the copyright issue and whether it eliminates the obstacles to the growth of major market cable systems is uncertain. The Act is essentially a legislative compromise between competing interests. Neither broadcasters, copyright owners, nor cable system operators find the Act totally to their liking.¹⁴⁶ Yet the legislation does achieve a major goal merely by its institutionalization of copyright liability for the cable industry. The potential difficulty with the Act lies in its implementation. Problems of interpretation, enforcement, and jurisdictional overlay are both readily apparent and already developing. Furthermore, aside from the more or less internal problems with the Act, which are natural outgrowths of any substantial change in the law, the Act introduces a new and unsettling factor into the FCC's already difficult process of developing national communications policy.

Although the revised Act relies on the FCC's signal carriage rules to determine the liability of a cable system, the terms used in the Act do not parallel the definitions in the FCC's cable television rules. Moreover, the copyright definitions are often ambiguously drafted. For example, the revised Act defines a cable system as a "facility . . . that in whole or in part receives signals transmitted . . . and makes secondary transmissions of such signals . . . to subscribing members of the public who pay for such service."¹⁴⁷ It appears that this definition would include any system, regardless of size. In comparison, the FCC recently revised its definition of a cable system to exempt systems with fewer than 500 subscribers from compliance with its regulations. The result is that retransmission systems which are not bound by the FCC regulations will be held liable for copyright infringements as cable systems.¹⁴⁸

146. For example, the final language on the fee schedules was hammered out in last minute sessions between the copyright and cable interests. The broadcasters had previously walked out of the sessions, but were forced to accept the terms once an agreement was reached between the two other parties. *See* BROADCASTING, April 19, 1976, at 48.

147. Revised Act § 111(f).

148. *See* First Report and Order in Docket No. 20561, 63 F.C.C.2d 956 (1976). The copyright definition provides no exemption for small systems. Section 111(a)(1) does exempt secondary transmissions of local signals within a hotel, apartment house or similar establishment when no charge is made for this service. If, however, a master antenna system in a large apartment complex also carries signals from another television market, such as Baltimore, it may be subject to copyright liability.

The situation was further confused by the Copyright Office's most recently promulgated regulations, which expressly declared that any FCC rule, regulation, or practice "which excludes facilities from consideration as a 'cable system' because of the number or nature of subscribers or nature of the secondary transmissions made shall not be given

The revised Act states that for purposes of computing the royalty fee, two or more cable systems in contiguous communities under common ownership or control or operating from one "headend"¹⁴⁹ are to be considered as one system. Although its precise meaning is uncertain, this statement has the potential to affect royalty fees dramatically. If, for example, it means that small systems in contiguous communities under common ownership or operating from the same headend are considered as one system, then gross receipts would be aggregated, and most likely the revenues would be in excess of the \$320,000 annual gross receipts limit for small systems. The resulting difference in royalty payments could have a significant effect on the economic viability of small cable systems.¹⁵⁰

The revised Act creates copyright liability for cable systems which carry broadcast signals beyond the local service area of the primary transmitter.¹⁵¹ The statute's definition of local service area relies on the FCC's signal carriage rules.¹⁵² Thus, a cable system would be required to make royalty payments for any distant signals carried. Read in conjunction with the Act's definition of a cable system, this liability would also seem to extend to master antenna systems in apartment houses, condominiums, and trailer parks, thereby imposing copyright liability on retransmission facilities which are not cable systems under the FCC rules. For example, the owner of a large apartment building in Washington, D.C. would be required to pay royalty fees if the master antenna system in the building distributed television signals from nearby cities, such as Baltimore, which are not a part of the Washington market. It is not clear whether Congress intended the Act to have such a broad scope.

effect" for the purposes of the new regulations. *See* 43 Fed. Reg. 961 (1978) (to be codified in 37 C.F.R. § 201.11 (a)(3)).

149. *See* revised Act § 111(f). A headend is the electronic processing center of a cable system. All signals, both broadcast signals and those originated on the cable system, are processed and transmitted through the cable system from the headend. Frequently one cable system operating with one headend serves several municipalities.

150. *Id.* This issue has been under consideration at the Copyright Office. *See* Transcript of Proceedings, Hearings on Cable Television, Docket No. RM 77-2 (Apr. 12, 1977) at 167 (unpublished transcript in Copyright Office). Many cable systems are designed so that one physical plant services many separate communities. The effect of aggregated revenues would be particularly severe on these systems. The Copyright Office recently acknowledged this problem but concluded that any "modification . . . would be an inappropriate addition to the language of the act." 43 Fed. Reg. 958 (1978).

