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Michael Botein

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

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PART I
ARTICLES

1. THE NEW COPYRIGHT ACT AND CABLE TELEVISION—A SIGNAL OF CHANGE

By MICHAEL BOTEIN*

Cable television has existed for more than a generation, but only now has the cable copyright issue reached a final and legislative resolution.¹ There are at least several reasons for the delay in defining the cable-copyright interface. First, until the last decade, cable—or “community antenna television” (CATV)—was a literally low-visibility medium; it merely relayed four or five otherwise unavailable broadcast television signals to a few hundred thousand subscribers in otherwise unserved or “white” areas, and had no program origination capability.² Second, when cable eventually did become an issue, the only available forum was the Federal Communications Commission. Reasonably enough, the Commission then viewed, and to a great extent still views, cable mainly in terms of its potential impact on broadcast television’s advertising revenues, rather than in terms of compensation to copyright holders. Finally, and perhaps most important, copyright liability for cable systems has been a political issue, in the higher sense of that much-abused term, ever since the first copyright reform legislation in 1965.³ Cable, copyright and broadcast lobbying groups thus have more or less fought each other to a standstill every year in Congress—as shown by the Dickensian career of copyright reform legislation.

For a short time, it seemed as if the courts might play their traditional role of filling in the legislative interstices. In 1968, the Supreme

*Mr. Botein is an Associate Professor at Rutgers Law School, Newark. He received a J.D. in 1969 from Cornell University and an LL.M. in 1972 from Columbia University.

¹ Pub. L. No. 94-553 § 111 (Oct. 19, 1976).

² W. BAER, *CABLE TELEVISION: A HANDBOOK FOR DECISIONMAKING* 1-10 (1973).

³ S. 1006, 89th Cong., 1st Sess. (1965); see H. R. Rep. No. 83, 90th Cong., 1st Sess. 2 (1967). The original revision bill did not deal with cable per se—since cable growth still was minor at that time. Note 11 *infra*.

Court had before it two cases which largely controlled the future of cable television. *United States v. Southwestern Cable Co.*⁴ was a challenge to the Federal Communications Commission's newly asserted jurisdiction over cable, while *Fortnightly Corp. v. United Artists Television, Inc.*⁵ was an attempt to impose copyright liability on cable's use of broadcast television signals. To the surprise of many communications lawyers, the Court upheld the jurisdiction of the FCC and rejected copyright liability for the cable industry. To a very real extent, the Court may have preferred regulation to litigation as a means of dealing with increasingly complicated problems of intermedia as well as intermodal competition, and assumed, incorrectly but not unjustifiably, that new copyright legislation would follow hard on the heels of its decision.

Even the cable industry conceded long ago that some form of copyright payment was necessary as well as inevitable. But the cable, copyright, and broadcast interests could not agree on the more complex question of "how much".

In *Teleprompter Corp. v. CBS, Inc.*,⁶ the various interest groups once again attempted to force a judicial resolution of the problem. The Second Circuit was willing to impose copyright liability on cable systems for use of "distant signals", which it could not define,⁷ only to be rather curtly reversed by the Supreme Court. As a result, by 1974 the battle had returned to legislative halls—where it remained.

In the midst of this brouhaha, the Commission quietly continued its role of protecting broadcast television against the real or imagined evils of cable. This regulatory effort has a major impact upon the new legislation's resolution of the cable copyright controversy. In virtually all copyright legislation proposals—including the new legislation—the Commission's rules as to what signals a system may carry are a touchstone for determining copyright liability. Unfortunately, however, the history of Commission regulation has not gone smoothly.

I. BACKGROUND

Throughout its twenty-year existence, cable television has lived in a chaotic regulatory environment. Local franchising has been uncoordinated, uninformed, and at times unscrupulous; states have acted with confusion and delay; and the Federal Communications Commis-

⁴ 392 U.S. 157 (1968).

⁵ 392 U.S. 390 (1968).

⁶ 415 U.S. 392 (1974).

