

# COPYRIGHT LAW AND CABLE TELEVISION\*

## I. INTRODUCTION

In recent years Congress has made several attempts to revise the Copyright Act of 1909.<sup>1</sup> One of the reasons for the failure to produce a new statute has been the difficulty encountered in drafting provisions governing the use of copyrighted material by community antenna television systems (CATV). The growth of CATV in recent years has been staggering,<sup>2</sup> and copyright owners, broadcasters, and CATV operators have been lobbying extensively to influence Congress in its final selection of a revised copyright act. A recent Senate bill<sup>3</sup> has been the focal point of their latest efforts. At hearings before a Senate subcommittee<sup>4</sup> representatives of all three groups appeared and advanced persuasive arguments in support of their respective interests.

The various viewpoints of these diverse interests can be better understood through an examination of the underlying principles of copyright legislation. Two overriding purposes can be identified: (1) the encouragement of literary creativity and (2) the promotion of the dissemination of knowledge to the public.<sup>5</sup> The second of these is paramount,<sup>6</sup> but it is obviously dependent upon the first.

Copyright owners and broadcasters, emphasizing the first, argue that the best way to encourage creativity is to guarantee the protection of their economic interests by compelling CATV operators to pay royalties for the use of their copyrighted work. CATV operators emphasizing the second, argue that their service can provide viewers a greater variety of television programs only if they can expand operations without the burden of paying excessive royalties. It is evident that in this situation the two purposes are in conflict. Traditionally, similar conflicts have been resolved through compromise,<sup>7</sup> and in terms of maximizing the attainment of the purposes of copyright legislation a compromise must likewise be reached between copyright owners and the cable television industry.

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<sup>1</sup> 17 U.S.C. § 1 *et seq.* (1970).

<sup>2</sup> In 1971 there was a 21.5% increase in subscribers served and a 24.6% increase in operating systems. 1972 gains, although unofficial, appeared to be even better. *See Hearings on S. 1361 Before the Subcomm. on Patents, Trademarks and Copyrights of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. at 297 (1973) [hereinafter cited as *Hearings*].

<sup>3</sup> S. 1361, 93d Cong., 2d Sess. (1974).

<sup>4</sup> *Hearings*, *supra* note 2.

<sup>5</sup> *See* NIMMER ON COPYRIGHT § 3.1 (1974).

<sup>6</sup> *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932).

<sup>7</sup> *See generally* H.R. REP. NO. 2222, 60th Cong., 2d Sess. (1909).

Many feel that *only* a legislative compromise will resolve the current conflict. Recent court decisions and the regulations promulgated by the Federal Communications Commission (FCC) have only served to complicate the issue. The new Senate bill attempts to achieve a workable solution,<sup>8</sup> and its adoption would best serve the purposes of copyright legislation. It will be the purpose of this note to critically review both FCC regulations and judicially evolved standards applicable to cable television systems including the effect of more recent decisions. The note will also offer criticism and suggested revisions of the most recent congressional proposal for a revised copyright act.

## II. LITIGATION CONCERNING CATV

The central issue in the cases involving CATV and copyright liability is whether a cable system broadcast to subscribers constitutes a "performance" of the copyrighted work thereby subjecting the broadcast to the exclusive rights provisions of the Copyright Act.<sup>9</sup> Since the Supreme Court had decided what would constitute a "public performance for profit" long before CATV came into existence, it is necessary to review the early "performance" cases.

### A. *The Right to Perform Cases*

A "performance" of a copyrighted work was originally envisioned in the context of a theatrical or musical production. However, technological advances have expanded the concept of "performance" far beyond that contemplated by the drafters of the 1909 Act.<sup>10</sup> In *Jerome H. Remick & Co. v. American Automobile Accessories Co.*<sup>11</sup> it was held that the Copyright Act may be applied to situations not anticipated by Congress if the situation in question is within the theoretical ambit of the statute. In that case, the owner of the copyright on a song attempted to enjoin a radio station owner from playing the song while advertising other products it manufactured and sold. The court held that although the radio

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<sup>8</sup> It is unlikely that the House of Representatives will take any action on the bill during the 93d Congress. However, proponents in the Senate say that if the legislation dies this year, an identical bill can be introduced early next year. *Wall Street Journal*, Sept. 10, 1974 at 4, col. 1. Several other proposed revisions have died in Congress. See, e.g., H.R. 11947, 88th Cong., 2d Sess. (1964); H.R. 4347, 89th Cong., 1st Sess. (1965); S. 1006, 89th Cong., 2d Sess. (1966); H.R. 2512, 90th Cong., 1st Sess. (1967).

<sup>9</sup> Copyright infringement occurs when one violates an exclusive right of the copyright owner. The right to perform the copyrighted material is one of the exclusive rights. 17 U.S.C. § 1 (1970).

