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Erwin G. Krasnow

John C. Quale

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DEVELOPING LEGAL ISSUES IN CABLE COMMUNICATIONS

*Erwin G. Krasnow**

*John C. Quale***

Change is in the offing for cable television. Indeed, as these symposium articles are published, proposals which may drastically alter the basic scheme of federal-state-local cable regulation and establish new ground rules for cable operators, television broadcasters, copyright holders, and members of the public are pending before Congress and the Federal Communications Commission (FCC). For example, the 94th Congress may review a bill drafted by the Office of Telecommunications Policy (OTP) to implement the proposals of the Cabinet Committee on Cable Television.¹ If enacted, the legislation would signal the ultimate separation of responsibility, control and ownership of cable television's transmission and programming functions.

Several articles in this symposium issue contribute to the policy debate on such legislation. Sheila Mahony, General Counsel for the Cable Television Information Center, questions the authority of Congress to enact legislation which attempts to confer power on the states.² Ms. Mahony contends that Congress may set minimum standards for state regulation, but it may not delegate to states the power to act, nor may it compel states to exercise their sovereign power. Professor LeDuc, rather than disputing the constitutionality of proposals before Congress concerning levels of concurrent jurisdiction, examines federal, state and local control to discover what benefits and burdens each might provide.³ Critical of the FCC's regulation of cable, he concludes that if any tier of cable regulation could be deemed superfluous, it would be the federal tier.

* Partner, Kirkland, Ellis & Rowe, Washington, D.C. A.B., Boston University, 1958; J.D., Harvard Law School, 1961; LL.M., Georgetown University Law School, 1965.

** Associate, Kirkland, Ellis & Rowe, Washington, D.C. A.B., Harvard, 1968; J.D., Harvard, 1971.

1. THE CABINET COMMITTEE ON CABLE COMMUNICATIONS, *CABLE: REPORT TO THE PRESIDENT* (1974); Office of Telecommunications Policy, *Draft of the Cable Communications Act of 1974: Summary and Analysis* 1973.

2. Mahony, *Cable Television's Jurisdictional Dispute*, p. 872 *infra*.

3. Le Duc, *Control of Cable Television: The Senseless Assault on States' Rights*, p. 795 *infra*.

The burdensome nature of state regulation is also the subject of David Smith's article.⁴ A predictable consequence of the ever increasing tax burdens imposed on cable systems by state and local governments is a court test of the lawfulness of such burdens. Mr. Smith analyzes the constitutional issues raised by local taxation of cable systems in light of the interrelationship of cable's function, technology and economics.

A basic question raised in the OTP bill is whether to change the FCC's role in the regulation of cable television. Professor Kahn accuses the FCC of acting unfairly to protect broadcast interests at the expense of cable, contending that the net effect of FCC policy has been to keep the cable industry in a state of disequilibrium and defensiveness while the stability of the broadcasting industry has been artificially bolstered through regulations designed to deter cable "encroachment".⁵ Future generations, predicts Professor Kahn, "will come to regard the Commission's handling of cable as a major failure of public policy formulation and administration in telecommunications"⁶

James Popham, an attorney for the National Association of Broadcasters, asserts that the nonimplementation of the 1971 Consensus Agreement,⁷ which in large part formed the basis of the FCC's 1972 cable rules,⁸ is one-sided in favor of cable and that the cable industry has failed to abide by the Agreement.⁹ He contends that the Commission is losing its credibility as a fair and impartial regulator by failing to redress an imbalance of competing interests.

Three other aspects of Commission regulation are discussed in articles by Professors Powe, Collins, and Botein. Professor Powe attempts to predict the development of the law pertaining to obscenity and indecency over cable.¹⁰ Professor Collins reviews the unique features of cable communications which apply in an analysis of whether the FCC should apply the fairness doctrine to CATV systems.¹¹ Professor Botein focuses on the

4. Smith, *Local Taxation of Cable Television Systems: The Constitutional Problems*, p. 755 *infra*.

5. Kahn, *Cable, Competition, and the Commission*, p. 854 *infra*.

6. *Id.* at 871.

7. The Consensus Agreement, entered into by the cable, broadcast, and copyright owner interests and designed to solve the question of the appropriate relationship between broadcast television and cable, is reprinted in Appendix D of Cable Television Report and Order, 36 F.C.C.2d 143, 284 (1972).

8. The Rules are reprinted in *id.*, Appendix A, at 211.

9. Popham, *The 1971 Consensus Agreement: The Perils of Unkept Promises*, p. 813 *infra*.

10. Powe, *Cable and Obscenity*, p. 719 *infra*.

11. Collins, *The Future of Cable Communications and the Fairness Doctrine*, p. 833 *infra*.

participation or lack thereof, of citizens groups in shaping the law of cable television.¹² His article outlines steps designed to enable citizens groups to make cable more responsive to their interests. If citizens groups respond to Professor Botein's call to action, they may succeed in institutionalizing procedures for citizen input and thus obviate the need for the type of massive future breakthrough of citizen access procedures which has taken place in other areas of the law.

