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THE 1971 CONSENSUS AGREEMENT: THE PERILS OF UNKEPT PROMISES

James J. Popham*

In November 1971, the television broadcast industry, the cable television industry, and the program copyright owners accepted a compromise agreement, thereby resolving—presumably, once and for all—the bitterly debated question of the appropriate relationship between cable and broadcast television and the related concern of the impact of the copyright laws on cable. The inability to answer these questions had stalled the Federal Communications Commission's efforts to promulgate a broad regulatory program for the development of cable television. This compromise, now known as the Consensus Agreement, was engineered by the White House Office of Telecommunications Policy, applauded by Congress, and to some extent implemented by the FCC.

When the rules which were adopted pursuant to the regulatory provisions of the Consensus became effective on March 31, 1972, both government and industry undoubtedly expected that the copyright legislation described in the Consensus would, through a mutuality of effort, be enacted in short order. However, three years have elapsed and copyright legislation has not been enacted, leaving basic and critical matters unresolved. This nonimplementation of the Consensus is decidedly one-sided. Thousands of cable television systems are benefiting from the liberalized signal carriage and nonduplication rules to which broadcasters agreed in the Consensus. Yet, in part because the cable television industry's promise to support specific copyright legislation has not been fulfilled, cable television systems still pay nothing for the broadcast programming for which broadcast stations and networks pay millions of dollars each year.

The FCC has started to reexamine major aspects of its 1972 Cable Television Report and Order. While the inequities arising from the one-

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* Attorney, National Association of Broadcasters. B.S., Tulane University, 1969; J.D., Tulane University, 1972.

1. The Consensus agreement is reprinted in Appendix D of Cable Television Report and Order, 36 F.C.C.2d 143, 284-86 (1972).


sided implementation of the Consensus are substantial and cry out for resolution, there are even more serious consequences which can be ascribed to the demise of the Consensus. First, the FCC’s statutory obligations remain unfulfilled, as do crucial aspects of its broad policy to promote cable development. In addition, the FCC’s credibility and effectiveness as a regulatory agency are at a low ebb and will remain so until the imbalance in the implementation of the Consensus is redressed.

Since 1972, the FCC has managed to skirt the full impact of the failure of the Consensus. Clearly, it can no longer afford to ignore the situation. The basic and unresolved issues of cable television’s competitive impact on broadcast television therefore must return for a center stage encore as the FCC reexamines its cable television regulatory program.

I. THE CONSENSUS: BACKGROUND

The Consensus was designed primarily to resolve the very concerns which prompted the FCC to regulate cable television in the first place, those of adverse economic impact on broadcast television and unfair competition between cable and broadcast industries. Since the two issues stem from cable television’s impact on the broadcast television service, they are closely related, but at the same time distinguishable.

First, when cable television retransmission of a multiplicity of broadcast television signals (especially those of distant and duplicative stations) occurs within the coverage area of local television stations, the local station’s audience is fragmented. Audience loss to the local station erodes its revenue base, thereby reducing the service which the local station can provide to the public. Marginally profitable or unprofitable stations might even be forced out of business, with the attendant loss of service in their communities. This aspect of cable television impact is usually described in the context of adverse economic impact.

The second issue, that of unfair competition, results from cable television’s use of retransmitted broadcast programming, for which it pays nothing. Because of this, cable has an unfair advantage over the local television stations with which it competes and which pay a considerable amount for their programming.

Although these two aspects of cable’s impact on the broadcast television service often coalesce into a single issue—that of the adverse impact of unfair competition—they can be distinguished. A local television station might suffer only marginal economic impact from a local cable system’s importation of one or two distant signals. But if the cable system pays no
copyright fee for use of the programming, it is competing for the same audience in an unfair manner. On the other hand, fair competition might produce adverse economic impact: if, for example, a cable system paid copyright fees in order to import and retransmit six distant signals, local broadcast stations could still be severely affected by loss of audience to the distant signals on the cable system. Therefore, resolution of the adverse economic impact issue will not necessarily resolve the issue of unfair competition, and the two issues should be addressed separately.

Concern over the impact of cable television led the FCC to adopt relatively restrictive signal carriage and nonduplication rules for microwave-served CATV systems in 1965.\textsuperscript{4} In 1966, the FCC applied the rules to all CATV systems.\textsuperscript{5} Although the Commission recognized that two distinct issues were raised by cable retransmission of broadcast signals, it apparently believed that its policy of very limited distant signal importation and broad nonduplication protection sufficed to resolve both issues.

Congressional efforts to solve the problem of unfair competition through creation of copyright liability for CATV retransmission of broadcast television programming also began in 1966.\textsuperscript{6} If cable systems, like broadcasters, were required to negotiate with copyright owners and pay for use of their products, competition between the two media no longer could be considered unfair since both systems would be paying for the programs which they presented to the public. Television stations providing one channel of costly program fare no longer would be competing for an audience against a cable operator offering a multiplicity of programs for which he paid nothing.

Also during this period, cable operators who were concerned that the courts might hold that existing copyright law created liability for the retransmission of broadcast signals entered into negotiations with program owners. Neither Congress nor the industry negotiators, however, had resolved the copyright issue when the Commission initiated its inquiry in 1968.

Although the FCC was enthusiastic about the “blue sky” promises of cable technology in 1968, it did remain vaguely cognizant of its obligations to preserve the public interest in a healthy and viable broadcast television

\textsuperscript{4} First Report and Order on Microwave-Served CATV, 38 F.C.C. 683 (1965) [hereinafter cited as First Report].