151. *See* revised Act § 111(c).

152. The revised Act § 111(f) defines the " 'local service area of a primary transmitter', in the case of a television broadcast station, . . . [as] . . . the area in which such station is entitled to insist upon its signal being retransmitted by a cable system pursuant to the rules, regulations, and authorizations of the Federal Communications Commission"

If a cable system serves subscribers both within and without the local service area of the primary transmitter, the system must compute the number of subscribers beyond the local service area and make royalty payments on revenues from those subscribers.¹⁵³ An accounting problem is apparent since the boundaries of a television market cannot be accurately measured.¹⁵⁴ Thus, it will be difficult, if not impossible, for a cable system to determine the correct percentages. Given the inherent inaccuracies in measurement techniques, this requirement seems certain to foster disputes between cable systems, copyright owners, and broadcasters, and conflict between copyright law and communications policy.

The Copyright Act defines a network station as one that is "owned or operated by, or affiliated with, one or more of the television networks . . . and that transmits a substantial part of the programing supplied by such networks for a substantial part of that station's typical broadcast day."¹⁵⁵ The FCC definition requires that the television station carry in weekly prime time 85 percent of the hours of programing offered by the major network with which it is affiliated.¹⁵⁶ It is not clear whether the "substantial programing" requirement of the copyright definition is congruent with the more specific FCC definition, but it is entirely possible that certain signals which the FCC would categorize as independent stations may well be considered network affiliates under the Copyright Act.

Another problem is that the term "gross receipts" is defined as revenues received from "the basic service of providing secondary transmissions of primary broadcast transmitters."¹⁵⁷ The calculation is limited to fees from carriage of distant broadcast signals, although it may be difficult for a cable operator to determine what portion of his revenues are derived from that service. Traditionally, system operators charge a basic monthly fee for all services except pay cable, for which an additional fee is paid. The basic fee includes charges for nonbroadcast signals such as news, tickers, sports channels, shoppers guides, and the like. Allocating this fee among channels may be an impossibility.

In addition to the potential definitional conflicts between the revised Act and the FCC cable rules, problems have already developed with respect to what very well should be the simpler and more mechanical aspects of the Act. The revised Act establishes detailed reporting state-

153. See revised Act § 111(d)(2)(B).

154. For a discussion of "television market," see note 4 *supra*.

155. Revised Act § 111(f).

156. 47 C.F.R. § 76.5(l) (1976).

157. HOUSE REPORT, *supra* note 68, at 96.

ments which must be submitted to the Register of Copyrights. The information required, however, does not comport with the information which the industry already submits to the FCC, although much of it has duplicative content. The cable industry may easily become burdened with excessive filing requirements.¹⁵⁸ The Act states that noncompliance with the filing or fee provisions renders the cable system liable for copyright infringement. The more onerous the filing requirements, the more likely that cable systems will be liable for infringements of the Act. The statutory requirements are particularly troublesome, since some appear to be technically impossible to perform. Some of these problems, however, have recently been remedied by the Copyright Office.¹⁵⁹ Furthermore, the statute grants the Register of Copyrights certain latitude in developing specific reporting requirements.¹⁶⁰ Predictably, this has resulted in a continuation of longstanding arguments among the cable, copyright, and broadcast interests, with the copyright owners and broadcasters pressing for more detailed and extensive reporting procedures, and the cable industry fighting for lesser requirements. This clash of interests is also apparent in conflicting interpretations of other sections of the Act. The copyright owners support regulations which permit them to review the financial accounts of cable systems in order to verify gross receipts, while the cable industry resists such regulations. In addition, the copyright owners urge that filing fees be imposed on the cable industry to pay for the administrative costs of the act.¹⁶¹

158. The cable television industry has recommended that the Copyright Office utilize the same filing forms as the FCC. This suggestion has been opposed by the copyright owners and broadcasters who assert that additional information necessitates the use of different reporting forms. In a recent rulemaking proceeding, the Copyright Office determined that it would not be advantageous to utilize the FCC forms; however, the office did not have alternative reporting forms available and ultimately suggested that the cable industry devise its own forms. 42 Fed. Reg. 15,065-68 (1977). The Copyright Office has stated that it is continuing to explore the possibility of providing standardized reporting forms. 43 Fed. Reg. 960 (1978).

