
The Copyright Status of Imported Television Signals for Cable Television - Teleprompter Corp. v. CBS, Inc.

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NOTES

THE COPYRIGHT STATUS OF IMPORTED TELEVISION SIGNALS FOR CABLE TELEVISION—TELEPROMPTER CORP. *v.* CBS, INC.

INTRODUCTION

Cable television (CATV)¹ effectively eliminates many technological problems encountered by over-the-air broadcasting.² First, through the use of a coaxial cable,³ CATV systems extend the distance over which television broadcast signals can be received.⁴ Secondly, because cable

1. The Federal Communications Commission defines community antenna television as follows:

Any facility that, in whole or in part, receives directly, or indirectly over the air, and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television or radio stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such term shall not include (1) any such facility that serves fewer than 50 subscribers, or (2) any such facility that serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house.

47 C.F.R. § 76.5(a) (1973).

2. The VHF band consists of twelve channels that comprise the bulk of American viewing. Because adjacent VHF channels in the same broadcast area interfere with each other, an outdoor antenna can at best receive seven television channels—of varying quality. Cable television is not limited by interferences in the spectrum because the television signals CATV transmits are confined within a cable—not spread outward into the air. Consequently, cable systems can carry far more television channels. B. MADDOX, *BEYOND BABEL* 148-50 (1972).

3. A coaxial cable is a

[c]opper or copper sheathed aluminum wire surrounded by an insulating layer of polyethylene foam. The insulating layer is covered with tubular shielding composed of tiny strands of braided copper wire or a seamless aluminum sheath and a protective outer skin. The wire and the shielding react electronically with each other and set up an electromagnetic field between them. This field reduces frequency loss and thus gives cable its great signal carrying capacity.

CABLE TELEVISION IN THE CITIES 102 (C. Tate ed. 1971).

4. For a detailed explanation of the technological distinction between over-the-wire broadcasting and CATV, see *ON THE CABLE, THE TELEVISION OF ABUNDANCE*, REPORT OF THE SLOAN COMMISSION ON CABLE COMMUNICATIONS 11-22 (1971).

television is not confined by the limited scope of the electromagnetic spectrum, it provides greater channel availability to viewers.⁵ The growth of cable television,⁶ and its intrusion into the television broadcasting field, has presented questions concerning infringement of copyrighted programs.⁷

Cable and broadcasting interests are battling over the copyright status of programs imported by cable systems. The copyright question is especially acute because the slowly emerging cable industry threatens established broadcasting interests. Potential loss of profits and audience viewing prompted the attempt by the broadcasting industry to keep cable from penetrating its already existing markets.⁸

The most recent confrontation has culminated in an action brought by Columbia Broadcasting System against Teleprompter Corp.⁹ for copyright infringement. In *Columbia Broadcasting System, Inc. v. Teleprompter Corp.*,¹⁰ Columbia Broadcasting System alleged that Teleprompter Corp. intercepted signals of their stations' copyrighted works at five separate locations,¹¹ transmitted the programs to cable subscribers without authorization or license, thereby infringing CBS's copyrights. The United States

5. *Id.*

6. Since 1968, CATV subscriber figures have grown from 2.8 million homes to more than 7 million homes. TELEVISION DIGEST, Apr. 23, 1973, at 5.

7. *Uncertainty Still Clouds the Outlook for Cable*, BROADCASTING, Feb. 26, 1973, at 58-61.

8. For an insight into the respective views of the broadcasting and cable industries see *Hearings on S. 1361 Before the Subcom. on Patents, Trademarks, and Copyrights of the Judiciary*, 93d Cong., 1st Sess. 277 (1973) [hereinafter cited as *Hearings on S. 1361*].

9. Teleprompter Corp., is the largest operator of community antenna television (CATV) systems in the United States, owning or having substantial interests in about 140 cable systems in 33 states and two Canadian provinces. As of December 13, 1973 the number of subscribers totaled 942,000. . . . CATV systems pick up and amplify television signals and distribute them by cable to individual subscribers. . . . Subscribers pay a fixed monthly service charge ranging from \$4 to \$8 and averaging \$5.

STANDARD & POOR'S CORP., STANDARD N.Y.S.E. STOCK REPORTS, Jan. 9, 1974, at 2197.

10. 355 F. Supp. 618 (S.D.N.Y. 1972).

11. The parties agreed that the alleged infringements were typified by the nature and extent of the activities at the following five locations: Elmira, N.Y.; Framington, N.M.; Great Falls, Mont.; New York, N.Y.; and Rawlins, Wyo. *Id.* at 619. All of the five systems had similar operations, except for the New York City system which did not import distant signals. Because of that factor, the appellate court found no copyright infringement for the New York City System. See note 16 *infra*. For a detailed explanation of the operations of the five cable systems see *Columbia Broadcasting Sys., Inc. v. Teleprompter Corp.*, 476 F.2d 338, 343-45 (2d Cir. 1973).