\textsuperscript{5} Second Report and Order on CATV, 2 F.C.C.2d 725 (1966).

\textsuperscript{6} See H.R. 4347, 89th Cong., 2d Sess. (1966). The bill, which was reported out of the House Committee on the Judiciary but never reached the floor of the House, provided for a general revision of the Copyright Act of 1917, U.S.C. §§ 1-216 (1964), and, in the CATV field, provided for some liability for unauthorized rebroadcasting of copyrighted materials.
service. 7 During the course of its inquiry, the Commission considered many new and innovative proposals, such as retransmission consent and commercial substitution, which had been proposed as solutions to the problems of unfair competition and adverse economic impact. 8 Meanwhile, Congress continued to ponder cable copyright legislation, and at Congress' urging, the FCC, the Office of Telecommunications Policy (OTP), and cable, broadcast and copyright interests made several unsuccessful attempts to resolve their differences.

In August 1971, the FCC submitted a letter of intent to Congress outlining its proposed regulatory program for cable television. 9 The Commission proposed to prevent adverse economic impact on broadcast television by regulatory means, but urged Congress to resolve the issue of unfair competition by promptly enacting a copyright law. 10

In late fall of 1971, OTP made a final attempt to draft an agreement which would be acceptable to cable, broadcast and copyright interests. The OTP "compromise" was presented to representatives of the principal industries on November 5, 1971. All were given approximately one week to accept or reject the proposal as presented. The OTP compromise, now known as the Consensus Agreement, called for substantial compromises by cable, broadcast and copyright interests. The cable industry was to agree to support legislation creating limited copyright liability for cable retransmission of broadcast programming. In return, the virtual freeze on cable development would be terminated, and liberalized distant signal and nonduplication provisions would replace burdensome hearing and notice requirements. Broadcasters were to accede to the liberalized signal carriage and nonduplication rules, but would stand to gain from limited syndicated program exclusivity protection and limited cable copyright liability. Finally, program copyright owners, who would be direct beneficiaries of the anticipated creation of copyright liability for cable retransmission of broadcast programs, were to support a more limited copyright liability than they might have preferred.

Within the one week deadline, each of the industry representatives

7. "[O]ur basic objective is to get cable moving . . . without jeopardizing the basic structure of over-the-air television." 1972 Cable Report 164.
8. For a description of the Commission's 1968 and 1970 proposals, as well as comments received by the Commission on the retransmission, consent and commercial substitution proposals, see id. at 148-56.
10. Id. at 261. The Commission concluded that "the two matters—cable regulation and copyright—can be separately considered; that the Commission, with appropriate review by the Congress, can resolve the regulatory matter; and that this will provide the necessary background for Congressional resolution of the copyright issue." Id.
accepted the Consensus. Each did so reluctantly but in good faith, hoping that their efforts would balance their competing interests to the ultimate benefit of the public. Once the affected industries agreed to the Consensus, FCC acceptance became the critical factor. Having proposed a comprehensive scheme of regulation the preceding August, the Commission could have ignored the Consensus and proceeded to adopt the rules proposed in the August letter of intent. There were few difficulties involved with the Commission modifying its program to accord with the Consensus, however. First, little delay was involved. The Commission originally intended to adopt its rules in late 1971 with an effective date of March 1, 1972, while modification of the rules in light of the Consensus led to the Commission’s rules becoming effective on March 31, 1972, a delay of 30 days. Second, the Consensus required only a few minor modifications of the Commission’s proposed program; as the Commission pointed out, these changes did “not disturb the basic structure of our August 5 plan.” Finally, the Consensus had been supported heartily by Senator John McClellan, whose subcommittee would consider the copyright provisions of the Consensus.

Following the FCC’s adoption of the Cable Television Report and Order in February 1972, broadcast interests requested that the Commission delay the effective date of the new rules until all parties to the Consensus had agreed upon the language of the copyright legislation to be supported in Congress. The FCC, however, refused to delay the effective date of the rules because it expected “agreement of the industries and that legislation [would] be forthcoming.”

II. A HISTORY OF UNKEPT PROMISES

Serious consideration of cable copyright legislation began again in Congress slightly less than a year after the 1972 FCC rules became effective. On March 26, 1973, Senator McClellan introduced a bill providing for a general

11. This date was predicted in the Commission’s August 5, 1971 Letter of Intent to Congress. Id. at 261.
12. The main changes required were: (1) simultaneous, in lieu of same-day, nonduplication protection; (2) syndicated program exclusivity in the top 100 markets; (3) a minor alteration to the significant viewing standard; and (4) changes in leapfrogging restrictions. See 1972 Cable Report 166.
13. Id.
revision of the copyright law, similar to bills he had introduced in prior
Congressess.

Despite Senator McClellan's previous support for the Consensus, section
111 of the bill, which established copyright liability for CATV, contained
provisions which were inconsistent with the Consensus. First, section
111(d)(2)(B) provided for a statutory fee schedule for CATV's compulso-
ry license; the Consensus had provided that in the event the parties failed to
agree on a schedule of fees or other payment mechanism there would be
recourse to compulsory arbitration. Second, section 111 provided for a
broader scope of compulsory license than that described in the Consensus,
which provided that compulsory licenses would cover only those signals auth-
orized or "grandfathered" under the 1972 cable rules. The Consensus pro-
vision would have required cable operators to negotiate individual licenses
with program copyright owners before carrying any subsequently authorized
distant signals. The compulsory license created in Senator McClellan's bill
would have covered CATV carriage of any signal authorized by the existing
rules or any rules that the Commission might adopt in the future. Thus,
in contrast to the intent of the Consensus, if the FCC were to amend its
rules to authorize CATV carriage of additional distant signals, their carriage
would be covered by the compulsory license. Finally, S. 1361 contained no
mention of the exemption from copyright liability for existent, independently
owned cable systems with fewer than 3,500 subscribers as provided for in
the Consensus.