⁷ 476 F.2d 338 (2d Cir. 1973). Indeed, The Second Circuit adopted an "I know it when I see it" attitude, by noting that "it is easier to state what is not a distant signal . . ." *Id.* at 351.

sion has assumed a veritable Kama Sutra of regulatory positions, remaining consistent only in its unwavering freeze on cable development until 1972.⁸

The bone of contention for the FCC as well as for copyright interests has been and still is cable's use of "distant signals"—signals of stations which normally cannot be received in a cable system's community.⁹ Cable operators see importation of distant signals as necessary to attract subscribers. But broadcasters fear that cable's use of distant signals will lure away some viewers, thus producing "audience fragmentation." And since advertisers pay only for the number of warm viewing bodies rendered unto them, audience fragmentation thus results in lost revenues. In point of fact, the broadcasters' fears of distant signals have turned out to be largely unfounded. Cable apparently has little detrimental impact on most stations and positively helps UHF stations (channels 14 and above.)¹⁰

When first presented with the problem of cable in 1959, the Commission simply refused to take jurisdiction, on the grounds that it lacked statutory authority and that cable posed no threat to broadcast television.¹¹ By 1966, cable's dramatic growth had changed the latter proposition, however, and in its *Second Report and Order*¹² the Commission slapped a virtual freeze on cable; it prohibited systems in the major—i.e., the one hundred largest—television markets from carrying distant signals unless they underwent a lengthy evidentiary proceeding¹³—only one of which was ever completed.

This tactic, however, soon began to look somewhat dilatory. In 1968 the Commission suspended the regulations and proposed requiring that cable systems secure the "retransmission consent" of stations

⁸ Botein, *CATV Regulation: A Jumble of Jurisdictions*, 45 N.Y.U.L. REV. 816, 817-21 (1970).

⁹ Actually, the present rules have developed several different definitions for both distant and local signals. See text accompanying notes 23-26 *infra*.

¹⁰ E.g., R. PARK, *POTENTIAL IMPACT OF CABLE GROWTH ON TELEVISION BROADCASTING* (1970). Cable helps UHF's by improving their otherwise poor signals.

¹¹ First Report and Order, 26 F.C.C. 403 (1959). At that time there were only about 600 cable systems with a total of a quarter of a million subscribers. KNOX, *Cable Television*, SCIENTIFIC AMERICAN, October, 1972, at 24.

¹² 2 F.C.C. 2d 725 (1966).

¹³ 47 C.F.R. §74.1007 (1972). In addition, a combination of two other rules, 47 C.F.R. §§74.1005, 74.1009 (1972), resulted in the imposition of a virtually identical requirement for smaller market—below the one hundred largest—cable systems whenever an objection was leveled at a system's use of distant signals.

broadcasting distant signals.¹⁴ But the cable operators somehow never were able to get consent.¹⁵ Then in 1970 the Commission proposed its chicken-in-every-pot “public dividend plan” as another alternative. This delightful but unworkable proposal would have allowed major market cable systems to import four distant signals in return for substituting local stations’ commercials on those signals and donating five percent of their gross receipts to public television.¹⁶

By the summer of 1971, the Commission had decided that neither the retransmission consent nor the public dividend plan was feasible. It also had begun slowly to realize that cable actually helped improve some stations’ audiences—particularly UHF’s. Because of political and time pressures, the Commission took the somewhat unusual step of sending a “letter of intent” to Congress.¹⁷ The Commission proposed allowing cable systems to import enough distant signals to offer cable viewers “minimum service”—three network and three independent signals in the fifty largest markets, three network and two independent signals in the fifty next largest markets, and three network signals and one independent signal in the smaller markets.

This new proposal thus put the Commission in a rather anomalous position. By the end of 1971 it had one suspended set of rules, two discredited sets of proposed rules, and one informally announced proposal. As might be expected, the impasse ultimately was resolved behind closed doors. Throughout 1971, Commission Chairman Burch and Office of Telecommunications Policy Director Whitehead played musical chairs in mediating negotiations between copyright, broadcasting and cable representatives.¹⁸ On November 11, 1971, they emerged with an accord, the “Consensus Agreement”,¹⁹ which paved the way for adoption of the FCC’s present rules. Although the 1972 regulations have been amended in literally dozens of ways by now, they created a basic structure which still governs—and which meshes with the provisions of the new copyright legislation in determining cable systems’ copyright responsibilities.

¹⁴ Notice of Proposed Rule Making and Notice of Inquiry, 15 F.C.C. 2d 417 (1968).

¹⁵ Cable Television Report and Order, 37 Fed. Reg. 3251, 3255-56 (1972).

¹⁶ Second Further Notice of Proposed Rule Making, 35 Fed. Reg. 11,015 (1970).