<sup>10</sup> See H.R. REP. NO. 2222, 60th Cong., 2d Sess. 4 (1909).

<sup>11</sup> 5 F.2d 411 (6th Cir. 1925).

listeners could not communicate with each other and were not assembled together, there was a "public performance" of the song.<sup>12</sup>

The *Remick* court relied on the Supreme Court's decision in *Herbert v. Shanley Co.*<sup>13</sup> to establish that the "performance" was for profit. *Herbert* held that the performance of a copyrighted song by an orchestra employed by a hotel to entertain its patrons without charge constituted a "performance for profit" and therefore entitled the copyright owner to royalties when the song was played.<sup>14</sup> The Court reasoned that the music was provided as part of the overall service of the hotel and thus was "for profit."

The "performance" case which is most analogous to CATV litigation is *Buck v. Jewell-LaSalle Realty Co.*<sup>15</sup> *Jewell-LaSalle* dealt with the relay of a radio program received on a master radio receiving set operated by the owner of the LaSalle Hotel to all the hotel rooms. One of the programs received and relayed was transmitted by William Duncan, operator of a commercial broadcasting station. The American Society of Composers, Authors and Publishers (ASCAP) informed Duncan and the hotel that unless licenses were obtained, the broadcasting of any copyrighted songs owned by one of its members would not be permitted. Such a song was broadcast by Duncan, received by the hotel, and piped into the rooms. ASCAP then sued for injunctive relief and damages for infringement. The district court held that the LaSalle Hotel did not "perform" the song within the meaning of the statute. After appeal to the court of appeals, the following question was certified to the Supreme Court:

"Do the acts of a hotel proprietor, in making available to his guests, through the instrumentality of a radio receiving set and loud speakers installed in his hotel and under his control for the entertainment of his guests, the hearing of a copyrighted musical composition which has been broadcast from a radio transmitting station, constitute a performance of such composition within the meaning of 17 U.S.C. Sec. 1(e)?"<sup>16</sup>

The Court held that the LaSalle Hotel was "performing" the songs by piping them to the individual hotel rooms. Justice Brandeis, writing for the majority, analogized the situation to another type of performance—the playing of a phonograph record: "The modulation of the radio waves in the transmitting apparatus, by the audible sound waves is com-

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<sup>12</sup> *Id.* at 412.

<sup>13</sup> 242 U.S. 591 (1917).

<sup>14</sup> *Id.* at 594-95. A companion case to *Herbert* involved the performance of a copyrighted song by singers on a stage in a restaurant. It was resolved in the same manner. *Id.* at 594. See NIMMER ON COPYRIGHT § 107.32 (1974).

<sup>15</sup> 283 U.S. 191 (1931).

<sup>16</sup> *Id.* at 195-96.

parable to the manner in which the wax phonograph record is impressed by these same waves through the medium of a recording stylus."<sup>17</sup> The Court recognized that both situations require complicated machinery to enable one to hear the program and in neither situation is the original program heard. Rather a reproduction is heard and that reproduction constitutes a "performance."<sup>18</sup>

The reasoning of Justice Brandeis is criticized by Professor Nimmer. He notes that playing a phonograph record is a "performance" only because of the specific statutory language of § 1(e) of the Copyright Act.<sup>19</sup> Professor Nimmer argues that unlike the playing of a phonograph record the language of § 1(e) should not be applied in denominating as a "performance" the reception of a radio broadcast.<sup>20</sup> He notes that playing a phonograph differs from receiving a radio broadcast in that the former involves sounds heard at different points in time (the original recording session compared with playing the record), whereas the latter involves sounds simultaneously heard at two different geographic points (the actual broadcast compared to hearing it on the radio); the latter being very similar to a public address system which permits a single performance to be heard over a greater area.<sup>21</sup>

The *Jewell-LaSalle* opinion noted that if Duncan had obtained a license to broadcast the copyrighted songs, an implied license might have justified the reception and distribution by the hotel.<sup>22</sup> However, an implied license was not found in *Society of European Stage Authors and Composers, Inc. v. New York Hotel Statler Co.*<sup>23</sup> wherein several radio stations had obtained a license to broadcast copyrighted songs which were relayed to hotel guests as in *Jewell-LaSalle*. The contracts provided that the licensee could not expressly or by implication, grant to others the right to "perform" the songs. The court in *Statler* denied the existence of an implied license running to the hotel owner due to the existence of the express contractual restrictions and held that the copyrights were infringed.<sup>24</sup> Notably, the question of the existence of an implied license

<sup>17</sup> *Id.* at 200.

<sup>18</sup> *Id.* at 201.

<sup>19</sup> 17 U.S.C. § 1(e) (1970): "[t]o make any arrangement or setting of it or the melody of it in any system of notation or any form of record in which the thought of the author may be recorded and from which it may be read or reproduced . . . ."

<sup>20</sup> NIMMER ON COPYRIGHT § 107.41 at 409-10 (1974).