In view of their support for the Consensus, it might have been expected
that the four parties to the agreement would act to bring S. 1361 into line
with the Consensus. This was not to be. Even before the bill was introduced,
the National Cable Television Association (NCTA) announced its support

19. 1972 Cable Report 285. Since negotiations between the copyright owners and
cable operators had broken down at the time S. 1361 was introduced, the legislation
should have provided for compulsory arbitration to develop an acceptable fee schedule.
23. See letter from Dean Burch, Chairman, Federal Communications Commission, to
Senator John L. McClellan, Jan. 26, 1972, in Appendix E of the 1972 Cable Report
286. Chairman Burch stated:
[A] primary factor in our judgment as to the course of action that would best
serve the public interest is the probability that Commission implementation of
the consensus agreement will, in fact, facilitate the passage of cable copyright
legislation. The parties themselves pledge to work for this result.
for the inconsistent provisions of S. 1361.\textsuperscript{24} In the months following the introduction of S. 1361, NCTA's lobbying position reflected its endorsement of copyright provisions which were at odds with the Consensus. In a document entitled "Remarks on the Provisions of Copyright Legislation Affecting CATV,"\textsuperscript{25} used by NCTA representatives when calling on members of Congress, NCTA pointed out that the Commission's 1972 cable rules "were adopted in conjunction with the Commission's understanding that we would support the OTP Consensus agreement."\textsuperscript{26} Nonetheless, NCTA supported the provision establishing initial copyright fees in the legislation, noting that the "OTP Consensus Agreement suggests that the initial fees be established either by the parties themselves or by compulsory arbitration."\textsuperscript{27} Of course, the Consensus provision calling for agreement or arbitration was no mere suggestion. The Consensus, having provided that all parties would agree to support its proposed legislation, explicitly stated that absent agreement, "the legislation would simply provide for compulsory arbitration . . . ."\textsuperscript{28}

Another obvious inconsistency between the NCTA position and the Consensus concerned the scope of the compulsory license. NCTA noted with approval that section 111 provided that the Commission could authorize CATV systems to carry additional distant signals which would be covered by the compulsory license.\textsuperscript{29} The Consensus, however, provided that additional authorized signals would not be covered by the compulsory license but would have to be bargained for in the marketplace.\textsuperscript{30}

During his testimony before Senator McClellan's subcommittee, NCTA President David Foster lent NCTA's official imprimatur to S. 1361, thereby abandoning any remaining semblance of support for the copyright legislation which NCTA had agreed to support in the Consensus. Although conceding that NCTA was a signatory to the Consensus, Mr. Foster rejected the

\textsuperscript{24} In early 1973, the President of NCTA voiced the NCTA Board's support of Senator McClellan's approach:

\textit{\[I\]ts [the NCTA Board's] obligation is to work for early passage of a copyright bill, and that any bill differing from the McClellan bill will not pass . . . . We feel the Senate subcommittee is committed to the idea of a fee schedule right from the beginning . . . . So we don't feel we're violating the spirit or the letter of the compromise agreement . . . .\]


\textsuperscript{25} National Cable Television Association, Remarks on the Provision of Copyright Legislation Affecting CATV, April, 1973 [hereinafter cited as NCTA Remarks].

\textsuperscript{26} \textit{Id.} at 2.

\textsuperscript{27} \textit{Id.} at 6.

\textsuperscript{28} 1972 Cable Report 285.

\textsuperscript{29} NCTA Remarks 7.

\textsuperscript{30} 1972 Cable Report 285.
Consensus provisions for fee arbitration and a compulsory license limited to signals authorized by the Commission's 1972 rules. Regarding the continuing validity of the Consensus, Mr. Foster stated that it had been useful to get the parties off dead center, but once its purpose was served, the parties "moved on." NCTA's efforts were partially successful. As eventually passed by the Senate in September 1974, S. 1361 contained the broader compulsory license provision and a statutory schedule of fees which, also through NCTA's efforts, was one-half that originally proposed in the bill. In light of the failure of the passage of S. 1361 in the House, the Supreme Court's decision in *Teleprompter v. Columbia Broadcasting System, Inc.*, and several other factors, eventual creation of any copyright liability for cable retransmission of broadcast television programming is hardly a foregone conclusion. First, NCTA's commitment to copyright legislation has eroded. At its meeting in November 1974, the NCTA Board of Directors voted to withdraw support of S. 1361 and to commence a new effort to perfect copyright legislation. Furthermore, NCTA's now vestigial support for copyright legislation is not without qualification. NCTA apparently intends to offer to Congress a trade-off: cable interests would agree to pay copyright fees only if Congress directed the FCC to delete its network nonduplication and nonnetwork program exclusivity rules. Ironically, both rules were adopted pursuant to the Consensus.