The symposium issue also touches upon pay cable, which many industry observers believe is cable's road to riches. George Shapiro, Gary Epstein and Ronald Cass review the development of domestic satellites and cable originations, exploring the possible structures that cable satellite networks might take.¹³ Satellites will soon make pay cable programming available throughout the nation. The authors point out that the development of satellite networks, while solving a major problem that has impeded the improvement of cable originations and the economic viability of the cable industry, raises significant communications law and antitrust problems.

To provide a fuller understanding of the issues addressed by the symposium articles, this article discusses recent governmental actions and pending proposals for regulation of cable television in three key areas. These areas are regarded by many cable television operators as capable of making or breaking the industry in the 1970's—copyright, pay cable, and state regulation.

The Copyright Issue: Congress and Cable

The copyright issue has been so politically acute, such a matter of conflict, that Congress has been generally unwilling to act on proposals for revision of the Copyright Act of 1909.¹⁴ One indication of a cause of the stalemate appeared in former Chairman Burch's concurring opinion to the 1972 *Cable Television Report and Order*,¹⁵ when he observed that "the obstacle to legislation has long been the ability of any or all of the contending industries—cable, broadcasting, copyright—to block any particular legislative approach with which they might take issue."¹⁶

For its part, the FCC has consistently maintained that resolution of the issue of whether cable systems should be liable for copyright payments is crucial to the success of its cable television regulatory program. Passage of

12. Botein, *Citizen Participation in the Regulation of Cable Television*, p. 777 *infra*.

13. Shapiro, Epstein & Cass, *Cable-Satellite Networks: Structures and Problems*, p. 692 *infra*.

14. 17 U.S.C. §§ 1-216 (1970).

15. 36 F.C.C.2d 143 (1972).

16. *Id.* at 290 (Burch, Comm'r, concurring).

cable copyright legislation, in the view of the Commission, is essential to the elimination of the uncertainty surrounding potential copyright costs which have impaired the cable industry's ability to attract the capital investment needed for substantial growth.¹⁷

Unlike the FCC, however, Congress has not been willing to adopt the recommendations contained in the 1971 Consensus Agreement.¹⁸ The Consensus Agreement provided that if the pertinent parties could not agree privately on a schedule of fees, Congress should provide for compulsory arbitration.¹⁹ Under S. 1361, a bill introduced by Senator John McClellan during the 93rd Congress, Congress would set the initial fees with periodic adjustments made by a Copyright Royalty Tribunal to be established by the Library of Congress.²⁰ The McClellan bill also established a compulsory license for cable systems, a license for which cable systems would pay royalties on a sliding scale of one to five percent for each corresponding \$40,000 of quarterly gross receipts from subscribers.²¹ Significantly, the compulsory license would have allowed cable systems to retransmit the signals of broadcast stations except for professional sports events not being broadcast by local television stations.²²

Senator McClellan's subcommittee deferred action on S. 1361 until the United States Supreme Court ruled on the question of whether cable operators were liable under existing law for carriage of distant signals. In March 1974, the Court held in *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*,²³ that the Copyright Act does not require cable operators to pay for importing distant signals because they already have been released to the public.²⁴ The Court thus adhered to its earlier determination in *Fortnightly Corp. v. United Artists Television, Inc.*²⁵ that since cable systems

17. Letter from Dean Burch, Chairman, FCC, to Senator John Pastore, Aug. 23, 1973.

18. In introducing S. 1361, 93d Cong., 1st Sess. (1973), a bill for the general revision of the copyright law, Senator John McClellan, Chairman of the Senate Subcommittee on Patents, Trademarks, and Copyrights, stated that the "private agreement developed by Dr. Clay T. Whitehead . . . has been generally interpreted as seeking to eliminate the Congress from any role in determining cable television royalty rates." 119 CONG. REC. 9389 (1973).

19. 36 F.C.C.2d at 285.

20. S. 1361, 93d Cong., 1st Sess. § 801 (1973).

21. *Id.* § 111(d)(2). The fees would be distributed annually by the Register of Copyrights to copyright holders who filed a claim based on the secondary transmission of their work. *Id.* § 111(d)(3).

22. *Id.*

23. 415 U.S. 394 (1974).

24. 415 U.S. at 410.