¹⁷ Letter from Chairman Dean Burch to the Communications Subcomm. of the Senate Comm. on Commerce, Aug. 5, 1971, 22 P&F Radio Reg. 2d 1759 (1971).

¹⁸ BROADCASTING, Nov. 15, 1971, at 16.

¹⁹ Cable Television Report and Order, *supra* note 15, at 3341.

II. THROUGH A GLASS DARKLY—THE FCC'S RULES ON DISTANT AND LOCAL SIGNALS

In order to work with Section 111 compulsory license and royalty provisions, it is essential to understand the Commission's rules as to what signals a system must and may carry. By way of egregious over-generalization—which is detailed in the next section²⁰—the Commission's rules have an impact upon S.111 in two major ways. First, a cable system²¹ has a compulsory license for a signal only if the Commission's rules permit it to carry that signal. Second, a system's royalty payments depend upon its number of "distant signals", as defined by the Commission's rules.

This meshing of copyright law and Commission regulations is hardly a surprise; many prior versions of Section 111 also hinged upon Commission rules.²² But precisely because of this relation, it is necessary to understand the Commission's rules in order to understand Section 111.

A. Classification of Signals

To begin with, the rules classify signals based upon their general type of programming—i.e., network, independent, noncommercial educational, etc. These distinctions have more than just definitional relevance, however, since the rules allow cable systems to carry different amounts of each type of signal.

First, as its name indicates, a network signal comes from a network affiliate.²³ Conversely, the rules treat a station as an independent

²⁰ See text accompanying notes 23-36 *infra*.

²¹ 47 C.F.R. §76.5(a) (1976) specifically exempts from the rules any operation which either has fewer than fifty subscribers or "serves the residents of one or more apartment dwellings under common ownership, control, or management . . ." The Commission has tended to limit the scope of the latter exemption on an ad hoc basis. *E.g.*, Pacific Western Mobiles Estates, Inc., 31 P&F Radio Reg. 2d 983 (1974) (trailer park operation); Citizens Development Corporation, 33 P&F Radio Reg. 2d 1116 (1975) (privately owned real estate development operation).

One inconsistency between Section 111 and the Commission's rules thus is that Section 111 (f) does not contain both of the above exemptions in its definition of "cable system", and makes no reference to the Commission's rules. At least in theory, Section 111 thus might impose a royalty upon an operation which the Commission does not regulate as a "cable system" in the first place.

²² See text accompanying note 48 *infra*.

²³ 47 C.F.R. §76.5(1), (m) (1976). Where a station comes fairly close to the rules' 85 percent network clearance mark, however, the Commission will treat it as a network station. CSRA Cablevision, Inc., 38 FCC2d 297 (1972); King Videocable Company, 39 FCC2d 600 (1973).

if it carries less than ten hours per week of network programming.²⁴ And there are important sub-groups of independent stations—for example, “specialty” stations.²⁵ A third type of station is a noncommercial educational station, usually a public television station broadcasting both educational and general interest programming.²⁶ A fourth significant type of station is a television translator station, which really is not a broadcast station at all; instead, it is just a means for retransmitting the signals of any one of the above types of stations.²⁷

As to each type of signal discussed above, the Commission draws a distinction between signals which a cable system *must* carry—i.e., “local signals”—and signals which a cable system *may* carry—i.e., “distant signals”.²⁸ Indeed, the distinction is embodied in Commission jargon of “must-carry” and “may-carry” signals.

As the terms indicate, in theory the distinction is comparatively simple. A cable system must carry some signals on request of the stations broadcasting them; but a system has discretion as to whether to carry other signals.

The number of must-carry (i.e., “local”) and may-carry (i.e., “distant”) signals varies not with the location of television stations, but rather with the location of cable television systems. The Commission

²⁴ 47 C.F.R. § 76.5(n) (1976).

²⁵ 47 C.F.R. § 76.59(d) (1); .61 (c) (1), .63(1976). The Commission issued a list of specialty stations in its Report and Order, 37 P&F Radio Reg. 2d 1381 (1976).