An increasing number of cable operators also no longer support any form of copyright liability. Obviously, the implications of the past three years' activity, or lack thereof, have not been lost on the industry. All cable systems are benefiting from liberalized signal carriage rules adopted pursuant to the Consensus. Hundreds of new cable systems have been certified since March 1972, while CATV has yet to pay any copyright fees. Since it appears that

31. *Hearings on S. 1361 Before the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. 40 (1973) (testimony of David Foster, President, National Cable Television Association).*
32. *See* 120 CONG. REC. 16,167 (daily ed. Sept. 9, 1974).
33. 415 U.S. 394 (1974). In *Teleprompter* the Court reiterated its view, first voiced in *Fortnightly Corp. v. United Artists Television*, 392 U.S. 390 (1968), that CATV functions did not fall within the Copyright Act and that, therefore, the cable operators could not be held liable for copyright infringement.
34. *See* BROADCASTING, NOV. 25, 1974, at 33.
35. *Id.* at 5.
36. *See* Comments of American Broadcasting Companies, Inc., Docket No. 20363, filed March 17, 1975, in which it is noted that "[t]he Cable Television Bureau advises that, since 1972 through February 1, 1975, 4,690 applications for certificates have been filed; 3,561 granted; 838 remain pending and 291 were either denied or dismissed." *Id.* at 13 n.3.
the FCC is not enforcing the Consensus, many CATV operators are refusing to support copyright liability for CATV in any form.37

The Omnibus Copyright Revision Bill was reintroduced in the 94th Congress38 with a cable copyright section identical to that passed by the Senate in S. 1361 during the 93rd Congress. Considering the ever growing proportion of the cable industry which opposes any copyright liability, deletion of the cable copyright section is a distinct possibility. Even if the section remains in the bill, the final version will not resemble the copyright provisions which the parties agreed to support in the Consensus.

III. THE LEGAL ISSUES

Congress has charged the FCC with the protection of the public interest in the maintenance and development of the locally oriented broadcast service.39 In view of this statutory obligation, the Commission has been committed to the preservation of the broadcast industry as a source of free, quality programming. The failure of the Consensus belies this commitment, and calls into question the ability of the Commission to formulate objectives and to regulate effectively.

As early as 1965, the Commission was aware that competition with CATV could seriously affect the economic viability of the broadcast industry.40 It reported that certain "nationwide trends" indicated that CATV could have a substantial negative impact upon station revenues by reducing the audience for broadcast television, and pointed specifically to growing

39. When the FCC initially asserted jurisdiction over microwave-served CATV systems in 1965, it described its ultimate responsibility as follows:

The fundamental statutory responsibilities of the Commission are clear. The Commission is charged with the duty of executing the policy [of the] Communications Act to "make available, so far as possible, to all people of the United States, a rapid, efficient, nationwide and worldwide wire and radio communication service" (47 U.S.C. 151) and "generally to encourage the larger and more effective use of radio in the public interest" (47 U.S.C. 303(g)). The Commission is also required to "make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same" (47 U.S.C. 307(b)). First Report 697.
40. Although the FCC recognized that CATV could provide valuable services, it concluded: "If there is a significant risk that CATV competition will destroy or seriously degrade the service offered by a television broadcaster, our statutory duties require us to seek means to prevent this result." Id. at 700.
CATV penetration, CATV development in major television markets, and the increasing number of imported distant broadcast signals carried by CATV systems. In an effort to ameliorate this impact, the FCC asserted jurisdiction over all CATV systems, all local and distant television signals, and the regulation of network program exclusivity.

These regulations were promptly challenged in the courts but were uniformly upheld. Moreover, the weight of authority affirmed the underlying rationale of the regulations that protection of broadcast television was a relevant consideration in the development of regulatory schemes for CATV. The most significant decision was United States v. Southwestern Cable Co., in which the Supreme Court upheld the FCC's assertion of jurisdiction over CATV and carefully analyzed the statutory provisions on which that authority was premised.

As interpreted by the FCC, the Communications Act mandated a system of local broadcast stations capable of serving all communities of appreciable size. The Court in Southwestern Cable noted that Congress affirmed this approach and had endorsed two subsidiary goals—wider utilization of ultra-high frequency (UHF) channels, and the development of channels for educational purposes. In the Court's opinion, these "broad responsibilities for the orderly development of an appropriate system of local television broadcasting" vested the Commission with the power to prescribe rules

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41. Id. at 709.
43. See, e.g., Great Falls Community TV Cable Co. v. FCC, 416 F.2d 238 (9th Cir. 1969), in which the Ninth Circuit dismissed a cable system's challenge by pointing to a consistent line of cases:

The propriety of the Commission's concern for the impact of competition from CATV upon off-the-air broadcasters, and the appropriateness of the Commission's response, have been uniformly sustained in decisions by other Courts of Appeals, with which we agree. E.g., Titusville Cable TV, Inc. v. United States, 404 F.2d 1187, 1190 (3d Cir. 1968); Conley Electronics Corp. v. FCC, 394 F.2d 620, 623-624 (10th Cir. 1968); see Community Television, Inc. v. United States, 404 F.2d 771, 773 (10th Cir. 1969); Wheeling Antenna Co. v. United States, 391 F.2d 179, 183 (4th Cir. 1968); Carter Mountain Transmission Corp. v. FCC, 116 U.S. App. D.C. 93, 321 F.2d 359, 362-363 (1963); cf. FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 475-476, 60 S. Ct. 693, 84 L. Ed. 869 (1940).