25. 392 U.S. 390 (1968). The Court held that merely relaying locally available television signals picked up on a CATV antenna and distributed by wire did not

"simply carry, without editing, whatever programs they receive," they are like viewers and unlike broadcasters, and therefore do not "perform" the programs they receive and carry within the meaning of that term as used in the Copyright Act.²⁶ Justice Stewart repeated the contention he originally made in *Fortnightly*,²⁷ that shifts in commercial relationships in the communications industry "simply cannot be controlled by means of litigation based on copyright legislation enacted more than half a century ago, when neither broadcast television nor CATV was yet conceived."²⁸

While the cable industry applauded the Supreme Court's decision in *Teleprompter*, the FCC, in a letter to Senator John Pastore,²⁹ took the position that the Court's opinion did not remove "the need for copyright legislation to integrate cable into the television programming distribution market"³⁰ The National Cable Television Association (NCTA), despite a split among its members on the implications of the *Teleprompter* decision,³¹ continued to support the payment of reasonable copyright fees by cable operators.

The so-called "sports blackout" provision was a source of heated controversy during subcommittee deliberations on S. 1361. Although included in the bill reported by the subcommittee on the principle that unrestricted cable television carriage of sporting events could reduce the live and television audiences for local sporting teams, the Senate Judiciary Committee subsequently deleted the controversial provision.³² The Judiciary Committee bill established copyright fees for *all* cable systems on a sliding scale of 1/2 percent to 2 1/2 percent (reduced from the one percent to five percent scale

constitute a "performance" infringing a copyright holder's statutory rights to perform in public for profit.

26. *Id.* at 400.

27. *See id.* at 401 & nn. 30-32.

28. 415 U.S. at 414. Justice Stewart suggested that "any ultimate resolution of the many sensitive and important problems in this field, must be left to Congress." *Id.*

29. Letter from Richard Wiley, Chairman, FCC, to Senator John Pastore, April 8, 1974.

30. *Id.* at 2.

31. Disagreement by small CATV operators with the NCTA position led to the creation in July 1973 of the Community Antenna TV Association (CATA), an association which takes the position that systems with fewer than 3,500 subscribers should be exempt from copyright liability. CATA maintains that NCTA does not adequately represent the interests of small CATV systems with respect to copyright and other matters. *See COMMUNITY ANTENNA TELEVISION J.*, March 1975; *id.*, April 1975.

32. The Committee Report states that the sports issues "should be left to the rulemaking process of the Federal Communications Commission, or if a statutory resolution is deemed appropriate to legislation originating in the Committee on Commerce." S. REP. NO. 93-983, 93d Cong., 2d Sess. 132 (1974).

proposed by the subcommittee).³³ In addition, the Judiciary Committee bill provided that the Copyright Royalty Tribunal would begin its investigation of the statutory fees six months after enactment (rather than the three year period suggested by the Subcommittee), and would be required to complete the study within the following year.³⁴

Largely as a result of lobbying by sports interests and broadcasters, S. 1361 was referred to the Senate Commerce Committee for a period of 15 days. The Commerce Committee recommended inclusion of the sports blackout provision and drafted language, suggested by the FCC, directing the Commission to adopt rules defining the rights of cable systems to carry distant sports programs.³⁵

On September 9, 1974, the Senate approved S. 1361 by a vote of 71 to 1,³⁶ thus providing strong impetus for the first general revision of the nation's copyright laws since enactment of the Copyright Act of 1909. By a vote of 36 to 34, the Senate tabled an amendment offered by Senator Philip Hart that would have required the FCC to draw up guidelines for blacking out television transmissions of sports events.³⁷ On December 31, 1974, the FCC requested parties to submit comments on the effect of the Senate's deletion of the sports blackout provision in the copyright bill and the impact of Public Law 93-107,³⁸ which amended the Communications Act to prohibit league blackouts of home games sold out three days in advance.³⁹

33. S. 1361, 93d Cong., 1st Sess. § 111(d)(2)(B).

34. See S. REP. NO. 93-983, 93d Cong., 2d Sess. (1974).

35. The Commerce Committee amendment provided that, in adopting such rules, "the Commission may consider the effect upon broadcasting, cable television, and sports of the policy objectives of Public Law 87-331, and any other factors the Commission deems appropriate." S. REP. NO. 93-1035, 93d Cong., 2d Sess. 12 (1974).

36. 120 CONG. REC. S 16167 (daily ed. Sept. 9, 1974). The Senate adopted an amendment suggested by the Commerce Committee which excluded Hawaii and Puerto Rico from a provision permitting CATV systems outside the 48 contiguous states to tape record broadcast signals for delivery to their subscribers, *id.* at 16161; it tabled another Commerce Committee amendment that would have provided a "grandfather" exemption for CATV systems in existence prior to March 31, 1972. *Id.* at S 16156.