District Court for the Southern District of New York, found no copyright infringement and dismissed the action.¹²

The copyright owners appealed and the Second Circuit Court of Appeals held that the use of the following services did not render CATV systems "performers" for copyright purposes: (1) origination of programming,¹³ (2) the sale of commercial time on non-broadcast channels,¹⁴ and (3) interconnection of CATV systems for the distribution of originated programming.¹⁵ However, the court held that the transmission of signals beyond the range of local antennae was functionally equivalent to broadcasting, or "performing" the distributed works.¹⁶

The United States Supreme Court affirmed the decision of the appellate court with respect to program origination, sale of commercials, and interconnection of CATV systems,¹⁷ but rejected the lower court's imposition of copyright liability on imported programming.¹⁸

The essential issue of the case was whether CATV merely enhanced a viewer's capacity to receive signals, or through the use of additional services,¹⁹ so changed the very nature of the transmissions of CATV, as to render CATV's functions equivalent to that of a broadcaster who "per-

12. *Columbia Broadcasting Sys., Inc. v. Teleprompter Corp.*, 355 F. Supp. 618 (S.D.N.Y. 1972).

13. Program origination or cablecasting is defined by the FCC as "[p]rogramming (exclusive of broadcast signals) carried on a cable television system over one or more channels and subject to the exclusive control of the cable operator." 47 C.F.R. § 76.5(w) (1973).

14. A non-broadcast channel is one that transmits a cable system's own original programming rather than programs received from other broadcast stations. *Columbia Broadcasting Sys., Inc. v. Teleprompter Corp.*, 476 F.2d 338, 344 n.10 (2d Cir. 1973).

15. 476 F.2d at 347-48. Program origination, sale of commercial time, and interconnection of cable systems was a case of first impression for the Second Circuit Court of Appeals. *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, permitted the importation of distant signals for the cable communities of Clarksburg and Fairmont, West Virginia. However, the *Fortnightly* Court confined their holding to the specific facts of that case. *Fortnightly* dealt solely with cable systems importing signals from limited ranges (i.e., the distances ranged from 52 to 82 miles). 392 U.S. at 392. The Court did not consider the effect of copyright liability for cable systems performing other functions such as program origination, etc. 392 U.S. at 392 n.6, 399 n.25. See 476 F.2d at 346-47 for the appellate court's interpretation of *Fortnightly*.

16. *Id.* at 349.

17. *Teleprompter Corp. v. Columbia Broadcasting Sys., Inc.*, 94 S. Ct. 1129, 1136-37 (1974).

18. *Id.* at 1137-41.

19. The additional services included program origination, sale of commercial time, and interconnection of cable systems. *Id.* at 1136.

forms" the programs transmitted.²⁰ The difference is crucial. Cable systems treated as "viewers" are not subject to copyright liability; those classified as "performers" are.²¹

This Note will examine the effect of allowing cable systems to freely import²² television signals. In addition, FCC requirements for the importation of distant signals and the overall impact of the Supreme Court's decision on the CATV industry will be discussed.

THE TELEPROMPTER CASE

The Second Circuit Court of Appeals held that "when a CATV system imports distant signals . . . there is . . . no reason to treat it differently from any other person who, without license, displays a copyrighted work to an audience who would not otherwise receive it."²³ The Copyright Act²⁴ affords the holder of the copyright the exclusive right to perform the protected work.²⁵ The question then becomes whether Teleprompter

20. *Id.* at 1135-36.

21. The question of whether CATV systems "perform" the programs they carry was discussed at length in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968). In *Fortnightly*, CATV was analogized to a passive beneficiary of the television broadcast signals they received and transmitted to subscribers. *Id.* at 399. See also *Buck v. Debaum*, 40 F.2d 734 (S.D. Cal. 1929). Cf. *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931). The *Jewell-LaSalle* case held a hotel owner liable for the infringement of a copyrighted song because he transmitted the song, without license, to guests in public and private rooms in the hotel. In *Society of European Stage Authors & Composers v. New York Hotel Statler Co.*, 19 F. Supp. 1 (S.D.N.Y. 1937), the radio performance in a hotel room of a copyrighted work constituted a public performance. However, the *Fortnightly* Court rejected the *Jewell-LaSalle* holding as being applicable to CATV. 392 U.S. at 396 n.18. In *Jewell-LaSalle* the original broadcast was unauthorized, unlike the television programs transmitted in *Fortnightly*.

22. There is no precise judicial definition of a distant (or imported) signal. 476 F.2d at 350. Within the context of this note, a distant signal is any signal that originates at a point too far away to be picked up by an ordinary receiving antenna, unless otherwise indicated. CABLE TELEVISION IN THE CITIES, *supra* note 3.