Id. at 242.
44. 392 U.S. 157 (1968).
45. See id. at 174.
46. Id. at 174-75. Congress endorsed the two subsidiary goals with the passage of legislation requiring that all televisions shipped in interstate commerce after 1962 be capable of receiving both UHF and VHF channels, 47 U.S.C. § 303(s) (1970), and by passage of legislation providing for assistance to educational television systems. 47 U.S.C. § 392 (1970).
47. 392 U.S. at 177.
reasonably ancillary to the effective performance of its statutory duties.\(^48\)

The Court was careful to state, however, that it expressed no opinion as to the Commission's authority to regulate CATV for any other purpose.\(^49\)

Subsequent interpretation of *Southwestern Cable* has emphasized the relationship between FCC jurisdiction and FCC responsibility to preserve and develop the locally oriented television broadcast service. In *GTE Service Corp. v. FCC*,\(^50\) the FCC, whose jurisdiction in the data processing field was being challenged, relied on *Southwestern Cable* for its assertion of jurisdiction. The court, however, distinguished *Southwestern Cable* precisely because it was

based on the need to control the growth of community antenna systems in order that the Commission might accomplish its broad responsibility of orderly development of an appropriate system of local television broadcasting. . . .  In short, there was substantial evidence that unregulated CATV would threaten an industry whose growth and development Congress had entrusted to the Commission.\(^51\)

Because of this distinguishing factor in the CATV field, the court held that the FCC did not have the power to promulgate rules in the data processing field.

More significantly, the Court's rationale in *Southwestern Cable* was reaffirmed by its own pronouncements in *United States v. Midwest Video Corp.*,\(^52\) in which the Court upheld the FCC's power to impose a mandatory

\(^{48}\) Mr. Justice Harlan, speaking for the Court, was explicit in this regard: "[T]he authority which we recognize today under § 152(a) 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.

Moreover, the Court carefully delineated the congressionally mandated responsibilities to which it referred:

The Commission has concluded, and Congress has agreed, that these obligations require for their satisfaction the creation of a system of local broadcasting stations, such that "all communities of appreciable size [will] have at least one television station as an outlet for local self-expression." *

*Id.* at 174.

\(^{49}\) The Court concluded that:

The Commission may for these purposes issue "such rules and regulations and prescribe such restrictions and conditions not inconsistent with law," as "public convenience, interest, or necessity requires." 47 U.S.C. § 303(r). We express no views as to the Commission's authority, if any, to regulate CATV under any other circumstances or for any other purposes.

*Id.* at 178 (emphasis added).

\(^{50}\) 474 F.2d 724 (2d Cir. 1973).

\(^{51}\) *Id.* at 734.

\(^{52}\) 406 U.S. 649 (1972).
origination rule on cable systems.\textsuperscript{53} While noting that the FCC's responsibilities were "considerably more numerous than simply assuring that broadcast stations operating in the public interest do not go out of business," it restated its findings that "avoidance of adverse effects" did constitute "a furtherance of statutory policies."\textsuperscript{54}

Shortly after its decision in \textit{Midwest Video}, the Supreme Court denied certiorari in \textit{Winchester TV Cable Co. v. FCC},\textsuperscript{55} leaving intact the Fourth Circuit decision in which network program exclusivity rules were upheld.\textsuperscript{56} The Fourth Circuit had rejected the argument that the FCC had improperly discriminated against cable systems in order to insulate broadcast television from lawful competition on the basis of the Commission's duty to fairly adjust conflicting claims in the public interest.\textsuperscript{57}

\begin{itemize}
\item \textsuperscript{53} Citing \textit{Southwestern Cable}, the Court stated:
We accordingly went on to evaluate the reasons for which the Commission had asserted jurisdiction and found that "the Commission has reasonably concluded that regulatory authority over CATV is imperative if it is to perform with appropriate effectiveness certain of its other responsibilities." In particular, we found that the Commission had reasonably determined that "the unregulated explosive growth of CATV, especially through its importation of distant signals into the service areas of local stations" and the resulting division of audiences and revenues, threatened to "deprive the public of the various benefits of [the] system of local broadcasting stations" that the Commission was charged with developing and overseeing under § 307(b) of the Act.
\end{itemize}

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\item \textsuperscript{54} \textit{Id.} at 664.
\item \textsuperscript{55} 409 U.S. 1007 (1972).
\item \textsuperscript{56} 462 F.2d 115 (4th Cir. 1972). The exclusivity rule requires that any CATV system "which operates in whole or in part, within the Grade B or higher priority contour of any . . . television station . . . and which carries the signal of such station shall upon request of the station licensee . . . maintain the station's exclusivity as a program outlet against lower priority or more distant duplicating signals . . . ." 47 C.F.R. § 74. 1103 (1974).
\item \textsuperscript{57} In reaching this decision, the court stated:
These charges are essentially the same as those we have previously considered. We adhere to the views expressed in Wheeling Antenna Co. v. United States, 391 F.2d 179 (4th Cir. 1968). There Judge Bryan thoroughly discussed the considerations which led the Commission to adopt the Second Report and Order, 2 F.C.C.2d 725 (1966), and the First Report and Order, 38 F.C.C. 683 (1965), which deal with the public's interest in both television broadcasting and CATV. Acknowledging the legitimacy and importance of CATV, we nevertheless accepted the nonduplication rule as "a fair adjustment and accommodation of conflicting claims to first place in the public interest." 391 F.2d at 183. We also concluded that the Commission's efforts to assure that the roles of CATV and television remained complementary were in keeping with the Communications Act of 1934.
\end{itemize}

\textbf{462 F.2d at 118-19.}
Thus, the clear weight of judicial authority has affirmed that the Commission has a statutory responsibility to maintain the nationwide broadcast television service and to act in accord with that responsibility in regulating cable television.\footnote{58} Full implementation of the Consensus provisions calling for copyright legislation would have hastened the attainment of this goal. But it does not seem likely that the legislation described in the Consensus will be enacted in the near future. Meanwhile, in the absence of remedial regulatory controls, cable has grown substantially, and the problem of unfair competition remains.