37. See 120 CONG. REC. S 16160 (daily ed. Sept. 9, 1974). Among those who opposed the sports blackout amendment was Senator Roman Hruska, who stated that "it would be wiser to await the FCC decision on this matter—expected by the year's end—and then assess by thorough hearings next year the need for further legislation on policy instructions to the FCC." *Id.* at 16158.

38. 47 U.S.C.A. § 331 (Supp. 1975).

39. See Further Notice of Proposed Rulemaking on the Carriage of Sports Programs on Cable Television, 50 F.C.C.2d 48 (1974). The Commission requested comments on a rule which would prohibit cable systems within 35 miles of a television station located in the home city of a professional baseball, basketball, football or hockey team from retransmitting, without the consent of the home team or league, a game of the same sport when the local team is playing at home.

The outlook appears bright for passage of copyright revision legislation by the 94th Congress. On January 15, 1975, Senator McClellan introduced S. 22, a bill containing the provisions of S. 1361 as passed by the Senate.⁴⁰ The bill was approved by the Senate Subcommittee on Patents, Trademarks and Copyrights and is pending before the Senate Judiciary Committee. On the House side, the Subcommittee on Courts, Civil Liberties and the Administration of Justice has conducted hearings on H.R. 2223,⁴¹ the House version of S. 22. The NCTA Board of Directors has voted to support copyright legislation, including the 1/2 to 2 1/2 percent schedule specified in S. 1361, but to lobby for (a) an exemption from copyright liability for cable systems with fewer than 1,500 subscribers; (b) elimination of the fee revision power of the Copyright Tribunal or, in the alternative, a one-time revision of the fee schedule; and (c) elimination or a lessening of the right vested in local broadcasters to sue cable systems for copyright violations.⁴²

Pay Cable

Serious questions exist as to whether cable television systems under the FCC's rules are permitted to carry sufficient television signals to achieve economic viability.⁴³ In numerous urban areas, viewers receive several off-the-air signals of high technical quality, and the Commission's rules may not provide cable operators with sufficient additional signals to compete with these offerings. The Commission has, however, repeatedly emphasized that it envisions cable as far more than a mere conduit for television broadcast signals.⁴⁴

While it recently concluded that systems should no longer be required to originate programs, the Commission expects that numerous larger systems will voluntarily originate their own programming.⁴⁵ This origination programming will undoubtedly include at least some programming for which the operator makes a separate charge over and above the basic monthly charge

40. S. 22, 94th Cong., 1st Sess. (1975), reprinted in 121 CONG. REC. S 30 (daily ed. Jan. 15, 1975).

41. H.R. 2223, 94th Cong., 1st Sess. (1975).

42. CATV, Dec. 2, 1974, at 6-7. Explaining the change in NCTA's posture, NCTA President David Foster stated that "economic necessity demands we take a tougher line." BROADCASTING, Dec. 16, 1974, at 26.

43. Distant signal importation is seen by most observers as the key to development of cable television. See, e.g., R. NOLL, M. PECK & J. MCGOWAN, ECONOMIC ASPECTS OF TELEVISION REGULATION 272 (1973).

44. See, e.g., Memorandum Opinion and Order on Cable Television Rules, 49 F.C.C.2d 1078, 1081 (1974).

45. In lieu of the mandatory origination requirement, the FCC adopted a rule requiring all cable systems with 3,500 or more subscribers to own and maintain minimal equipment necessary for either access or local origination. Report and Order on Cablecasting Services, 49 F.C.C.2d 1090, 1110 (1974).

for service. Many industry observers believe that this service—usually called “pay cablecasting” or “pay cable”—is vital if cable is to achieve a revenue breakthrough in major markets.

Pay cablecasting is any programming for which a per-program or per-channel charge is made.⁴⁶ Cable operators in several communities are now making origination programming available for a premium charge, usually on a per-channel basis. Programming consists primarily of feature films and some sports events which are not available on over-the-air television.

A study by the Stanford Research Institute (SRI), released in early 1974, predicts that pay cable operations will boom in the near future.⁴⁷ Pay cable growth in 1975 appears to confirm these estimates, as industry observers predict a pay cable subscriber count of between 450,000 and 500,000 by the end of this year.⁴⁸ According to SRI estimates, 30 percent of all United States television households will be pay television customers by 1985, generating annual revenues approaching \$4 billion.⁴⁹ As discussed by Messrs. Shapiro, Epstein and Cass,⁵⁰ a key factor in the growth of pay cable on a nationwide scale will be the use of satellites for transmission of program material. By the end of 1976, it is expected that earth stations will be in place in most regions of the United States.⁵¹

For years, the industry has complained that the growth of pay cable has been retarded by the Commission's pay cable rules which limit the type of programming that may be offered on a premium charge basis.⁵² Pay cablecasting restrictions were first applied to cable television operators in August 1970.⁵³ Convinced that the restrictions were vitally necessary to prevent the siphoning of programs away from free television to cable television, the Commission explained that it must extinguish this threat before it became an actuality:

46. See 47 C.F.R. § 76.225 (1974). Some proponents of pay cable refer to pay cablecasting as “family choice cable.” Pay cable antagonists equate pay cable with siphoning; one of the first broadcast organizations formed was called The Committee to Protect the Public From Paying What They Now Get Free on Television.