159. For example, the Act requires that the cable system submit a log of all radio signals which the system carries. The cable system which utilizes an all-band FM radio receiver cannot list with accuracy all signals since available radio signals depend to a large extent on weather and topographical conditions. Yet under the revised Act's § 111(c)(2)(B), a cable system may be violating the Act for failure to accurately file a statement of account as required in the revised act § 111(d). The Copyright Office has modified the filing requirement so that all-band FM signals "generally receivable" as a result of monitoring at reasonable times and intervals are listed in statements of account. 43 Fed. Reg. 963 (1978) (to be codified in 37 C.F.R. § 201.17 (e)(9)(iii)).

160. The revised Act § 111(d) permits the Register to require by regulation submission of any additional data by cable systems.

161. See testimony of Jack Valenti, President of Motion Picture Association of America, and Daniel Aaron, Chairman of National Cable Television Association in Hearings on Cable Television, *supra* note 150. The Copyright Office has determined that the Act

A further problem is one of available revenues. It is anticipated that the cable industry will pay approximately \$8.7 million annually in royalty fees,¹⁶² from which will be deducted the costs of administration for the Register of Copyrights and the Royalty Tribunal. In other words, the copyright holders bear the costs of administering the Act, since the deductions reduce the size of the fund out of which they are eventually paid. It is likely that in the early years of the Act there will be a considerable number of disputes as to the validity of fees submitted by the cable industry and the manner in which royalty fees will be distributed. These disputes will increase administrative costs and thereby reduce the monies available for distributions. Consequently, it is likely that copyright owners and broadcasters will soon seek additional compensation by requesting increases in the royalty fee schedule. Despite these easily anticipated difficulties, the Act provides only minimal guidance to the Tribunal on standards for changing the fee schedule.¹⁶³

Finally, there exists the potential for abuse of the remedy provisions by copyright owners and broadcasters seeking redress for alleged infringements. The Act requires infringements to be willful or repeated, in order to protect the cable industry against harassment suits.¹⁶⁴ Section 501, however, indicates that any violation is an infringement of the Act, and until the meaning of "willful" or "repeated" is determined, there are likely to be numerous test suits, which may be perceived by cable interests as harassment.

Perhaps of even greater concern than these essentially internal interpretation problems is the potential for discord in the interaction of the Act with FCC policy. Because of the interrelationship between the FCC and copyright regulation, the FCC may at times find its policy determinations stymied by conflicting copyright considerations. For example, the FCC is now considering changes in the distant signal and syndicated exclusivity rules. A change in the FCC's signal carriage or syndicated exclusivity requirements automatically triggers an immediate reevalua-

prohibits the imposition of filing fees for cable systems submitting mandatory statements of account. However, filing fees will be imposed for permissive amendments. 43 Fed. Reg. 959 (1978).

162. See HOUSE REPORT, *supra* note 68, at 91.

163. See revised Act § 801(b); HOUSE REPORT, *supra* note 68, at 175-76.

164. The HOUSE REPORT, *supra* note 68, indicates that:

The words "willful or repeated" are used to prevent a cable system from being subjected to severe penalties for innocent or casual acts ("Repeated" does not mean merely "more than once," of course; rather, it denotes a degree of aggravated negligence which borders on willfulness. Such a condition would not exist in the case of an innocent mistake as to what signals or programs may properly be carried under the FCC's complicated rules).

Id. at 5708.

tion of the cable fee schedule in the Copyright Act.¹⁶⁵ This mechanism makes sense from the standpoint of copyright regulation, since cable systems pay royalties only for retransmissions which are not currently prohibited by the FCC rules, but it could subject the cable industry to intensive and conflicting pressures. If royalty fees are unreasonably increased, the cable industry might refrain from carrying additional distant signals, despite the fact that the agency charged with creating communications policy has determined that such carriage is in the public interest. Thus, the Royalty Tribunal could become a court of last resort for competitive interests unhappy with FCC regulations.