IV. POLICY IMPLICATIONS

The FCC's primary motivation in adopting the regulatory provisions of the Consensus was its belief that the agreement would facilitate passage of copyright legislation.\footnote{59} The enactment of such legislation was regarded as critical to the success of the entire cable regulatory program for three reasons. First, the Commission hoped to reconcile its statutory responsibilities vis-à-vis the broadcast industry with its policy to promote the public interest through the development of nonbroadcast cable services. Copyright legislation would have helped to resolve the issue of unfair competition by bringing cable television into the programming distribution market and by removing the "pirate" stigma which had blemished cable's image among legislators and rulemakers.\footnote{60} Presumably, this political compromise would quell broadcaster and copyright owner opposition to the Commission's program.

Second, the adoption of copyright payment schedules as detailed in the Consensus would have improved the industry's ability to more accurately project future operating costs. This change would have removed the uncertainty facing potential investors and thereby enhanced cable's ability to attract investment capital.\footnote{61} Since cable is a capital intensive industry, this change would have made a substantial contribution to cable's future growth.

Finally, Congress has never addressed the basic issue of cable regulatory policy. The Commission believed that enactment of copyright legislation in the context of the 1972 Cable Report would amount to congressional recog-

\footnote{58. The Commission itself recognized this situation, stating: \[I\]t would not be consistent with such responsibilities to permit growth of substantial CATV operations carrying distant signals in major markets until the aspect of unfair competition is eliminated. Notice of Proposed Rulemaking and Notice of Inquiry, 15 F.C.C.2d 417, 434 (1968).\footnote{59. See 1972 Cable Report 166.\footnote{60. Cable interests themselves recognized the existence of the "pirate" label and the impact that copyright legislation could have on removing it. See NCTA Remarks 2.\footnote{61. See 1972 Cable Report 167.}}}}
nition of the FCC's jurisdiction and authority to regulate cable television.62 Congressional affirmation of these FCC regulatory objectives is still desirable since the FCC's present policy objectives differ significantly from those which have been recognized by the courts. Southwestern Cable tied the FCC's authority to regulate cable to one specific purpose—preserving the public interest in a viable broadcast television service.63 Midwest Video, by the narrowest of margins, permitted the FCC to pursue one other goal which was not inconsistent with this obligation.64 Yet in 1972, the Commission assigned as its primary policy a position of secondary importance.65 As Commissioner Lee noted in his dissenting statement, the issue shifted from "what is needed in the way of regulation to insure that the public does not suffer a loss in existing or potential broadcast service," to "what cable must be given in the way of opportunities to use broadcast signals in order to grow and prosper . . . without unduly or unnecessarily impairing broadcast service to the public."66

The rationale prompting the Commission's original policy shift has been severely undercut. In 1972, the Commission determined that the time had come for cable to realize its technological and economic potential as a medium of abundant capacity.67 On the assumption that a greater diversity of broadcast programming would enhance cable's marketability and its attractiveness to investors,68 the FCC permitted CATV wider access to broadcast television signals. It was hoped that increased access to broadcast signals would hasten cable's development of nonbroadcast program services.69 The Commission, therefore, augmented its existing program origination requirements with requirements for minimum channel capacity, designated access channels and nonvoice return (two-way) capability. These requirements applied to all cable systems with 3,500 or more subscribers located within

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62. Id.
63. 392 U.S. at 178.
64. See notes 53, 54 & accompanying text supra.
65. "[O]ne basic objective is to get cable moving so that the public may receive its benefits, and to do so without jeopardizing the basic structure of over-the-air television." 1972 Cable Report 164.
66. Id. at 296 (Lee, Comm'r, dissenting).
67. Id. at 189.
68. The theory under which the Commission was working was that an adequate supply of investment capital would allow cable to increase its penetration and subscriber revenues, and in turn, provide new and diverse communications services such as access channels, local program originations, and two-way communications.
69. The Commission described the dynamic it was fostering when it stated: "We emphasize that the cable operator cannot accept the broadcast signals that will be made available without also accepting the obligation to provide the nonbroadcast bandwidth and the access services described below." 1972 Cable Report 190.
television markets. Existing systems were given until March 1977 to comply with the channel capacity, two-way, and access channel requirements. 70

At present, there is little left of the Commission's premises for permissive signal carriage restrictions. The experience has been that rules cannot guarantee effective local or origination programming. 71 Thus, on November 21, 1974, the FCC substituted for its mandatory program origination rule a requirement that certain large systems have equipment available for production and presentation of nonoperator cablecast programming. 72 However, on July 9, 1975, the Commission cancelled the March 1977 date for compliance with its channel capacity and access requirements, 78 and has now begun to look into the substantive provisions of those rules as well. 74

Additionally, the basic assumptions underlying the Commission's decision to promote cable development and to promote it at the expense of the broadcast industry are in urgent need of reexamination. Does cable marketability really depend on distant signal importation? 75 Can this country afford cable? Economic considerations aside, has the ultimate impact of cable technology on society been adequately assessed? Two-way capability is the technology of 1984; can it be properly controlled? These are serious questions which can no longer be glossed over in a moment of infatuation with the technological potential of cable communication. Ought they to be decided summarily and independently of Congress?

Had Congress enacted copyright legislation with knowledge of the Commission's full regulatory program, the Commission's choice of policy and its answers to these underlying questions would have been affirmed. In the context of congressional silence, however, the Commission remains committed to a regulatory program which diverges from judicially recognized objectives, with no guarantee that it is proceeding in the right direction.