47. K. Penchos, *Pay Television*, 5 THE OUTLOOK FOR CABLE TELEVISION (1974).

48. See CATV, Aug. 25, 1975, at 24.

49. K. Penchos, *supra* note 48, at 7.

50. Shapiro, Epstein & Cass, *supra* note 13.

51. See CATV, Aug. 25, 1975, at 24.

52. 47 C.F.R. § 76.225 (1974) provides, with certain exceptions, that a cable system may not offer a feature film on a pay cable basis if it is (a) more than two years old; (b) a sports event televised in the community during the two years preceding the proposed cablecast; or (c) a series program. These rules have recently been amended, see notes 58-64 & accompanying text *infra*.

53. See Memorandum Opinion and Order on CATV, 23 F.C.C.2d 825 (1970); 47 C.F.R. § 74.1121 (1970).

We agree that where cablecasting is accompanied by a per-program or per-channel fee, it is akin to subscription television and presents the same threat of siphoning programs away from free television in favor of a service limited to those who can pay and, in the case of cablecasting, to those to whom the cable is geographically available. Remedial action in this area should not wait upon the threat becoming actuality.⁵⁴

The cable rules are virtually identical to the restrictions which the Commission placed on over-the-air subscription television (STV) in 1968 in its *Fourth Report and Order on Subscription Television*.⁵⁵ It took the Commission thirteen years to determine whether over-the-air subscription television was in the public interest. Although the Commission's inquiry into subscription television began in 1955, the first regular STV station has yet to begin pay operations under the rules adopted in 1968.

Against this background,⁵⁶ the cable industry has continued, undaunted, to fight for relaxation of the programming restrictions. Its first success occurred in July 1972, only two years after adoption of the rules, when, on reconsideration of the original order adopting the restrictions, the Commission reopened the entire question of pay cablecasting and initiated another rulemaking proceeding.⁵⁷ After receiving voluminous comments and hearing several days of oral argument, the Commission in April of this year adopted slightly relaxed restrictions on pay cablecasting.⁵⁸ The new rules (a) permit cable systems to show movies up to three years old instead of two years, as under the former rules;⁵⁹ (b) permit the local showing of movies which are three to ten years old if they are under nonexclusive contract to the local

54. 23 F.C.C.2d at 828.

55. 15 F.C.C.2d 466 (1968). Like pay cablecasters, the over-the-air telecaster would make a per-program or per-channel charge for programming. To receive subscription programming, a viewer must attach to the antenna lead wires in a television set a decoder which will unscramble the video and audio transmissions.

56. One commentator offers the following characterization of the history of the pay television controversy:

The story of pay television provides one of the most graphic and fearful examples today of the withholding and distortion of facts, the protection of monopoly position at the expense of the public interest, the misuse of control of broadcast facilities for the fabrication of public opinion, and manipulation by large groups of both Congressional and individual voting.

H. SKORNIA, *TELEVISION AND THE NEWS: A CRITICAL APPRAISAL* 135 (1968).

57. See Notice of Proposed Rulemaking and Memorandum Opinion and Order, 35 F.C.C.2d 893 (1972).

58. First Report and Order on Cablecasting and Subscription TV Program Rules, 52 F.C.C.2d 1, *reconsideration denied*, 40 Fed. Reg. 34341 (1975), *appeal docketed*, Home Box Office, Inc. v. FCC, No. 75-1280, D.C. Cir., March 21, 1975.

59. 52 F.C.C.2d at 71.

television stations;⁶⁰ (c) permit the showing of movies over 10 years old if they have not been shown on local television during the preceding three-year period;⁶¹ (d) extend protection of specific sports events to five, instead of two years;⁶² (e) permit cable operators to show a specified percentage non-specific sports events (*e.g.*, all home baseball games);⁶³ and (f) permit the cablecasting of series programs not previously broadcast on conventional television.⁶⁴

Although pay proponents expressed extreme disappointment and even outrage over the new rules,⁶⁵ pay cable appears to have boomed during the few months since the Commission issued the new rules. Of course, it is impossible to say whether the new rules have had any effect on this recent growth. One future trend, however, is readily discerned. As the foregoing discussion demonstrates, the new rules are exceedingly complex. Indeed, Commissioner Robinson complained:

Our rules—and most important the purposes beneath them—have grown in complexity to a point beyond understanding except by a small number of specialists. It was once remarked by Baron Rothschild that only two men really understand gold—an obscure clerk in the Bank of France and one of the directors of the Bank of England. Unfortunately, he noted, “they disagree.” Without in any way suggesting that our new rules are golden, I fear the Baron’s remarks are all too apt here.⁶⁶

In sum, even though the pay television controversy is over 20 years old, the prospects for future litigation and rulemaking appear unlimited.