23. 476 F.2d at 350.

24. 17 U.S.C. §§ 1 *et seq.* (1970).

25. 17 U.S.C. §§ 1(c), (d) (1970). Section 1(c) provides the copyright owner of a nondramatic literary work the exclusive right "to play or perform [the work] in public for profit, and to exhibit, represent, produce, or reproduce it in any manner or by any method whatsoever." Section 1(d) affords the copyright owner of a dramatic work the exclusive right "to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever." Note that the performance of a dramatic work must only be public, not necessarily for profit, as contrasted with a nondramatic work which must be presented for profit. A performance is public even if it is heard by a person in a private residence. *Jerome H. Remick & Co. v. American Auto Accessories Co.*, 5 F.2d 411 (6th Cir.), *cert. denied*, 269 U.S. 556 (1925). It is not necessary that profit actually accrues, for a

infringed CBS's copyrights by "performing" the works through the distribution of imported programs to its subscribers.

Because the Copyright Act of 1909 has never been amended to include copyright standards applicable to broadcast communications, the courts have devised their own interpretation of the Act in determining guidelines for copyright liability.²⁶ The appellate court looked to the rationale in *Fortnightly Corp. v. United Artists Television, Inc.*²⁷ as a starting point for their analysis of copyright infringement claims. *Fortnightly* set forth the distinction between "viewers" and "performers":

Broadcasters perform. Viewers do not perform. Thus, while both broadcaster and viewer play crucial roles in the total television process, a line is drawn between them. One is treated as active performer; the other, as passive beneficiary.

When CATV is considered in this framework, we conclude that it falls on the viewer's side of the line. Essentially, a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals; it provides a well-located antenna with an efficient connection to the viewer's television set.²⁸

The appellate court in *Teleprompter* refused to extend the *Fortnightly* doctrine to the facts in the instant case. They concluded that because the cable systems used in *Teleprompter* brought in signals from "beyond the range of local antennas,"²⁹ they no longer functioned as a "viewer" within the definition of *Fortnightly*.³⁰

This determination was derived, in part, from the concept handed down in *United States v. Southwestern Cable Co.*,³¹ decided one week prior to *Fortnightly*. *Southwestern* held that cable systems perform either of two separate functions: "they . . . supplement broadcasting by facilitating satisfactory reception of local stations in adjacent areas in which such reception would not otherwise be possible; [or] second, they . . . transmit to subscribers the signals of distant stations entirely beyond the range of local antennas."³²

performance to be "for profit." In *Herbert v. Shanely Co.*, 242 U.S. 591 (1917), defendant-restaurant was held liable for copyright infringement when an orchestra it hired performed a copyrighted song without authorization.

26. Comment, *The Copyright Law and Its Relevance to CATV: Can an Old Dog Be Taught New Tricks*, 19 BUFF. L. REV. 65 (1969).

27. 392 U.S. 390 (1968).

28. *Id.* at 398-99 (footnotes omitted).

29. 476 F.2d at 349.

30. *Id.* at 350.

31. 392 U.S. 157 (1968).

32. *Id.* at 163.

The court of appeals concluded that when a cable system transmitted distant signals to subscribers their operations were no longer analogous to a technically improved antenna designed to facilitate local viewing. The use of distant signals fell within the second function of cable television, advanced in *Southwestern*, thereby transforming the system into a "performer" of the programs imported and distributed to subscribers.³³

The appellate court held that a signal must be capable of reception within the immediate vicinity of the cable community (*i.e.*, it must be received off the air, by an antenna situated in or adjacent to the cable community, without the use of relay or retransmittal³⁴ devices) or it will be subject to copyright infringement liability.³⁵ Furthermore, the court stated that when a signal is received on an antenna in or near the community in which it originated and is subsequently transported by microwave links³⁶ to the receiving cable community, a heavy presumption arises that the signal is distant. Similarly, if an antenna or receiving device is situated between the originating community and the cable community, the signal transmitted is considered distant unless evidence is shown to the contrary.³⁷ The presumption can be rebutted, for example, by evidence indicating that the nature of the topography makes it more advantageous for reception to situate the antenna at a higher point outside of the community.³⁸

The Supreme Court found that the appellate court had misconstrued the holding in *Fortnightly*.³⁹ The Court held that the "reception and re-channeling of . . . signals for simultaneous viewing is essentially a viewer function, irrespective of the distance between the broadcasting station and

33. 476 F.2d at 349. The court of appeals distinguished *Teleprompter* from *Fortnightly* on the grounds that the television signals in *Fortnightly* were already receivable within the cable community.

34. 47 C.F.R. § 74.784 (1973).

35. 476 F.2d at 351.