<sup>21</sup> *Id.* § 107.41 at 410.

<sup>22</sup> 283 U.S. at 199 n. 5.

<sup>23</sup> 19 F. Supp. 1 (S.D.N.Y. 1937).

<sup>24</sup> Notwithstanding the provisions in the contract, if the implied license is implied in law, even such express reservations should have no effect. NIMMER ON COPYRIGHT § 107.43 (1974). Thus the majority in *Statler* arguably reached an incorrect result based on the erro-

in the absence of such express contractual restrictions was left unanswered. Moreover, it should be noted that the Supreme Court has never decided whether the implied license theory would obviate infringement.

Despite contrary argument, case law clearly establishes that providing the equipment to enable customers to listen to copyrighted material constitutes a "performance" of that material in violation of § 1 of the Copyright Act. This is so regardless of the novelty or complexity of the equipment.<sup>25</sup> How cable television would fit into this scheme was a problem soon confronted by the courts.

### B. *The Fortnightly Case*

The Fortnightly Corporation operated cable systems in Clarksburg and Fairmount, West Virginia. Due to the mountainous nature of the region, the residents of these areas could not obtain clear reception of programming originating in Pittsburgh, Pennsylvania, Steubenville, Ohio or Wheeling, West Virginia despite being fairly close to these cities. Fortnightly set up large antennas on hilltops a short distance from the centers of Clarksburg and Fairmount to receive television broadcast signals coming from the other three cities. The signals were then transmitted through coaxial cables, strung on utility poles, and other "house drop" cables to the subscribers of the company. Fortnightly did not edit or select the programs and did not know what programs would be shown at any given time.

United Artists Television, Inc. (UATV) owned the copyrights on several motion pictures which were televised by the three stations. Fortnightly received the signals from the stations and carried them to its subscribers by the cable system. UATV alleged, *inter alia*, that this constituted an unlicensed "public performance for profit" in violation of the Copyright Act. Fortnightly answered by claiming that it had not "performed" any of these motion pictures. The district court ruled in favor of UATV<sup>26</sup> and was affirmed by the court of appeals.<sup>27</sup> Both courts were simply following a long line of precedent which had withstood numerous prior challenges. Notwithstanding these precedents, the Supreme Court reversed.<sup>28</sup>

Justice Stewart's majority opinion emphasized that Fortnightly clearly did not "perform" the copyrighted works "in any conventional sense of

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neous belief that the existence of express reservations would prevent the finding of an implied license.

<sup>25</sup> See generally *Harms, Inc. v. F. W. Woolworth Co.*, 163 F. Supp. 484 (S.D. Cal. 1958).

<sup>26</sup> 255 F. Supp. 177 (S.D.N.Y. 1966)

<sup>27</sup> 377 F.2d 872 (2d Cir. 1967).

<sup>28</sup> 392 U.S. 390 (1968).

that term, or in any manner envisaged by the Congress that enacted the law in 1909."<sup>29</sup> He did recognize, however, that the statutory language must be read in light of technological progress,<sup>30</sup> and therefore, that the conversion of electronic signals into images on a television screen could conceivably constitute a "performance."

In applying this new interpretation to *Fortnightly* the Court rejected the "quantitative contribution" test employed by the court of appeals and replaced it with a "functional" test. The question which must be asked is not "how much did the [cable system] do to bring about the viewing and hearing of a copyrighted work,"<sup>31</sup> but rather whether the cable system performs the function of a viewer or a broadcaster.<sup>32</sup> The broadcaster actively "performs" the work exhibited, the viewer is merely a passive beneficiary.<sup>33</sup> The Supreme Court held that under this test the cable system was more like a viewer than a broadcaster. It did not "broadcast or rebroadcast" any programs; it did not select which programs would be broadcast; and it did not edit any of the programs broadcast. Instead the cable system merely made it possible for viewers to receive the signals broadcast by the stations in Pittsburgh, Steubenville and Wheeling, which was no more than any other viewer could have done for himself, if he was willing to make the effort. Since there was no "performance" of the copyrighted motion pictures, there could be no copyright liability.<sup>34</sup>

The *Fortnightly* decision is directly contrary to the cases discussed above, especially *Jewell-LaSalle*. However, the Court did not overrule *Jewell-LaSalle*, nor did it attempt to distinguish the case.<sup>35</sup> It simply explained that the "questionable 35-year-old decision"<sup>36</sup> must be "limited to its facts."<sup>37</sup> Others have enunciated grounds on which the cases could have been distinguished,<sup>38</sup> however, the Court would have been much

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<sup>29</sup> *Id.* at 395 (citing H.R. Rep. No. 2222, 60th Cong., 2d Sess. 4 (1909)).

<sup>30</sup> *Id.* See *Jerome H. Remick & Co. v. American Automobile Accessories Co.*, 5 F.2d 411, 412 (6th Cir. 1925).