70. 47 C.F.R. § 76.251(c) (1974).
72. Id. at 43310. The Commission shifted the emphasis to access programming by requiring that equipment be made available to nonoperator producers.
75. Comanor and Mitchell, for example, could conclude only that importation of distant commercial independent stations "may possibly" lead to more subscribers. Comanor and Mitchell, Cable Television and the Impact of Regulation, 2 Bell. J. Econ. & Mgmt. Sci., 154, 161 (1971). Similarly, a study conducted for Montgomery County, Maryland, a suburb of Washington, D.C., concluded that cable television would be marketable in the county without extensive distant signal importation. See Broadcasting, July 22, 1974, at 27. While not necessarily conclusive, these studies do suggest that the Commission's assumption cannot be considered a foregone conclusion.
76. But see Comments of American Broadcasting Companies, Inc., at 7-9, Docket No. 20363, filed March 17, 1975.
V. EFFECT ON THE FCC’S CREDIBILITY AND EFFECTIVENESS

The Consensus is a delicately balanced package which was designed to achieve the intended fair and equitable result only if all of its provisions were fully implemented. If the Commission fails to redress the imbalance of competing interests created and continued by cable’s failure to support the agreement, it will lose its credibility as a fair and impartial regulator and its ability to promote compromise agreements will be impaired.77 Failure to act to fulfill the terms of the Consensus would be a particularly blatant failure on the Commission’s part since the equities involved are very substantial. The broadcast industry compromised a number of deeply entrenched positions in agreeing to the Consensus and those compromises have gone unfulfilled. First, in agreeing to the substantial distant signal importation for CATV systems in the Consensus, broadcast interests gave ground not only in terms of the number of distant signals,78 but also in regard to the size of a broadcast station’s market.79 Second, the Consensus further limited broadcasters’ protections against nonduplication, from a same-day time frame to simultaneous protection.80 Third, the Consensus terms regarding leapfrogging represented less than the National Association of Broadcasters (NAB) had sought from the Commission and a gain for cable interests.81

77. Compromise has often played a significant role in the Commission’s regulatory process. One example, in which NAB was a party, occurred in 1970 when the central issue was AT&T tariff increases for audio program transmission services. AT&T representatives and broadcast industry parties finally agreed to compromise their differences as to proposed television tariffs. Compare letter from W.E. Albert, Administrator, Rates and Tariffs, AT&T Long Lines Dep’t to Secretary, Federal Communications Commission, June 24, 1970, with Order, 44 F.C.C.2d 525 (1973).

78. NAB had advocated that the Commission retain its 1966 rules while developing a policy that would lead to adequate service by CATV in communities in which three network stations, an independent and a noncommercial station were not receivable off the air. Under the 1966 rules, a CATV system could not carry a distant signal (i.e., a signal carried beyond its Grade B contour) into a top 100 market unless authorized to do so after a hearing.

The Consensus substantially liberalized distant signal importation by prescribing minimum service criteria for various market sizes. For example, CATV systems within the 35-mile zone of the top 50 markets were permitted to carry three full network and three commercial independent stations. 1972 Cable Report 285.

79. In this regard, broadcasters agreed to make no change in the proposal of the FCC in its August 9th Letter of Intent to Congress, supra note 9, at 262. The size of a station’s market was measured from the predicted Grade B contour of the station to the specified 35-mile zone from the community in which the station is located.


81. NAB supported a general prohibition against leapfrogging by CATV systems located outside the specified zone of all television stations as well as a provision that would have prohibited CATV from importing distant signals into specified zones of television stations. Comments of NAB to Parts IV and portions of Part III of Notice of Proposed Rulemaking and Notice of Inquiry at 16, Docket No. 18397, filed May 12, 1968.
Finally, even in the area of copyright legislation, which is generally viewed as an area of compromise on the part of the cable industry, NAB and the broadcast industry made significant concessions on specific terms of the legislation proposed in the Consensus, including the scope of the compulsory licensing and nonnetwork program exclusivity provisions.

FCC inaction flies in the face of OTP's consistent pronouncements that the Consensus remains operative and binding. In early 1974, OTP assured the NAB that the Consensus remained in effect despite OTP's far-reaching Cable Report. Moreover, as recently as December 1974, OTP reiterated its support for the Consensus and admonished NCTA that its waning support for copyright legislation was unjustified.

Most damaging to the FCC's credibility and effectiveness would be the inconsistency of inaction when viewed in light of its own pronouncements.

The Consensus embodies a less restrictive prohibition; for example, no restriction was imposed on the first two imported signals unless taken from a top 25 market, in which case they must be taken from one of the two closest top 25 markets. 1972 Cable Report 285.

82. While NAB squarely opposed any compulsory license covering the importation of distant signals into larger markets, thereby requiring CATV systems to bargain with copyright owners for retransmission rights as do broadcasters, the Consensus provided for a compulsory license for local and distant signals authorized by the Commission, initial rules, and any grandfathered signals. 1972 Cable Report 285.

83. NAB's position was that whenever a television station pays for copyright exclusivity for a particular program or series as against other television stations in the same market, the station should automatically receive exclusivity for that program or series on any CATV system in that market which retransmitted a lower priority (based on predicted signal grade) television signal from another market.

The Consensus, while providing for limited regulatory exclusivity, fell far short of the broadcaster's position. It applied only in the top 100 markets (leaving smaller markets without programming protection) and existing CATV systems were grandfathered, thereby exempting them from any future obligation to respect copyright exclusivity agreements or to delete any nonnetwork program from any signal that was carried prior to March 31, 1972. Id. at 284-86.