²⁶ Oddly enough, the cable television rules do not define noncommercial educational stations, known as “educators”. Accordingly, it is necessary to refer to the Commission’s broadcast television rules. 47 C.F.R. § 73.606 (1976). This situation can create difficulties in some situations. *E.g.*, Valley Cablevision, Inc., 44 FCC2d 232 (1973)

²⁷ Translators are comparatively low-powered devices, which receive a signal on one frequency and then change or “translate” it to another. 47 C.F.R. § 76.5(c) (1976) defines a translator station by reference merely to Part 74 of the Commission’s rules, which governs translator stations. A translator station usually changes either a VHF (Channels 2-13) or UHF (Channels 14 and above) to an unused UHF channel; they are an effective way for stations, particularly UHF stations, to fill in otherwise “white” areas caused by terrain problems or other obstacles.

²⁸ The Commission never has bothered to define “carry”, although its obvious meaning is to make signals available to subscribers. *E.g.*, Columbia Television Company, Inc., 42 FCC2d 674 (1973). In theory, the distinction between must- and may-carry signals might be somewhat blurry, since systems are required to carry must-carry signals only upon request of the stations broadcasting them. In practice the distinction is quite clear, however, since stations invariably request carriage. 47 C.F.R. § 76.57(a), .59(a), .61(a), .63(a) (1976).

follows the custom of broadcasters in classifying and ranking areas as "television markets". The rank of a market thus depends upon the number of viewers within it. For example, the New York metropolitan area is market number one and Columbia, South Carolina is market number one hundred.²⁹ (More than ninety percent of the United States population is located within the top one hundred markets.) Within this overall ranking, there are four relevant sub-categories for purposes of determining a system's signal carriage—the top fifty markets, the next fifty markets, all other or "smaller" markets, and areas located outside of all markets.

B. "Must-Carry" or Local Signals

In defining must-carry or "local" signals, the rules use a different set of criteria for each one of four categories mentioned above. Precisely because the criteria vary from category to category and rule to rule, it would be extremely tedious and repetitive to examine the must-carry requirements for all four categories. Nevertheless, it may be useful to analyze briefly the criteria used most commonly in the rules.

The two most important criteria in determining whether a cable system must carry a signal are the "specified zone" and the "predicted Grade B contour". As discussed below, cable systems within this "specified zone" or "predicted contour" area of a station must generally carry its signal.

Both standards basically attempt to define the area within which a television station will transmit a decent signal and thus have a substantial number of viewers; in a very real sense, these standards thus resemble traditional notions about spheres of influence.

A specified zone is simply a thirty-five mile radius around a television station,³⁰ an area which readily can be found with a reasonably accurate set of compasses. The center of the radius normally will be a latitude and longitude specified by the rules, and these govern practically all situations.³¹

²⁹ 47 C.F.R. § 76.51 (1976). With no intent to offer a gratuitous advertisement, it may be useful to note that the CATV AND STATION COVERAGE ATLAS is a very useful research tool in determining not only in what market a cable system is located, but also what signals it must carry. The ATLAS is the only publication which contains maps of all stations' predicted Grade B contours and specified zones, as discussed in the text accompanying nn. 30-33 *infra*.

³⁰ 47 C.F.R. § 76.5(f) (1976).

³¹ 47 C.F.R. § 76.53 (1976) thus gives a list of these "designated reference points" for practically all communities to which television stations are

On the other hand, a “predicted Grade B contour” varies with each station. It is a measurement of the area in which a television station’s signal theoretically should be receivable most of the time. The rules thus define a predicted Grade B contour in terms of signal strength—that is, decibel units—a term which obviously has little meaning for non-engineers.³² It cannot be over-emphasized that a Grade B contour is predicted, not actual; it thus is based solely upon statistical estimates of where a signal should exist. These estimates are by definition highly inaccurate. As a general rule, the predicted Grade B contours of VHF stations may be too small, while those of UHF stations invariably are too large.³³

A third criterion in defining must-carry signals is the “significant viewing” standard. Even if a station does not place a specified zone or predicted Grade B contour over a system’s community, a system must carry it if it is significantly viewed—that is, if it has more than a minimum audience specified by the rules.³⁴ Although the significant viewing standard is designed to reflect the actual patterns of audience behavior, it uses admittedly arbitrary standards and merely attempts to draw a clear and administratively feasible line.

licensed. In order to find the specified zone, the easiest but not totally accurate method is to consult the *ATLAS*, *supra* note 29, which has maps of all stations’ specified zones. In the rare case where the rules do not give a designated reference point, “the geographic coordinates of the main post office in the community shall be used.” § 76.53.