36. Microwave is "a method of transmitting closed circuit television signals through the air on a highly directional, line-of-sight system from the originating station to one or more receiving stations." CABLE TELEVISION IN THE CITIES, *supra* note 3, at 103. The court of appeals held that the use of microwave links in the transmission of television signals in and of itself did not constitute copyright infringement. Only when microwave was used to import distant signals did copyright liability attach. 476 F.2d at 353.

37. 476 F.2d at 351-52.

38. Television waves travel in straight lines and are therefore limited by the earth's curved surface. Consequently, television signals can at best reach distances of sixty to one hundred miles. In certain areas the location of a receiving antenna at high altitudes facilitates the reception of signals ordinarily blocked by topographical interference. 94 S. Ct. at 1134.

39. *Id.* at 1137.

the ultimate viewer."⁴⁰ Thus, a cable system is not engaged in a separate function when it transmits signals to subscribers beyond the range of local antennae.⁴¹

The Court further stated that the *Southwestern* definition of the two distinct functions of CATV systems was wrongly interpreted by the reviewing court to mean that any cable system importing distant signals is thereby subject to copyright liability. The Court concluded that the language in *Southwestern* provided no more than a descriptive analysis of cable operations and their relationship to FCC regulatory authority.⁴² "In that context it did not and could not purport to create any separation of functions with significance for copyright purposes."⁴³

As a result of the Court's findings, cable systems importing distant signals may now do so without losing their status as non-broadcasters.⁴⁴ The Supreme Court in *Teleprompter* upheld the distinction between broadcaster and viewer as set forth in *Fortnightly*, which was based on the principle that because CATV systems carry rather than select the programs transmitted, their role is one of viewer, not performer. By virtue of the fact that cable systems do not "perform" the programs carried, they do not infringe the program owners' copyrights.⁴⁵

Broadcasters contend that cable operators have a choice in selecting the programs carried to subscribers. The Court, however, distinguished the "rechanneling" of programs by cable operators, and the actual creative selection of programs by broadcasters.

[A] CATV system importing 'distant' signals does not procure programs and propagate them to the public, since it is not engaged in converting the sights and sounds of an event or a program into electronic signals available to the public. The electronic signals it receives and rechannels have already been 'released to the public' even though they may not be normally available to the specific segment of the public served by the CATV system.⁴⁶

ROLE OF THE FCC

Although cable systems are not considered "performers" for copyright

40. *Id.* at 1138.

41. *Id.*

42. *Southwestern Cable* upheld FCC regulatory authority over CATV with respect to matters "reasonable ancillary" for effective FCC performance. 392 U.S. at 178.

43. 94 S. Ct. at 1137.

44. *Id.* at 1138.

45. *Id.*

46. *Id.* at 1139.

purposes of the distant programs carried, they are not totally free to import any programs they choose. FCC regulations for cable television require the carriage of certain signals deemed as local, and limit the importation of distant signals by most cable communities.⁴⁷ "Local" signals that cable systems must carry in compliance with FCC regulations comprise: signals within a thirty-five mile radius of the cable community;⁴⁸ signals that meet FCC significant viewing requirements;⁴⁹ and signals in hyphenated market areas.⁵⁰ All signals not defined as "local" are "distant."⁵¹

Cable systems are allowed to import distant signals in order to supply full network coverage to subscribers;⁵² network stations may also be added as a means of substituted programming;⁵³ and independent stations may be imported under certain circumstances.⁵⁴ In addition, cable sys-

47. 47 C.F.R. §§ 76.51-65 (1973).

48. The thirty-five mile zone is measured from a designated reference point in the community in which the television station is licensed or authorized by the FCC. 47 C.F.R. § 76.5(f) (1973). Reference points are listed in 47 C.F.R. § 76.53 (1973). If a station's reference points are not given, the geographic coordinates of the main post office are used. 47 C.F.R. § 76.53 (1973).

49. Significantly viewed stations are those

[v]iewed in other than cable television households as follows: (1) For a full or partial network station—a share of viewing hours of at least 3 percent (total week hours), and a net weekly circulation of at least 25 percent; and (2) for an independent station—a share of viewing hours of at least 2 percent (total week hours), and a net weekly circulation of at least 5 percent. . . .

47 C.F.R. § 76.5(k) (1973).

50. FCC regulations limit the amount of imported signals carried in each market area according to the size of the respective market. Market areas do not conform to municipal boundaries, but are based on such factors as population distribution and the terrain of the market areas involved. *E.g.*, the largest market is New York, N.Y.-Linden-Paterson, N.J. The 49th is Wilkes Barre-Scranton, Pa. 47 C.F.R. § 76.51 (1973). *See also* 37 Fed. Reg. 3264 (1972).

51. *Cable Television Service*, 37 Fed. Reg. 3251, 3263 (1972). In some instances Grade B signals are treated as local. *See, e.g.*, 47 C.F.R. § 76.61(a)(2) (1973). Grade B signals are those signals capable of reception at least 90 percent of the time at 50 percent of specified receiving locations. Sixth Report and Order, 17 Fed. Reg. 3905 (1952).