<sup>31</sup> 377 F.2d at 877.

<sup>32</sup> 392 U.S. at 398-99.

<sup>33</sup> *Id.*

<sup>34</sup> 17 U.S.C. § 1(d), (e) (1970). Nimmer points out that it could be argued that cable systems infringe other exclusive rights under § 1. However, he doubts that the Supreme Court would uphold any of these arguments. NIMMER ON COPYRIGHT § 107.44 at 414.3-.5. See also Note, *CATV and Copyright Liability*, 80 HARV. L. REV. 1514, 1515-17 (1967).

<sup>35</sup> Reference was made to the implied license theory. 392 U.S. at 396 n. 18. However, it is difficult to see how that theory is relevant to the issue of whether the copyrighted material was performed.

<sup>36</sup> 392 U.S. at 401 n. 30.

<sup>37</sup> *Id.* at 396 n. 18.

<sup>38</sup> The performances could have been deemed private rather than public because the television set belonging to the subscriber of the cable system, not the cable system's equipment,

more logically consistent if it had explicitly overruled *Jewell-LaSalle*, since to distinguish the case would have only further confused the issue.<sup>39</sup>

Justice Fortas noted in dissent that *Jewell-LaSalle* "stands squarely in the path of the route which the majority today traverses."<sup>40</sup> He believed that the decision in *Fortnightly* abandoned the precedents under which an entire industry had functioned. Without new legislation to take care of the novel problems brought about by cable television, he could see no alternative but to follow *Jewell-LaSalle*.

Justice Fortas criticized the "functional" test as resulting in arbitrary distinctions between modes of broadcasting; the *Fortnightly* system is exempted even though it is indistinguishable from other modes which clearly constitute "performances."<sup>41</sup> Moreover, while cable television might be no more than "a 'cooperative antenna' employed in order to ameliorate the image on television"<sup>42</sup> sets situated within a geographical area having unfavorable topographical features, the situation would be different in a case where the signals were carried *beyond* that area. While Justice Fortas' reasoning on this point would be applicable to situations involving distant signal carriage, the fact pattern in *Fortnightly* involved only local signal carriage.

### C. *Teleprompter v. CBS: Distant Signals*

In 1964 the creators and producers of copyrighted television programs brought a suit alleging that a cable system (Teleprompter Corp.) had infringed their copyrights by making their programs available to the subscribers of the system. Teleprompter Corp. owned and operated antennas in five different cities and carried the signals received as far as 450 miles. The suit was initially stayed pending the decision in *Fortnightly*. After that case was resolved, the plaintiffs filed supplemental pleadings attempting to distinguish the two cases. They alleged that Teleprompter's operations involved the use of the following factors and techniques not present in *Fortnightly*: (1) distant signal transmissions; (2) original programming; (3) advertising of programming; (4) program selection; (5) microwave transmission; (6) interconnection with closed circuit theaters; and (7) sales of commercials. The district court held that none

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converted the signals into light and sound waves. NIMMER ON COPYRIGHT, § 107.44 at 414.4; Note, *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 95, 273 (1968).

<sup>39</sup> If the distinction mentioned in note 38 *supra* was coupled with the Court's reasoning in *Fortnightly* the result would be that both the television station and the home audience function as a broadcaster while the cable system functions as a viewer.

<sup>40</sup> 392 U.S. at 406 (Fortas, J., dissenting).

<sup>41</sup> *Id.* at 407. A television camera at a live presentation performs the same function as a spectator's eye.

<sup>42</sup> *Id.*

of these were sufficient to cause the transmissions to be deemed "performances" and dismissed the complaint.<sup>43</sup>

The Second Circuit agreed with respect to six of the techniques but reversed the lower court on the ground that the importation of distant signals constituted a "performance" and rendered Teleprompter liable for copyright infringement.<sup>44</sup>

Recognizing that *Fortnightly* had not determined whether importing distant signals constituted a "performance," the court reasoned that when a cable system performed a service which its individual customers could not undertake themselves, the system was functioning as a broadcaster rather than a viewer. The court felt that Teleprompter was not merely enhancing "the viewer's capacity to receive the broadcaster's signals,"<sup>45</sup> which under normal conditions would have been received by the viewers, but was displaying for profit, and without a license, a copyrighted work to a public which could not otherwise have viewed it.<sup>46</sup>

The Supreme Court reversed the decision of the Second Circuit.<sup>47</sup> The Court explained that once a broadcaster transmits a program, its content has been made available for simultaneous viewing and hearing by the public. The signals, said the Court, could be received and converted into sights and sounds by anyone. In applying the functional test, the majority concluded that the rechanneling of the signals, even those originating from a distant source, was a viewer function rather than a broadcaster function. Teleprompter could not be held liable for copyright infringement.