³² 47 C.F.R. § 76.5(e) (1976). The Commission’s rules also create two other types of predicted contours—in decreasing order of size, Grade A and principal community. But these have no relevance to the signal carriage provisions.

³³ The estimates do not take into account differences in terrain and frequency. Broadcast television is largely a “line of sight” medium, since the signals travel in an almost straight line from the transmitting antenna. A signal thus may be deflected very easily by any obstruction—whether a mountain or an apartment house. Moreover, the higher a station’s frequency, the more easily its signal will be deflected. Channel 2 thus will transmit a signal farther than Channel 13 with the same amount of power. And any VHF station will go much farther than any UHF station. Although this statistical approach has many faults, there simply is no better system at present. An actual survey of a station’s coverage area would be prohibitively expensive, since it would require making continuous measurements along a circular route of several hundred miles, a roughly one-year task for a professional engineer.

³⁴ 47 C.F.R. § 76.5(k) (1976) defines significant viewing in terms of net weekly circulation and audience share. The Cable Television Report and Order, *supra* note 15, contains in Appendix B a list of significantly viewed stations in every county in the United States, and § 76.54 allows parties to make special surveys to determine whether a signal in fact is significantly viewed.

Finally, a cable system must carry the signal of any television translator station which serves the system's community.³⁵ Although the existence of a translator generally will be fairly obvious, it may be questionable whether it is providing a system's community with adequate service.³⁶

In order to determine whether a system must carry a particular signal, it thus is necessary to examine all criteria relevant to the category into which the system falls. For example, a cable system located outside of all television markets must carry the following signals: (1) any station which places a predicted Grade B contour over the system's community; (2) any translator serving the community; (3) any noncommercial station placing a specified zone over the community; and (4) any commercial station which is significantly viewed.³⁷ It is important to remember that each must-carry criterion is totally independent of the others. In a community located outside of all markets, a commercial television station very well might not qualify for carriage because it did not place a predicted Grade B contour over a system's community, but still be entitled to carriage because it was significantly viewed.

C. "May-Carry" or Distant Signals

The number of may-carry or "distant" signals also varies with the location of a cable television system. Depending upon its location, a cable television system may carry as many distant signals as are necessary to reach a "minimum complement".³⁸ In the top fifty markets, a cable system thus may import enough distant signals to provide three network stations, three independent stations, and two additional independent stations.³⁹ A cable system in the next fifty television markets may carry basically the same line-up, except that it is limited to two independent signals.⁴⁰ And a system in a smaller market may carry enough signals to offer three network stations and one independent station.⁴¹ Re-

³⁵ 47 C.F.R. §§ 76.57-63 (1976).

³⁶ *E.g.*, Staunton Video Corporation, 42 FCC2d 1119 (1973).

³⁷ 47 C.F.R. § 76.57(a) (1976).

³⁸ A system located outside of all markets, however, may carry as many distant signals as it wishes. *Id.* This may seem rather anomalous at first glance, since it can result in a small rural area having more signals than a large urban area; it makes sense, however, to the extent that there is no need to protect any television market in the first place.

³⁹ 47 C.F.R. § 76.61(b),(c) (1976). These two possible additional signals thus are known as "wild cards".

⁴⁰ 47 C.F.R. § 76.63(b) (1976).

⁴¹ 47 C.F.R. § 76.59(b) (1976).

ardless of its location, a cable system may carry an unlimited number of noncommercial signals.⁴² Similarly, there are no restrictions upon the number of "specialty" stations which a cable system may carry.⁴³ Finally, a cable system is perfectly free to pick up bits and pieces of signals if they fall into particular categories—i.e., network news programs and "late-night" programs.⁴⁴

To be sure, the amount of programming on a distant signal which a system may carry is limited by the "exclusivity" rules. A cable system thus may not carry a program from a distant network station if a local network station is carrying the same program at the same time.⁴⁵ Similarly, a system may not carry a syndicated program if a local station has bought the exclusive rights to the same program for showing during the same season.⁴⁶

A station thus must carry "local" signals and may carry "distant" signals. With this fundamental distinction in mind, it is possible to examine the new copyright legislation's provisions as to both compulsory licenses and royalty payments.