52. A full network station is defined as

[a] commercial television broadcast station that generally carries in weekly prime time hours 85 percent of the hours of programming offered by one of the three major national television networks with which it has a primary affiliation (i.e., right of first refusal or first call).

47 C.F.R. § 76.5(1) (1973).

53. *Id.* at § 76.61(e)(2).

54. An independent station is a "[c]ommercial television broadcast station that generally carries in prime time not more than 10 hours of programming per week offered by the three major national television networks." 47 C.F.R. § 76.5(n) (1973).

tems are allowed to import a restricted number of distant signals, depending upon the market size of the community in which the system is located.⁵⁵ Larger market areas are afforded more protection because in such localities the competition between cable and broadcasting interests is greater. Hence, systems located in the top fifty market areas are permitted to import fewer distant signals than smaller market areas.⁵⁶

The FCC, in implementing signal carriage requirements, stated that their objective was to get cable "moving" in order for the public to receive its benefits without jeopardizing the over-the-air broadcasting industry.⁵⁷ Furthermore, the FCC set up program exclusivity rules to protect broadcasters from the potentially harmful impact of distant signal carriage.⁵⁸

Broadcasters maintain that if CATV is not subjected to copyright liability, the structure on which copyright protection for television is based would be threatened.⁵⁹ They rely on the fact that a station's source of revenue is derived primarily from advertiser's commercials that are inserted during breaks in programming. A station pays the copyright owner a fee in order to broadcast his copyrighted programs. This fee is dependent on the amount paid by advertisers, which in turn reflects the size of the viewing audience.⁶⁰

Broadcasters argue that if an increase in market size is allowed through CATV services without copyright restriction, the copyright owners will suffer a loss in revenues when their programs are resold in different market areas. They maintain that their potential audience size will be reduced in such "captive" market areas by the intrusion of cable.⁶¹

55. Cable communities are divided into various market sizes; television carriage rules are dependent on the size of the respective market areas. Market areas are largely derived from rankings of the American Research Bureau (ARB). The ARB rankings reflect actual prime time audience viewing (usually 6-11 p.m.), as opposed to Net Weekly Circulation (NWC), which is a measure of a station's potential audience. 37 Fed. Reg. 3262 (1972). Markets are described as follows (1) systems located in the first fifty major markets, (2) systems located in the second fifty major markets, (3) systems located in smaller television markets, and (4) systems located outside all television markets. 47 C.F.R. § 76.57-.63 (1973).

56. 37 Fed. Reg. 3261 (1972).

57. *Id.* at 3259.

58. Program exclusivity rules are designed to protect local broadcasters while insuring the continued supply of television programming. 47 C.F.R. § 76.91-.159 (1973).

59. Brief for Motion Picture Assoc. of America, Inc. as Amicus Curiae at 45, Columbia Broadcasting Sys., Inc. v. Teleprompter Corp. 476 F.2d 338 (2d Cir. 1973).

60. 94 S. Ct. at 1139.

61. *Id.* For an excellent discussion of how television time is sold to advertisers see M. Mayer, *The Mystical Business of Selling Time*, in ABOUT TELEVISION (1972).

The FCC provides for the protection of local broadcasters by virtue of program exclusivity rules, designed to restrict distant signal carriage of syndicated programs under exclusive contract to licensed stations in designated markets.⁶² In taking a "conservative [and] pragmatic"⁶³ approach the Commission stated that the provisions for limited importation of distant signals and program exclusivity are "designed both to protect local broadcasters and to insure the continued supply of television programming As with the basic signal carriage rules the type of exclusivity incorporated into the rules vary according to market size."⁶⁴

While the Commission recognizes that some stations may suffer economically because of cable's penetration into their market areas, they contend that it would be "wholly wrong to halt cable development on the basis of conjecture" ⁶⁵ Instead, the FCC has provided special relief for stations that suffer through the impact of cable.⁶⁶ Such relief might take the form of increased non-network programming, or the reduction of distant signals allowed imported into the cable community.⁶⁷

Cable interests respond that because broadcast programming can reach a wider audience through cable operations, broadcasters use this increased audience coverage to sell their programming at higher prices.⁶⁸ They contend that advertisers pay higher prices for network time as the size of the audience increases. Both major rating services used in determining audience viewing include CATV subscribers in their compilation of audience measurement. Many broadcasting stations thereby benefit from cable in the sale of commercial time to advertisers.⁶⁹ The FCC

62. The following is an example of how program exclusivity operates: cable systems in the top fifty markets must refrain from carrying syndicated programming (i.e., programming distributed in more than one television market in the United States) on distant signals for a period of one year in the market area where the program is first sold. If a program is under exclusive contract to a station in a designated market, cable systems must refrain from importing that program for the term of the contract. 47 C.F.R. § 76.151 (1973).