Justice Douglas, one of three dissenting justices, argued that the Court was invading the province of the legislature. It was clear to him that despite the majority's conclusion to the contrary, Teleprompter was functioning as an ordinary broadcaster.<sup>48</sup>

Because television signals travel in straight lines, the curvature of the earth has created separate television markets. Cable systems, by importing distant signals, are able to invade these markets with programming from other market areas. When they do, they are effectively "broadcasting" the program into a new market. Justice Douglas thought that these "acts of piracy are flagrant violations of the Copyright Act."<sup>49</sup> To say

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<sup>43</sup> 355 F. Supp. 618 (S.D.N.Y. 1972).

<sup>44</sup> 476 F.2d 338 (2d Cir. 1973). The court of appeals did not think that any of the other new techniques employed by Teleprompter were sufficiently different from those used by *Fortnightly* to necessitate a different ruling.

<sup>45</sup> *Id.* at 350 (quoting 392 U.S. at 399).

<sup>46</sup> Shortly after this decision the new Senate Bill (S. 1361) was introduced.

<sup>47</sup> *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974).

<sup>48</sup> 415 U.S. at 416-19 (Douglas, J., dissenting).

<sup>49</sup> *Id.* at 418.

that there is no violation, he asserted, makes the Copyright Act nonexistent in relation to cable television. Whether or not this is good public policy is not a decision to be made by the judiciary; instead, it is a legislative decision.<sup>50</sup>

### III. FCC REGULATION

*Teleprompter* enabled cable systems to carry broadcaster signals into the homes of their subscribers without ever being liable for copyright infringement. However, the path was not entirely clear for cable systems, since they still had to contend with FCC regulations. Although the FCC lacked the power to hold the cable television companies liable for copyright infringement, it could severely restrict their carriage of signals through its licensing authority.

With the rapid growth of the cable television industry, copyright owners and broadcasters, anxious to protect their own interests, exerted increasing pressure on the FCC to promulgate regulations which would restrict cable television's expansion.<sup>51</sup> The Commission, cognizant of the threat which cable television presented to small, independent broadcast stations, and anxious to promote the growth of local independent stations, responded by promulgating regulations in two areas: signal carriage and exclusivity.<sup>52</sup>

#### A. Signal Carriage

The rules regulating signal carriage require that cable systems carry some broadcast stations and prohibit them from carrying others. Since 1965 several sets of regulations have been promulgated.<sup>53</sup> Some had a serious crippling effect on the growth of cable systems<sup>54</sup> and many were made more stringent in response to favorable court decisions.

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<sup>50</sup> *Id.* at 419.

<sup>51</sup> See, e.g., *Hearings on S. Res. 224 and S. 376 Before the Senate Comm. on Interstate and Foreign Commerce*, 85th Cong., 2d Sess., pt. 6 (1957); S. REP. NO. 928, 86th Cong., 1st Sess. (1959); *Hearings on H.R. 12914, H.R. 13286, and H.R. 14201 Before the House Comm. on Interstate and Foreign Commerce*, 89th Cong., 2d Sess. (1966).

<sup>52</sup> See *In re Inquiry into the Impact of Community Antenna Systems, Television Translators, Television "Satellite" Stations, and Television "Repeaters" on the Orderly Development of Television Broadcasting*, 26 F.C.C. 403 (1959); Chazen and Ross, *Federal Regulation of Cable Television: The Visible Hand*, 83 HARV. L. REV. 1820 (1970).

The FCC has authority to regulate broadcasting by virtue of the Communications Act of 1934, 47 U.S.C. § 151 (1970). See also *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968) (FCC has authority to regulate cable television).

<sup>53</sup> See First Report and Order, 38 F.C.C. 683 (1965); Second Report and Order, 2 F.C.C. 2d 725 (1966); Notice of Proposed Rulemaking and Notice of Inquiry, 15 F.C.C. 2d 417 (1968).

<sup>54</sup> See Chazen and Ross, *supra* note 52, at 1827; *Cable Snarl*, THE NEW REPUBLIC, Jan. 15, 1972, at 7.

The current regulations have varying requirements depending on the size of the broadcast area served. Cable systems in the first fifty major television markets must carry the following: (1) the signals of broadcast stations within whose specified zone the system is located;<sup>55</sup> (2) "[n]on-commercial educational television broadcast stations within whose Grade B contours the community of the system is located . . ."<sup>56</sup> and (3) commercial television broadcast stations that are significantly viewed in the community in which the system is located.<sup>57</sup> Upon compliance with these and certain other requirements,<sup>58</sup> the cable system may import any missing full network station, subject to the requirement that it be either the nearest station or the nearest station within the state.<sup>59</sup> Importation of independent stations is also regulated. If less than three local independent stations are in operation, distant independent stations may be imported so that a total of three are available to subscribers.<sup>60</sup> Cable systems in the second fifty major television markets are governed by the same rules except that a total of only two independent stations may be available to subscribers.<sup>61</sup>

The carriage rules give broadcasters in communities served by cable systems a great deal of protection by restricting the number of signals imported, and hence, the competition. In addition, audience size is maximized by demanding carriage of local stations' signals.

