1974

Copyrights: Introduction

Michael Botein
New York Law School, michael.botein@nyls.edu

VII. Copyrights

Introduction

*Michael Botein**

In 1968, the United States Supreme Court had before it two cases which largely controlled the future of cable television. *United States v. Southwestern Cable Co.*[1] was a challenge to the Federal Communications Commission's newly asserted jurisdiction over cable, while *Fortnightly Corp. v. United Artists Television, Inc.*[2] was an attempt to impose copyright liability on cable's use of broadcast television signals. To the infinite surprise of many communications lawyers, the Court found for the FCC on the issue of jurisdiction and rejected the contention that the cable industry would be subject to liability. The Court may have preferred regulation to litigation as a means of dealing with the increasingly complicated problem of intermedia and intermodal competition, and assumed—quite justifiably—that new copyright legislation would follow hard on the heels of its decision.

Even the cable industry conceded that some form of copyright payment was necessary as well as inevitable.[3] But the cable, copyright, and broadcast interests could not agree on the more complex question of "how much." Under the baleful eyes of the FCC and the Office of Telecommunications Policy, they eventually negotiated the November, 1971 "concensus agreement."[4] This not only opened the way to the FCC's adoption of new cable television rules,[5] but also committed the parties "to support separate CATV copyright legislation . . . , and to seek its early passage."[6] The new negotiations settled nothing and charges of bad faith once again flew back and forth among the parties.

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* Assistant Professor, University of Georgia Law School. B.A., 1966, Wesleyan University; J.D., 1969, Cornell University; LL.M., 1972, Columbia University.

[1] 392 U.S. 157 (1968).

[2] 392 U.S. 390 (1968).

[3] *Resolution Adopted by the Nat'l Cable Television Ass'n Bd. of Directors*, May 28, 1969. Copy on file at the *Brooklyn Law Review*.

[4] FCC Rules & Regs., 37 Fed. Reg. 3251, 3341 (1972) (rules relating to cable television service).

[5] *Id.* at 3277. These rules cover not only traditional problem areas of signal carriage, but also federal/state/local relations, access to cable television, and technical standards.

[6] *Id.* at 3341.

It was precisely this log-jam which the Second Circuit sought to break in *Columbia Broadcasting System, Inc. v. Teleprompter Corp.*[7] In holding that a cable system infringes when using "distant" broadcast television signals, the court attempted to create a judicially mandated compromise. The main problem with the court's approach was, of course, the incredible vagueness of its holding. The difficult part of attaching copyright liability to distant signals is defining the term "distant." As the Second Circuit candidly noted, "it is easier to state what is not a distant signal."[8] Moreover, the court did not attempt to dovetail its definition of a distant signal with the FCC's multiple and complicated tests.[9]

The Second Circuit probably did not intend to design an operable mechanism for settling copyright claims. There are, currently, approximately four thousand cable television systems in the United States, and most of them carry one or more distant signals. Any judicial resolution of the copyright problem would thus require adjudicating literally thousands of separate claims—a task which no court would wish upon the already overloaded federal judiciary.

Realistically, the court may have viewed its decision as a plea to the Congress and a goad to the parties. Thus, its opinion ended by noting that "[w]e hope that the Congress will in due course legislate a fuller and more flexible accommodation of competing copyright, anti-trust, and communications policy considerations . . . ."[10] The decision's sheer vagueness may have been an effective—albeit extra-judicial—tactic for encouraging meaningful negotiations; the more uncertain their positions, the more willing the parties may be to compromise. The Second Circuit attempted to throw a significant wild card into the copyright deck. Whether the court would have succeeded when so many others failed, must remain an unanswered question.[11]

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[7] 476 F.2d 338 (2d Cir. 1973).

[8] *Id.* at 351.

[9] Thus, the FCC requires carriage of a signal where, *inter alia*, a station places a Grade B contour over a cable system's community, the station is within thirty-five miles of the cable system's community, the station is "significantly viewed," or where the station operates in the same television market. FCC Telecommun. Regs., 47 C.F.R. §§ 76.57(a), .59(a), .61(a) (1972).

[10] Columbia Broadcasting Sys., Inc. v. Telprompter Corp., 476 F.2d at 354.

[11] The Supreme Court, in reversing the Second Circuit, held that the importation of distant signals did not constitute copyright infringement. Teleprompter Corp. v. Columbia Broadcasting System, Inc., 94 S. Ct. 1129, 1138 (1974).