State Regulation of Cable Television

Probably the most important ground broken by the FCC’s 1972 *Cable*

60. *Id.* The Commission apparently expects that distributors will be induced to hold back exclusive contracts from stations.

61. *Id.*

62. *Id.*

63. *Id.* Nonspecific sports events may be shown up to the number of the games not broadcast in the season among the five preceding seasons in which the largest number of games was broadcast, and when local television has not shown 25 percent of the games in any of the prior five years. When more than 25 percent have been shown, the pay cable operator could show up to one-half of the remaining games, but never more than the number shown on television. *Id.*

64. *Id.* at 72. The Commission, rather than terminating this seemingly endless proceeding, issued a Second Further Notice of Proposed Rulemaking on Cablecasting and Subscription TV, 52 F.C.C.2d 83 (1975), which proposes further relaxation of the series rule.

65. One NCTA official stated that “after four years of hearings and a mountain of evidence, the two rulemaking notices and six days of oral hearings, the Commission has made a cosmetic change in an outrageous rule.” BROADCASTING, NOV. 18, 1974, at 5.

66. 52 F.C.C.2d at 82 (Robinson, Comm’r, concurring in part and dissenting in part).

Television Report and Order was the emergence of a substantial federal presence in the regulation of the local activities of cable television systems. Three of the symposium articles address the critical question of whether the Commission can or should preempt the field of cable regulation.⁶⁷ All three authors, LeDuc, Mahony and Smith, provide valuable insight into the Commission's gradual assertion of jurisdiction. As the authors point out, nearly all of the Commission's initial regulatory effort was directed toward the issue of what programming cable systems could carry, an inquiry designed primarily to protect television stations from competition. The Commission did not concern itself with who operated cable systems, or whether they were honest or their rates fair.

In most areas of the country, entrance into the cable television business was regulated, if at all, by local municipalities whose prior consent was required before an operator could string its cable through public streets and alleys. In 1970, however, the Commission became concerned that "actions [had] been taken in the cable field without any overall plan as to the Federal-local relationship."⁶⁸ Consequently, the Commission asked for comments on which of three regulatory courses it should pursue. First, it could license all cable television systems, as it did broadcast stations. Alternatively, the Commission could regulate some aspects and permit local governments to regulate others pursuant to federally prescribed standards. Finally, the Commission could have opted for a continuation of the status quo, which would mean enforcing its rules by ordering operators to cease and desist from practices in violation of those rules.⁶⁹

Most cable interests responded to the Commission's invitation by urging some degree of federal preemption of cable regulation.⁷⁰ Cable interests were also nearly unanimous in condemning regulation by state government, particularly of the public utility commission variety. They argued that regulation of cable rates was unnecessary.⁷¹

Notwithstanding the dubious record of achievement by some local municipalities in awarding franchises on the basis of purely political, or worse, monetary considerations,⁷² the Commission, after due deliberation, deter-

67. Le Duc, *Control of Cable Television: The Senseless Assault on States' Rights*, p. 795 *infra*; Mahony, *Cable Television's Jurisdictional Dispute*, p. 872 *infra*; Smith, *Local Taxation of Cable Television Systems: The Constitutional Problems*, p. 755 *infra*.

68. Notice of Proposed Rulemaking on CATV, 25 F.C.C.2d 50, 51 (1970).

69. The Communications Act of 1934 requires a public and very long proceeding before a cease and desist order may be issued. See 47 U.S.C. § 312(c) (1970).

70. See Cable Television Report and Order, 36 F.C.C.2d 143, 205 (1972).

71. *Id.* at 206.

72. While the Commission was considering comments submitted on whether local municipalities needed help in choosing cable operators, the cable television industry was

mined in the 1972 *Cable Television Report and Order* to abstain from the licensing of cable operators in a conventional manner on the ground that it "would place an unmanageable burden on the Commission."⁷³ Opting for "creative federalism," the Commission decided that "a deliberately structured dualism is indicated."⁷⁴ While the local franchising authority would continue to review the qualifications of operators, the Commission set minimum standards for franchises issued to these operators.⁷⁵ The adoption of these standards represented a substantial intrusion by the Commission into the local regulatory arena.