### B. *Exclusivity*

Exclusivity guarantees to qualifying broadcast stations the right to be the only source of programming in some situations, thereby preventing a decrease in the market share of these stations from the importation of the same signals via cable. Exclusivity is granted for both network and syndicated programming.

Network exclusivity concerns only the programming supplied by a national or regional network, not every program shown on a network station.<sup>62</sup> Cable systems must refrain from simultaneously duplicating sig-

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<sup>55</sup> 47 C.F.R. § 76.61(a)(1) (1973).

<sup>56</sup> *Id.* § 76.67 (a) (2). Grade B contour is defined at *id.* § 73.683(a).

<sup>57</sup> *Id.* § 76.61 (a) (5). See also *id.* § 76.5(k).

<sup>58</sup> For other requirements on the signal carriage of the first fifty major television markets see, *id.* § 76.61 (a) (3), (4). See also *id.* § 74.701.

<sup>59</sup> *Id.* § 76.61(b)(1). The qualification is known as the "leapfrog rule."

Any cable system that was operating in compliance with FCC regulations on January 20, 1968, need not eliminate any station it carried which it would be prohibited from carrying under the latest regulations. *Id.* § 76.65.

<sup>60</sup> *Id.* § 76.61(b)(2).

<sup>61</sup> *Id.* § 76.63.

<sup>62</sup> *Id.* § 76.5(o).

nals of lower priority stations if a higher priority network station in the zone which encompasses the community served by the system is broadcasting the same network signals and notifies the cable system.<sup>63</sup> A station's priority is determined by its signal strength and its location in relation to the community served by the cable system.<sup>64</sup>

Syndicated exclusivity encompasses all programming available in more than one market for television broadcasts, with the exception of live presentations.<sup>65</sup> Because it is unlikely that these programs will be broadcast simultaneously, the regulations provide time limits during which the program cannot be carried by a cable system. In the first fifty major television markets a cable system may not carry a syndicated program licensed to a local broadcaster for a period of one year from the grant of such license.<sup>66</sup> In all major television markets programs cannot normally be carried by a cable system if a local station has exclusive broadcast exhibition rights.<sup>67</sup>

Exclusivity protects local broadcasters by preventing dilution of their audience. Since advertisers pay according to the projected number of viewers, exclusivity and signal carriage regulations bolster the economic position of broadcast stations; but the effect on cable systems is devastating. By severely limiting the number of signals and programs which can be carried, cable television is made much less attractive to the public, thus diminishing both the number of subscribers and the fee paid by each subscriber.

#### IV. PROPOSED LEGISLATION—S. 1361

On March 26, 1973 Senator McClellan introduced S. 1361 which was then referred to the Committee on the Judiciary. Section 111 of that bill deals with cable television.<sup>68</sup>

A major step toward producing a workable statute was a Consensus Agreement arrived at by cable system operators, copyright owners, and broadcasters. The agreement emerged from negotiations sponsored by the FCC and the Office of Telecommunications.<sup>69</sup> The agreement supported several measures, including the passage of cable television copy-

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<sup>63</sup> *Id.* §§ 76.91(a), 76.93. See also *id.* § 76.95, 76.97.

<sup>64</sup> *Id.* § 76.91(b).

<sup>65</sup> *Id.* § 76.5(p).

<sup>66</sup> *Id.* § 76.151(a).

<sup>67</sup> *Id.* § 76.151(b).

<sup>68</sup> S. 1361, *supra* note 3, denominates broadcasting and cable operations as primary and secondary transmissions, respectively.

<sup>69</sup> *Hearings, supra* note 2, at 295.

right legislation.<sup>70</sup> The legislation was to include copyright liability for all cable carriage of television signals except for systems with less than 3500 subscribers, compulsory licensing for all local signals and certain distant signals, and an agreement on a fee schedule or compulsory arbitration to resolve disputes which might arise. Most of these ideas were incorporated into S. 1361.

### A. *The Statutory Provisions*

Section 106 of the bill legislatively overrules *Fortnightly* and *Teleprompter* by establishing a new definition for "performance." In order to infringe a copyright under the new bill, one must violate one of the exclusive rights guaranteed to copyright holders.<sup>71</sup> The right to "perform" is still guaranteed and now includes the showing of any movie or other audiovisual work in any sequence.<sup>72</sup> Because the legislative intent of Congress to include the activities of cable system operators is very clear, no court should hold that cable systems are not "performing" the programs when they carry signals to subscribers. The new bill also codifies the holding of the *Remick* case<sup>73</sup> by providing that a "performance" is public when members of the public are capable of viewing it individually or together.<sup>74</sup> These definitions make § 111 a clear and effective provision.