63. 37 Fed. Reg. 3261 (1972).

64. *Id.*

65. *Id.*

66. 47 C.F.R. § 76.7 (1973).

67. 37 Fed. Reg. 3261 (1972).

68. Petitioner's Brief for Certiorari at 39-40, *Teleprompter Corp. v. Columbia Broadcasting Sys., Inc.*, 94 S. Ct. 1129 (1974).

69. The Supreme Court acknowledged testimony indicating that major rating services do include CATV subscribers in their total compilation of television viewers. However, the weight of such evidence was not established. 94 S. Ct. at 1140 n.14. See Note, *CATV and Copyright Liability*, 80 HARV. L. REV. 1514, 1522-25 (1967) for a defense of a cable operator's right to transmit imported signals. "A copyright holder does not invariably have a claim to royalties whenever others de-

agrees that this is a "benefit to broadcasters whose stations will have a more salable commodity to advertisers."⁷⁰

CATV operators argue further that the restriction of the use of imported programs defeats the very purpose of cable television. Cable originally began operating in areas unable to receive adequate television reception because of rural location or topographical interferences.⁷¹ CATV solved the over-the-air broadcasting problem by amplifying and distributing signals to subscribers through a coaxial cable. Cable can thereby extend the range of a broadcast signal to communities with little or no television reception.⁷²

When cable first began operating, broadcasters were pleased to have their programs reach wider audiences. It was only when cable started competing with broadcasters in larger market areas that the attempt to restrict CATV began.⁷³ Broadcasters' concerns are twofold. First, many broadcasters own copyrighted programming that is picked up at no cost by CATV systems and sold to cable subscribers. Second, CATV systems compete directly with broadcasting stations for audience viewing and advertising revenues.⁷⁴

Broadcasters are disturbed that the use of their programs without copyright protection will have a deleterious impact on the "economics and market structure of copyright licensing."⁷⁵ However, despite such arguments against the free use of copyrighted programs, the Court in *Fortnightly* held that CATV systems supplying programming to viewers unable to receive broadcast stations by ordinary rooftop antennas did not violate copyright laws.⁷⁶

rive benefits from his property. . . . The doctrine of fair use allows persons to use copyrighted materials for various purposes as long as there is not wholesale appropriation." 80 HARV. L. REV. at 1525.

70. Memorandum Opinion and Order, 36 F.C.C.2d 326, 332 (1972).

71. Historically, cable systems were used to supply television service to areas that could not receive adequate reception because of topographical interferences. *Hearings Before the Subcommittees on the Revision of the Copyright Law of the House Committee on the Judiciary*, 89th Cong., 1st Sess., ser. 8, pt. 2, at 1225 (1965). J. Watson is said to have developed the first commercial CATV system, in Mayhony City, Pa. Ed Parsons claims the same title for his cable system developed in 1949 in Astoria, Oregon. However, the real credit goes to Robert Tarlton of Panther Valley Television Co. and Milton Jerrold Shapp, founder of Jerrold Electronics Corp. In 1949 Jerrold demonstrated the first master antenna system at the National Electronics Assoc. M. PHILLIPS, CATV: A HISTORY OF COMMUNITY ANTENNA TELEVISION 7-39 (1972).

72. Note, *supra* note 69.

73. M. Mayer, ABOUT TELEVISION 354 (1972).

74. *Hearings on S. 1361*, *supra* note 8, at 377.

75. 94 S. Ct. at 1139.

76. *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968).

The *Fortnightly* Court observed that the functions of CATV and broadcast systems have little in common.⁷⁷ The majority cited *Intermountain Broadcasting and Television Corp. v. Idaho Microwave, Inc.*,⁷⁸ stating:

[Broadcasters] are in the business of selling their broadcasting time and facilities to the sponsors to whom they look for their profits. They do not and cannot charge the public for their broadcasts which are beamed directly, indiscriminately and without charge through the air to any and all reception sets of the public as may be equipped to receive them.

[CATV systems], on the other hand, have nothing to do with sponsors, program content or arrangement. They sell community antenna service to a segment of the public for which [broadcasters'] programs were intended but which is not able, because of location or topographical condition, to receive them without rebroadcast or other relay service by community antennae⁷⁹

The *Teleprompter* Court extended the rationale in *Fortnightly*. They found that an adverse economic impact due to the dilution of market size by cable penetrations, if any, was of no direct economic or copyright significance.⁸⁰ Extending the range over which a signal can be received does not interfere with the copyright holders' compensation for the programs transmitted.