The Commission left unanswered, however, the question of who should be its local regulatory partner in this scheme of creative federalism. While cable industry parties had urged in their comments that the Commission bar state regulation on top of local regulation—the so-called third-tier—the Commission declined to do so.

At the time, the Commission's failure to clarify this question was understandable. Only five small states, Connecticut, Hawaii, Nevada, Rhode Island and Vermont, were regulating cable television.⁷⁶ In each case, there was no problem of three-tier regulation; the states had asserted public utility-type regulation and local municipalities were excluded from the regulatory scheme.⁷⁷ In addition, the Commission established a committee—the Federal/State-Local Advisory Committee (FSLAC)—to answer the question of how the regulatory responsibility should be allocated on the federal and nonfederal levels.⁷⁸

New forms of state regulation, however, began to emerge. They did not

rocked by scandals arising in connection with the franchising process. The largest cable operator in the country and its chief executive officers were convicted, and the mayor and a city councilman of Johnstown, Pennsylvania pleaded guilty, on federal charges arising from a payment of \$15,000 to get the franchise in Johnstown. See *BROADCASTING*, Dec. 16, 1974, at 27.

The effects of these scandals linger on. The Commission recently denied one company certificates of compliance for its Johnstown and Trenton, New Jersey cable operations on the ground that the franchise was procured through fraud. *Teleprompter Cable Systems, Inc.*, 52 F.C.C.2d 1263 (1975).

73. 36 F.C.C.2d at 207.

74. *Id.*

75. See 47 C.F.R. § 76.11. Under § 76.11, a cable system must obtain from the Commission a "certificate of compliance" before it can commence operations.

76. CONN. GEN. STAT. ANN. §§ 16-330 to -333 (Supp. 1975); HAWAII REV. STAT. §§ 440G-1 to -14 (Supp. 1974); NEV. REV. STAT. §§ 711.010-180 (1973); R.I. GEN. LAWS ANN. §§ 39-19-1 to -8 (Supp. 1974); VT. GEN. LAWS ANN. tit. 30, § 501-08 (Supp. 1975).

77. See *Clarification of the Cable Television Rules and Notice of Proposed Rulemaking and Inquiry*, 46 F.C.C.2d 175, 188 (1974).

78. See *Cable Television Report and Order*, 36 F.C.C.2d 143, 210 (1972).

supplant the local level, but added a third tier. The first state to adopt legislation was Massachusetts, in November 1971.⁷⁹ The Massachusetts legislature set up a Community Antenna Television Commission which, much like the FCC, was empowered to set minimum state requirements for the franchising process. Subsequently, Minnesota, New Jersey, and New York adopted even more complicated schemes requiring complete certification at the state level.⁸⁰ Other states have considered and rejected the three-tier approach and, according to FSLAC, nearly 30 states have decided against adopting a public utility-type regulation.⁸¹

Against this background of increasing state activity, the work of the FSLAC assumed even greater importance. Acting with truly commendable speed and after reportedly bitter internal squabbling, a divided FSLAC delivered its report to the Commission on September 21, 1973.⁸² Part I of the committee's report concerned various aspects of the Commission's relationship with the franchising authority, be it the state or local municipal entity, and led to the Commission's April 1974 release of its *Clarification of the Cable Television Rules and Notice of Proposed Rulemaking and Inquiry*.⁸³

Part II of the FSLAC report was specifically directed to the question of whether both state and local municipal entities should be permitted simultaneously to regulate cable operators. The report started on a unanimous note—all agreed that "nonduplicative regulation [of cable television] is a desirable objective."⁸⁴ That was about the extent of the agreement. Separate majority and minority reports were included, and there were numerous separate statements issued by members of the majority.

After only 18 months, the majority was ready to abandon the Commission's experiment in creative federalism. As far as it was concerned, the experiment had led to "a regulatory free-for-all."⁸⁵ Accordingly, the majori-

79. MASS. GEN. LAWS ch. 166A, §§ 1-21 (Supp. 1975).

80. MINN. STAT. § 238.09 (Supp. 1975); N.J. REV. STAT. § 48:5A-15 (Supp. 1975); N.Y. EXEC. LAW §§ 819, 821 (Supp. 1975). See Notice of Proposed Rulemaking and Inquiry on Cable Television—Additional Rules, 49 F.C.C.2d 1199, 1208 (1974).

81. See FCC Cable Television Advisory Committee on Federal/State-Local Regulatory Relationships, Final Report 39, Feb. 1973.

82. FCC Cable Television Advisory Committee on Federal/State-Local Regulatory Relationships, Final Report, Feb. 1973.

83. 46 F.C.C.2d 175 (1974).