Although § 111 is framed broadly in terms of secondary transmissions, exemptions limit its impact primarily to CATV operators. Section 111(a) exempts the following secondary transmissions from copyright infringement: relays without charge by hotels, apartment houses, or similar establishments to private lodgings of guests or residents;<sup>75</sup> certain educational broadcasts;<sup>76</sup> secondary transmissions in which the carrier has no control over the content or selection of the primary system or over the recipients of secondary transmissions;<sup>77</sup> noncommercial broadcasting;<sup>78</sup> and secondary transmissions made by a cable system serving a local community prior

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<sup>70</sup> The full text of the Consensus Agreement is printed at *Hearings* 307-08 and 37 Fed. Reg. 3341 (1972).

<sup>71</sup> S. 1361, *supra* note 3, § 106. The violation of an exclusive right is a precondition to an infringement action under the current act also. 17 U.S.C. § 1 (1970).

<sup>72</sup> S. 1361, § 101, 93d Cong., 2d Sess. 1974.

<sup>73</sup> See notes 11 and 12 *supra*.

<sup>74</sup> S. 1361, *supra* note 3, § 101.

<sup>75</sup> *Id.* § 111(a)(1).

<sup>76</sup> *Id.* § 111(a)(2).

<sup>77</sup> *Id.* § 111(a)(3).

<sup>78</sup> *Id.* § 111(a)(4).

to March 31, 1972, if the cable system is the community's principle means of access to broadcast signals.<sup>79</sup>

Section 111(b) protects broadcasters of closed circuit television programs by providing that a secondary transmission of such broadcast to the general public constitutes an infringement of copyright.<sup>80</sup>

The most important part of the proposed bill with reference to CATV is § 111(c) which provides for compulsory licensing of secondary transmissions. Under this provision an unlicensed secondary transmission, unless exempt, is a copyright infringement, and the operator is liable to the copyright owner and subject to the penalties provided by the bill.<sup>81</sup> Section 111(c) (1) states that secondary transmissions are subject to compulsory licensing, (if the notice requirements of § 111(d) have been met) when any local signals are carried, or when distant signals are carried in compliance with the FCC regulations. Under § 111(c) (2) a secondary transmission constitutes an infringement of copyright if the carriage of the signals comprising the secondary transmission is not permitted by the FCC,<sup>82</sup> if the cable system has not recorded the notice specified in § 111(d),<sup>83</sup> or if the carriage of signals comprising the secondary transmission of a sports event is not permitted under the rules promulgated by the FCC.<sup>84</sup>

Section 111(d) establishes the mechanism through which royalty fees are paid by cable systems making secondary transmissions. The cable system is required to file with the Register of Copyright, within thirty days after the Act becomes effective, or at least one month before its first secondary transmission (whichever is later), a notice containing information relevant to its operations. Thereafter it must submit quarterly reports to the Register listing information pertaining to its subscribers, the channels it has been carrying and the revenue it has received.<sup>85</sup> The royalty fees are computed by taking the applicable percentage of the gross revenue for the quarter.<sup>86</sup> The royalty payments are made quarterly to the Register of Copyright which in turn distributes them to the claimants.<sup>87</sup> Thus by enumerating those secondary transmissions which are ex-

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<sup>79</sup> *Id.* § 111(a)(5).

<sup>80</sup> *Id.* § 111(b).

<sup>81</sup> *Id.* § 111(c)(2). Compulsory licensing actually benefits the CATV operators since by complying with the provisions of the bill it is given the right to carry the television signals without interference from the copyright owners or broadcasters.

<sup>82</sup> *Id.* § 111(c)(2)(A).

<sup>83</sup> *Id.* § 111(c)(2)(B).

<sup>84</sup> *Id.* § 111(c)(2)(C).

<sup>85</sup> *Id.* § 111(d)(2)(A).

<sup>86</sup> *Id.* § 111(d)(2)(B). The fee schedule is listed in this section.

<sup>87</sup> *Id.* § 111(d)(2), (3).

empt, those which are actionable as infringements and those which are subject to compulsory licensing, and by creating the framework through which royalty payments are to be paid, § 111 establishes the rights and duties of the cable systems in relation to copyright owners and broadcasters.

## B. *Suggested Modifications*

Although S. 1361 would fill the void now existing in the copyright law concerning cable television, there are two aspects of the bill which should be modified: the provisions for royalty fee payments for local signal carriage and the royalty fee schedule.

### 1. Royalty Payments

The proposed bill makes no distinction for royalty purposes between the carriage of local signals and distant signals. While it is a necessary and welcome innovation to compel cable systems to pay royalties on some of their operations, it is not clear why they should pay for carrying local signals, especially since FCC regulations compel them to carry these signals.