84. In a letter to the President of the NAB, the Director of OTP stated:

Specifically, you need have no concern that OTP has forgotten about the consensus agreement. From the very inception of the Cabinet Committee, we made clear that the Committee was concerned with long-range policy and not with OTP's concurrent activities regarding achievement of a consensus on the FCC's proposed cable rules. Indeed, the only point upon which the Cabinet Committee's deliberations and OTP activities touched was the issue of copyright liability for distant signal importations. Even though there is no specific mention of the consensus agreement, this point is amply reflected in the Cable Report, and the report was written with the assumption that the consensus agreement stands.

Letter from Clay T. Whitehead, Director of the Office of Telecommunications Policy to Vincent Wasilewski, President of NAB, Feb. 4, 1974.

85. In a letter addressed to Mr. David Foster, Chairman of the NCTA, David Eger, Acting Director of the Office of Telecommunications policy, stated:
that it would not forsake the Consensus. In its 1972 Cable Report, the Commission emphasized that “for full effectiveness, the Consensus agreement requires Congressional approval, not just that of the Commission.”86 In recognition of this, the Commission virtually committed itself to revise the rules if Congress failed to act: “Without Congressional validation, however, we would have to reexamine some aspects of the program.”87 The Commission was no less firm in its commitment to revise the rules when it rejected requests from the broadcast industry to postpone the effective date of the 1972 rules until the parties had agreed on the language of copyright legislation.88

A year after the Commission adopted its 1972 rules, FCC Chairman Dean Burch reiterated the Commission’s intent to revisit those rules during congressional “oversight” hearings. Responding to a question from Senator Marlow Cook, the Chairman stated:

In a sense—in our report, Senator, we said that if no copyright legislation were forthcoming, that we would have to revisit, reevaluate that which we have done . . . . I will say this: If this bill S. 1361 is not introduced and passed within a reasonable period, I would say within a year, year and a half, we are simply going to have to revisit.89

OTP has consistently viewed the consensus agreement as operative and binding on all parties. Previous correspondence between this Office and representatives of the principal industries involved has made it clear that the terms of the agreement should be followed strictly . . . . In our view, nothing has occurred since November, 1971 to cause any party to the agreement to abandon its commitment of three years ago. None of the premises underlying the agreement have changed; the same equities which favor cable paying a share of program supply costs exists now as existed in 1971.

Letter from John Eger, Acting Director, OTP, to David Foster, Chairman, NCTA, Dec. 3, 1974.

86. 1972 Cable Report 167.
87. Id. (emphasis added).
88. In its Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order, 36 F.C.C.2d 326 (1972), the Commission noted:

Finally, we reach ABC’s contention that the Commission will have to take action if copyright legislation is not forthcoming within a reasonable period of time. We agree with this position, and have so stated in Paragraph 65 of the Report. It would be premature to speculate now what action would be necessary in that event. We hope never to reach that point since it is our expectation that the parties will expeditiously reach an accord and that copyright legislation will be enacted once these rules become effective. We have decided after much study and debate to take the first step. We will revisit the matter if our estimate proves wrong that adoption of our program will facilitate copyright legislation.

Id. at 329 (footnote omitted).

Undoubtedly, the Commission's awareness of the sensitive equities involved led it to acknowledge that reexamination of some aspects of its 1972 rules would be necessary if copyright legislation were not catalyzed by the Consensus. Copyright legislation has not been effectuated but, as yet, the Commission has not acted. Continued inaction obviously will detract from the Commission's credibility. Furthermore, parties to future proceedings before the Commission will likely balk at compromising with other parties. As already detailed, the Commission's inaction has done nothing but encourage cable interests to move closer to a position of complete opposition to copyright liability in any form,\(^90\) despite their express agreement to support specific legislation. This point will not be lost on others who might be tempted to compromise in order to assist the Commission in resolving difficult regulatory dilemmas. The broadcast industry certainly will not be lured into any compromises in the foreseeable future. In fact, any industry which did so would be acting at its own peril and with full knowledge that the Commission will go its own merry way with scant regard for either its previous commitments or for what is fair and equitable.

VI. CONCLUSION

The 1971 Consensus agreement has yet to be fully implemented. Very likely, it never will be. Obviously, the resultant inequities alone dictate that the FCC act to redress the imbalance of competing interests. But other more serious implications flow from the one-sided implementation of the Consensus. The basic statutory responsibilities of the FCC remain unfulfilled, as do most of the objectives of its 1972 Cable Report. Furthermore, continued inaction regarding the Consensus will erode the FCC's credibility and effectiveness.

Clearly, the FCC must act now. It can take actions designed to facilitate passage of the copyright legislation described in the Consensus by making it clear to the cable industry that it will not tolerate further frustration of the agreement. Specifically, the FCC could halt the processing of cable certificates of compliance,\(^91\) or order a temporary stay of its 1972 distant signal carriage provisions.\(^92\) Admittedly, the FCC cannot control Congress, but an intensive and mutual lobbying effort by the four parties to the Consensus in conjunction with the FCC might well produce acceptable copyright legislation.

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90. See note 37 & accompanying text supra.
91. See 47 C.F.R. § 76.11 (1974). A cable system needs a certificate of compliance before it may begin operations and before it may change its existing operations.
If the ensuing legislation were not wholly consistent with the Consensus, then the FCC could readjust its rules to redress any remaining imbalances.

Alternatively, the FCC can resolve the issue of unfair competition itself, much as it did in 1966, through tighter restrictions on distant signal carriage rules and greater exclusivity protection. Whatever course the FCC may take, it must recognize that much of its regulatory program for cable was based upon the Consensus. Therefore, the Commission must act to insure that all parties honor their commitment to that agreement.