A further example of this problem is the carriage of foreign broadcast signals. The FCC has determined that it is in the public interest to encourage carriage of foreign language stations on cable systems.¹⁶⁶ Cable systems located in the southern tier of the country, and serving substantial Spanish populations, often import broadcast signals from Mexico. Under the Copyright Act, a compulsory license for Mexican signals is given only if the signal can be received by "direct interception" or if carriage was grandfathered prior to April 15, 1976.¹⁶⁷ Presumably, only signals that can be picked up off-air will be subject to a compulsory license. Any Mexican signal which is transported by microwave or satellite would require the cable company to negotiate directly with the copyright owner or the broadcast station. Given the generally small audience for foreign language programing and the high cost of negotiating copyright agreements, it is foreseeable that cable systems will refrain from carrying Mexican signals. Therefore, the effect of the copyright

165. *Id.* The revised Act § 804(b) permits any owner or user of a copyrighted work to request an immediate review of royalty rates upon any change in the FCC's signal carriage, syndicated or sports exclusivity rules. In filings on the FCC's notice of inquiry on revision of signal carriage and syndicated exclusivity rules, the Motion Picture Association of America has already indicated that the cable industry's copyright fees are not high enough and has requested certain changes in the rules. *See TELEVISION DIGEST*, August 15, 1977, at 5.

166. *See* Cable Television Report and Order, 36 F.C.C.2d 143, 180-81 (1972).

167. *See* revised Act § 111(c)(4)(B). A cable system would be subject to full copyright liability if it used any receiving equipment other than an antenna which can pick up the signal directly from the transmitting station. Since an antenna can only receive signals transmitted over a limited distance, those cable systems located at too great a distance for direct pickup of the signal would be required to negotiate separately for copyright fees in order to carry a Mexican signal.

"Grandfathering" a signal is a procedure used by the FCC to permit a cable system which was in operation prior to the 1972 cable television rules to continue to carry broadcast signals which are not permissible under the 1972 rules. The term applies to any act by a cable system which is not permissible under current regulations but which the FCC permits because the practice was established prior to the imposition of the FCC regulations.

provision would contravene the FCC's stated public interest determination to encourage carriage of such signals. In addition, it may conflict with the FCC's determination that the distance between an originating signal and an importing cable system should not be a factor in choosing which distant signals will be carried. Finally, since the revised Act makes every program carried on a distant signal contrary to the FCC rules a copyright violation,¹⁶⁸ most determinations as to whether a cable system has violated FCC rules will be made in the context of copyright suits in which the FCC is not a party. Hence, communications policy may be made without the benefit of the FCC's input.

V. CONCLUSION

Under the new Copyright Act of 1976, the cable television industry will be subject to copyright liability for retransmission of distant broadcast signals. The revised Act is long overdue. Although judicial interpretations of the predecessor Act have exempted the cable industry from copyright payments, its use of broadcast programming without compensation to the copyright holder has been consistently in conflict with federal copyright objectives. Indeed, payment of royalty fees should benefit the cable industry. It should eliminate harsh criticism from the competing industries as well as from certain policymakers in both the FCC and Congress who have maintained that the industry has been pirating programming. At the same time, passage of the Copyright Act should signal the end of the FCC's syndicated exclusivity rules which were enacted as a substitute for copyright legislation. The deletion of the rules would certainly be in keeping with the FCC's recently stated policy of deregulation of the cable industry.

These benefits may never accrue, however, because of the inherent character of the revised Act. The cable television provisions are the result of endless negotiations between industries with conflicting interests. Accordingly, the provisions represent political compromises and, therefore, are only marginally acceptable to some of the parties. It is quite foreseeable that each industry will seek changes in the rules in order to further its self-interest. Consequently, hostilities between the cable, copyright, and broadcast industries may continue unabated on issues such as the extent of copyright liability and the level of royalty payments. Because the copyright provisions are closely linked with the FCC's signal carriage rules, it is likely that the pressures for change in the new law will be felt in Congress, the Copyright office, and the FCC.

168. See revised Act § 111(c)(2).

In addition, the Act may encourage a blurring of jurisdictional boundaries between the FCC and the Copyright Office. It is likely, for example, that the FCC rules will be interpreted by courts deciding copyright cases without the benefit of input from the FCC.

The revised Act creates a substitute for marketplace negotiations of royalty fees, and should, therefore, aim to duplicate marketplace behavior as closely as possible. Unfortunately, the new Act fails in this respect, particularly with regard to the royalty fee schedule. The fee schedule is extremely low and appears to bear little relationship to the fees which would be generated in the marketplace. Consequently, it is likely that copyright and broadcast interests will request increased royalty payments by the cable industry at every available opportunity.

Other weaknesses in the conceptualization of the cable television provisions suggest that these provisions may become needlessly difficult to implement, obey, and enforce. Whether the Act will ultimately provide an effective resolution of the cable-copyright issue will depend upon the outcome of judicial interpretations, the development of working procedures in the Copyright Office, possible legislative amendments, and, ultimately, the passage of time.