By carrying local signals only, as distinct from also carrying distant signals, cable systems further both goals of copyright legislation:<sup>88</sup> the public is exposed to more information and the economic interests of copyright owners are not impaired. Through the elimination of geographic impediments the cable system assures the public in a particular locality of access to local programs.

In terms of protecting the economic interests of copyright owners, the Supreme Court pointed out in *Teleprompter* that the television industry is compensated in an indirect manner.<sup>89</sup> Advertisers, not the viewers, pay the broadcasters with rates based on the size of the audience watching the program. It makes no difference to a sponsor whether his commercial is seen through a cable system or the conventional medium, and he should be willing to pay more if a cable system increases the audience. Thus there is no compelling reason for allowing the broadcaster, if he is the copyright owner, to reap a windfall in royalties.

The same reasoning negates any claim that copyright owners, who are not broadcasters, have against cable systems carrying local signals. Since the broadcaster can expect more revenue from the sponsor for showing the copyrighted program, he can pay more for the privilege of showing

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<sup>88</sup> See text at note 5 *supra*.

<sup>89</sup> 415 U.S. at 411-12.

the program, and thus, the copyright owner will obtain a greater economic benefit because of cable television.

The above result may be altered when we consider the effect on audience size of a cable system's carriage of both local signals and distant signals. In this situation the local broadcasters' viewing audience may actually be decreased by the cable system's presence. This would be true if a greater number of viewers are attracted to the imported distant signals than are exposed for the first time to the local signals carried by the cable system. However, provision for royalty payments are not justified on the basis of the potential injury to copyright owners stemming from the natural competitive effects of a cable system's importation of distant signals. Disregarding the effects of competition, the only relevant consideration in justifying royalty payments under the Copyright Act is the effect of a cable system's carriage of local signals.

The arguments which justify payment in the case of distant signal carriage are not applicable to local signal carriage. Broadcasters often cannot exact larger advertising fees when their signals are imported into distant markets because a great deal of advertising is directed solely at the local community. Thus, the copyright owner cannot expect sizeable increases in income. At the same time he can expect sizeable losses, since the distant markets invaded by the cable relay are lost in terms of potential markets in which to license the copyrighted work. Even if a license in the potential market is granted it has diminished value since the broadcast of the copyrighted work would constitute a second showing.

## 2. Royalty Fee Schedule

When the Senate Subcommittee on Patents, Trademarks and Copyrights held hearings on the proposed bill, the only aspects of the bill they discussed were the royalty fee schedule and the blackout of certain professional sports.<sup>90</sup> The copyright owners who testified before the committee expressed concern over the fact that cable operators were not willing to submit the fee schedule for arbitration, as provided for in the Consensus Agreement.<sup>91</sup> The cable operators countered by claiming that current arbitration of the fee schedule would be extremely unfair since all of the data essential to formulating a fair fee schedule was not yet available. They pointed out that cable systems had not in the past made great inroads into the largest television markets and, therefore, fees es-

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<sup>90</sup> *Hearings, supra* note 2.

<sup>91</sup> *Id.* at 279, 297-98, 380.

tablished on the basis of current data, collected primarily from rural areas, would be grossly unfair.<sup>92</sup>

In fact, the subcommittee's examination of various witnesses indicates that there was little basis for the fee schedule proposed in S. 1361.<sup>93</sup> Thus, it would be unwise to enact the bill until more reliable evidence can be found to support a fair fee schedule. The findings of the two studies introduced during the hearings were exactly opposite, and thus, are of very little value in formulating an equitable fee schedule.

The most reasonable approach would be that suggested in the Consensus Agreement: appoint an independent body to formulate a fair schedule. Such an independent body could consider the existing data as well as make reasonable estimates of the projected successes and expenses of cable systems in urban areas. The result would be a much fairer schedule than one formulated on the basis of either existing data or no data. Since any fee schedule will be subject to revision every five years, the economic effects of new developments in the industry will continually be incorporated into the new fee schedule.<sup>94</sup>

## V. CONCLUSION

As evidenced by the cable television dispute, the Copyright Act of 1909 does not adequately protect copyright owners in our modern society. Copyrighted material is being used without the payment of royalties. Moreover, since the courts were attempting to interpret an imprecise and outdated law, no logical pattern could be discerned from their decisions. The FCC had little choice but to intervene on behalf of copyright holders and broadcasters, with the result that the FCC regulations are much stricter than would be necessary under the proposed legislation. In order to remedy this situation legislation similar to S. 1361 should be enacted. Such legislation would allow copyright holders to collect the royalties rightfully due for the use of their work, and would remove the doubts currently plaguing cable television system operators as to proper royalty fees. Finally, such legislation would allow the FCC to reconsider the regulations currently restricting the realization of the full potential of cable television in our society.

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<sup>92</sup> *Id.* at 398-99.

<sup>93</sup> *Id.* at 283-84, 409.

<sup>94</sup> S. 1361, *supra* note 3, § 802.