84. FCC Cable Television Advisory Committee, *supra* note 81, at 30.

85. *Id.* at 31. The majority expressed concern "that the multi-level scramble for control of cable is producing policies and regulations which duplicate, and thereby burden, or directly conflict with the federal objectives." *Id.* Conceding that there might be situations in which two nonfederal jurisdictions could operate without duplication, the majority indicated that its regulatory program makes allowance for split local jurisdiction

ty recommended that the Commission immediately preempt regulation of cable and simultaneously announce its intention to delegate certain matters to local regulators.⁸⁶ In return, states would be expected to establish programs involving only one nonfederal body—state or local, but not both. Failure to do so would lead to total federal preemption.⁸⁷ A similar approach is taken in a draft bill prepared by the Office of Telecommunications Policy to implement the recommendations of the President's Cabinet Committee on Cable Communications.⁸⁸

Disagreeing sharply, the minority suggested that "the problem itself is scarcely worthy of federal concern."⁸⁹ In addition, it extolled the virtues of cooperative state-local regulation, noting that "there is a separate need for some kind of supervisory review to assure that the bargaining process is, and is seen to be, conducted fairly and on the merits."⁹⁰ Lastly, the minority contended that serious constitutional difficulties exist with the proposed federal preemption.⁹¹

In December 1974, the Commission issued a *Notice of Proposed Rule-making and Inquiry on Cable Television*⁹² which called for comments on which course it should follow. To a certain extent, the Commission had already made some tentative judgments. For example, it stated in the *Notice* that it "is clear . . . that cable television is in danger of becoming smothered in regulatory paperwork."⁹³ It therefore urged states to refrain from adopting duplicative certification procedures. Instead, the Commission urged that

on showings to the FCC that a specific plan for split level jurisdiction is nonduplicative. *Id.* at 33 n.2.

86. *Id.* at 34.

87. *Id.* at 35.

88. No bill has yet been introduced. For a summary of the draft bill, see *Notice of Proposed Rulemaking and Inquiry*, 49 F.C.C.2d 1119 (1974), 39 Fed. Reg. 4358 (1974). See also note 1 & accompanying text *supra*. The OTP bill requires that nonfederal cable regulation be "consistent with Federally imposed standards [and] such regulation may be imposed, executed, and enforced by only one non-Federal level of government in order to avoid duplication and inconsistency of regulation." *Id.* See note 1 & accompanying text *supra*.

The constitutional questions presented by this proposed preemption and subsequent delegation are discussed in Mahony, *supra* note 2.

89. FCC Cable Television Advisory Committee, *supra* note 82, at 83. The minority report pointed out that there were only four states implementing the three-tier regulation with which the majority was so concerned. *Id.* at 87.

90. *Id.* at 90.

91. "[T]here simply is no federal power, arising from the Commerce clause or otherwise, to limit or control the intra-State allocation of regulatory jurisdiction." *Id.* at 84.

92. 49 F.C.C.2d 1199 (1974).

93. *Id.* at 1207.

states adopt guidelines which, if necessary, and presumably only occasionally, could be enforced in the courts.⁹⁴

On August 13, 1975, the Commission issued a *Report and Order*⁹⁵ which terminated its proceeding on duplicative regulation. Although it conceded that "undue burdens are being placed on an infant industry because of a myriad of regulatory efforts at the federal, state, and local level,"⁹⁶ it declined to follow the FSLAC majority. Instead, the Commission concluded that "internal regulatory allocations within a state . . . [are] not subject to our jurisdiction."⁹⁷

While the Commission declined to expand its jurisdiction as urged by the industry, it did modify its procedures so that inconsistent franchise provisions will be automatically voided,⁹⁸ and it clarified the areas of federal preemption.⁹⁹ The dual regulation controversy, however, is far from over, since the Commission announced that it is drafting legislation to clarify the role of nonfederal regulators.¹⁰⁰

Regulation of Cable Television: A Time of Change

While cable this year celebrates its 25th anniversary, it is, in the Commission's words, an infant industry.¹⁰¹ As the foregoing review of three key regulatory areas should indicate, the Commission, Congress and the courts are only beginning to grapple with the difficult issues which will shape the broadband communications industry. These basic issues, which are explored in detail in the following articles, must be resolved before the cable television industry can mature into a fully integrated component of the nation's communications system.

94. *Id.* Professor Le Duc strongly disagree with this conclusion and suggests that the Commission has been too quick to adopt the industry position. *See* Le Duc, *supra* note 3.

95. 40 Fed. Reg. 34608 (1975).

96. *Id.* at 34609.

97. *Id.*

98. *Id.* at 34610.

99. *Id.* at 34611.

100. *Id.* at 34612.

101. *Id.* at 34609.