When a broadcaster transmits a program under license from the copyright holder it has no control over the segment of the population which may view the program . . . he gets paid by advertisers on the basis of all viewers who watch the program. The use of CATV does not significantly alter this situation. Instead of basing advertising fees on the number of viewers within the range of direct transmission plus those who may receive 'local signals' via a CATV system, broadcasters whose reception ranges have been extended by means of 'distant signal' CATV rechanneling will merely have a different and larger viewer market.⁸¹

The Supreme Court's decision unraveled many of the conflicting standards that would have faced cable operators had the appellate court's decision been upheld. The court of appeals and the FCC's definition of imported signals for copyright status were conflicting.⁸² The appellate

77. *Id.* at 400.

78. 196 F. Supp. 315, 325 (D. Idaho 1961).

79. 392 U.S. at 400 n.28.

80. 94 S. Ct. at 1139.

81. *Id.* at 1140.

82. *Compare* Columbia Broadcasting Sys., Inc. v. Teleprompter Corp., 476 F.2d 338, with 47 C.F.R. 76.55-63 (1973). Signals considered "local" by FCC standards, do not necessarily fall within the guidelines set by the Second Circuit Court of Appeals. The FCC and the appellate court arrived at two different definitions for the term, "distant signal." Had the appellate court not been reversed, cable systems would have been faced with the dilemma of which standard to adhere to.

court reasoned that FCC classification of "distant" and "local" signals for purposes of signal carriage requirements was unsuited to copyright purposes.⁸³ The court of appeals then implemented their own definition of distant signals based on the ability of a cable system to receive signals on an antenna located in or adjacent to the cable community.⁸⁴ If the decision of the lower court had been affirmed with respect to distant signal importation, many cable systems would have been required to carry programs in compliance with FCC regulations that would have violated the copyright standards set forth by the lower court.⁸⁵

The appellate court obscured the exact point when a cable system changed from "viewer" to "performer"; they established a heavy burden of proving what is and what is not a distant signal. Cases with similar factual situations might have produced different results because of the location of a cable system's receiving antenna.⁸⁶

CONCLUSION

The Supreme Court lacked recently enacted copyright legislation to aid it in its decision.⁸⁷ Congressional resolution of the copyright problem has been sought since 1965, but the adoption of needed legislation may not take place for years.⁸⁸ The most recent proposal, introduced March 26, 1973, is contained in Section 111 of Senate Bill 1361.⁸⁹ Section 111 (d)(2)(B) of the proposed Bill sets forth a royalty fee schedule based on the percentage of gross receipts derived from cable subscribers over a specified period of time, establishing fees to be paid by CATV systems for the use of copyrighted programs. Upon payment of a fee, a cable

83. 476 F.2d at 350.

84. *Id.* at 351.

85. The conflicting standards are exemplified by the following: FCC regulations provide for the importation of two distant signals by cable systems in the top fifty market areas. 47 C.F.R. § 76.61(c) (1973). This would clearly amount to copyright infringement under the appellate court's standards. Moreover, under FCC regulations a cable system is allowed to carry a minimum number of network and independent stations to fulfill adequate service requirements. The regulations afford full television service to viewers in isolated communities. The number of signals carried is dependent upon the size of the market area involved. 47 C.F.R. 76.61(b) (1973). If the court of appeal's decision had been upheld many rural areas without full network viewing would be denied such service.

86. 476 F.2d 351-52.

87. Nimmer, *Copyright Publication*, 56 COLUM. L. REV. 185 (1956).

88. See *Hearings on H.R. 4347 Before Subcomm. No. 3 of the House Comm. of the Judiciary, 89th Cong., 1st Sess.* 1313-14 (1965). Proposed bills for copyright amendment have continually been defeated. See 117 CONG. REC. 2001 (1971) (remarks of Senator McLellan).

89. *Hearings on S. 1361, supra* note 8.

system would obtain a compulsory license for the use of a station's copyrighted programs.⁹⁰ The programs licensed to be carried would be limited to the distant signals defined and authorized under FCC regulations.⁹¹ Generally included would be the importation of two distant signals into the thirty-five mile zones of larger market areas, along with distant signal importation which would supply adequate program service to those areas that do not receive full programming. The retransmission of distant signals beyond the compulsory licensed area would be subject to full copyright protection.⁹²

It has been stated that the use of broadcast signals by cable television systems often amounts to piracy. As Justice Douglas argued in his dissenting opinion, when a cable system brings in signals from hundreds of miles away, that system is no longer operating as a simple receiving device.⁹³ However, had the Supreme Court upheld copyright liability of distant signals the economic effect on the cable industry would have been disastrous.⁹⁴

Approximately 650 CATV systems with an estimated 2.3 million subscribers receive some form of distant signal programming. About one half of these systems supply full network coverage to their subscribers through the use of distant signals.⁹⁵ If the appellate court's copyright

90. Section 111(d)(2)(B) reads as follows:

A total royalty fee . . . [is] computed on the basis of specified percentages of the gross receipts from subscribers to the cable service during said period, as follows:

- (i) 1 percent of any gross receipts up to \$40,000;
- (ii) 2 percent of any gross receipts totalling more than \$40,000 but not more than \$80,000;
- (iii) 3 percent of any gross receipts totalling more than \$80,000 but not more than \$120,000;
- (iv) 4 percent of any gross receipts totalling more than \$120,000 but not more than \$160,000 and
- (v) 5 percent of any gross receipts totalling more than \$160,000.

Hearings on S. 1361, supra note 8, at 19.

91. *Id.* Section 111(c).

92. *Id.*

93. 94 S. Ct. at 1143.

94. It would cost each CATV owner at least \$33,000 a year in administrative expenses to properly clear copyrighted materials. This sum is equivalent to the annual revenue derived from 550 subscribers. Copyright fees would be an additional expense. Educational broadcasters currently pay copyright fees of about \$150 for local distribution of a one-act play and about \$5,500 for use of a still photograph. Commercial users, however, face higher fees.

M. SEIDEN, *CABLE TELEVISION U.S.A.* 111 (1972). Moreover, copyright owners are so numerous that it would be almost impossible to find and identify the rightful owners. Needless to say the cost of doing so would be exorbitant. *Id.* at 110.

95. *TELEVISION FACTBOOK, Services Volume*, No. 42, 1972-73 ed., at 75(a),

standard had been applied to these systems, the potential statutory damages payable by cable owners would have been more than two million dollars per year for each channel on which signals were transmitted.⁹⁶ In effect, this would cripple cable development.⁹⁷

Retroactive liability payments for copyright infringement would unfairly hinder CATV growth. What is needed now, as protection for broadcasting interests, is the implementation of new copyright laws that would provide a workable compromise for both cable and broadcasting industries.⁹⁸ Although the FCC limits signal importation in most areas,⁹⁹ there are still certain communities that can freely import signals without restriction.¹⁰⁰

Hopefully, the Supreme Court's decision will speed up the passage of needed copyright legislation. While the dispute over reasonable royalty fees has impaired its passage, the Court's decision should place the CATV industry in a strong bargaining position.¹⁰¹

The Court, in refusing to hold distant signals as copyrightable, has left the only alternative for copyright reform in the hands of the legislature.¹⁰²

363(a). See also Cambridge Research Institute for the American Society for the Information of Science, *OMNIBUS COPYRIGHT REVISION—COMPARATIVE ANALYSIS OF THE ISSUES* 51 (1973). [Hereinafter cited as *OMNIBUS COPYRIGHT REVISION*].

96. The Copyright Act, 17 U.S.C. § 101(b) (1970), establishes a statutory minimum of \$250 per copyright infringement. At the time of the court of appeals decision enormous potential damages threatened an estimated 650 systems that received some form of distant signal carriage. Petitioner's Brief for Certiorari at 44, *Teleprompter Corp. v. Columbia Broadcasting Sys., Inc.*, 94 S. Ct. 1129 (1974).

97. *OMNIBUS COPYRIGHT REVISION* *supra* note 95, at 51.

98. For an insight into the importance of copyright legislation see Note, *supra* note 69. Also see M. Price & J. Wicklein, *CABLE TELEVISION* 92-94 (1972) for a discussion of the competing interests for copyright amendment.

99. The FCC has the authority to regulate television markets because of the scarcity of spectrum availability. The Communications Act of 1934, §§ 303(c)(d)(h) provides for the FCC to "[a]ssign frequencies for each individual station," "determine the power which each station shall use," "[d]etermine the location of . . . individual stations," and "[h]ave authority to establish areas or zones to be served by any station." 47 U.S.C. §§ 303(c)(d)(h) (1970). In addition, the FCC has been granted full control over cable television. In 1966 the FCC stated that its statutory powers included authority to regulate CATV operations. Second Report and Order, 2 F.C.C.2d 725 (1966). In *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972), the Supreme Court upheld the FCC's authority to regulate CATV within reasonable ancillary limits. For an excellent discussion of the history of FCC control over cable television see Note, *United States v. Midwest Video Corp.—Cable Television and the Program Origination Rule*, 22 DEPAUL L. REV. 461 (1972).

100. 47 C.F.R. § 76.57(b) (1973).

101. *The Wall Street Journal*, Mar. 5, 1974, at 4, col. 2 (Midwest ed.).

102. 94 S. Ct. at 1141.

As cited in Justice Douglas' dissent, Chief Justice Burger in *United States v. Midwest Video Corp.*,¹⁰³ correctly stated that, "The almost explosive development of CATV suggests the need of a comprehensive re-examination of the statutory scheme as it relates to this new development, so that the basic policies are considered by Congress and not left entirely to the Commission and the Courts."¹⁰⁴

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103. 406 U.S. 649 (1972).

104. *Id.* at 676.