⁴² 47 C.F.R. §§ 76.59(c), .61(d), .63(b) (1976). If the noncommercial signal comes from outside the system's state, however, any noncommercial station within the state may request the Commission to prohibit its carriage. But few noncommercial stations bother to file such objections, and the Commission virtually never imposes any restrictions. The apparent rationale for this position is that noncommercial stations now receive most of their funding from national sources, and thus competition from another station will not dry up local contributions. In light of the current fiscal cut-backs by both private foundations and the federal government, however, this rather blithe assumption may be somewhat questionable.

⁴³ 47 C.F.R. § 76.59(d) (1), .61(e) (1), .63(b) (1976).

⁴⁴ 47 C.F.R. §§ 76.59(d) (3), .61(e), (3) .63(b) (1976) allow a system to carry distant signals either after the last station in its market has signed off or after 12:00 A.M. Mountain Time and Central Time or 1:00 A.M. Eastern and Pacific Time, on the theory that no local station needs protection then.

⁴⁵ 47 C.F.R. § 76.92, .94 (1976).

⁴⁶ In the top fifty markets, 47 C.F.R. § 76.151(a) (1976) provides protection for a year after a "program is first licensed or sold" anywhere in the United States. This is obviously a rather extreme provision, designed to provide copyright-like protection. In light of the new copyright royalties, however, this rule very well may call for some rethinking.

In the next fifty markets, a station acquires syndicated exclusivity protection only if it actually has bought the exclusive rights to a particular program. The rationale behind this distinction is that the lion's share of copyright revenues from television programs accrue in the top fifty markets.

III. THROUGH SECTION 111 WITH GUN, CAMERA, AND THE COMMISSION'S RULES

Section 111's basic thrust is to give cable systems compulsory licenses for all FCC-authorized signals and to require systems, except in specifically exempted situations,⁴⁷ to pay for the use of distant signals. This formulation is no surprise, however, in light of past legislative proposals. Almost every copyright bill for the last decade has started from the proposition that cable systems should pay for distant signals; the major differences—aside from amount—have centered around whether systems also must pay for local signals. Most prior bills would have required a system to pay a basic amount for local signals and then an additional amount for distant signals.⁴⁸

Section 111 thus breaks somewhat with precedent by not requiring cable systems to pay for local signals.⁴⁹ Although this approach may seem anomalous at first glance, it actually makes very good sense; after all, if a cable system does not import distant signals it cannot

⁴⁷ § 111 (a) thus creates several rather conventional exemptions from liability—i.e., use by master antennas on apartment buildings, educational purposes already covered by § 110, common carriers which relay signals to cable systems, and governmental or other nonprofit organizations.

More important, § 111 (b) makes clear that cable systems are fully liable for carriage of pay programming broadcast by over-the-air subscription television (STV) stations, as opposed to the increasingly popular pay programming which cable systems themselves generate. This clarification helps to resolve what has begun to become a problem for STV stations, which now are just beginning to go on the air; in the past, it was unclear whether a cable system could pick an STV signal, "unscramble" it, and then offer it to its subscribers, effectively robbing STVs of potential customers.

⁴⁸ S. 597, 90th Cong., 1st Sess. § 111 (a) (3) (1967); S. 543, 91st Cong., 1st Sess. § 111 (d) (1969); S. 644, 92nd Cong., 1st Sess. (d) (1971); S. 1361, 93rd Cong., 1st Sess. § 111 (d) (1973). In point of fact, the latter two bills were virtually identical.

These bills in fact would have given at least some cable systems somewhat more than just must-carry signals for their money, since each one specified its own "minimum complement" of signals—generally somewhat more restrictive than the Commission's, as discussed in the text accompanying note 17 *supra*—which a cable system could carry in return for the basic royalty payment.

⁴⁹ § 111 (d) (2) (B) thus requires a system to pay only for "distant signal equivalents", as will be discussed later. Interestingly enough, this also represents a departure from a pact reached between the MPAA and NCTA—and vigorously opposed by the NAB—which would have imposed a basic payment for use of local signals. Agreement between MPAA and NCTA, April 13, 1976 ¶1.

conceivably fragment a station's audience,⁵⁰ thus insuring that neither stations nor networks will lose advertising revenues which ultimately are passed on to copyright owners.

The only fly in this ointment is that Section 111 is somewhat vague as to the amount of royalty due to owners of copyrighted material broadcast by local stations when a cable system does carry distant signals, and thus conceivably does fragment a local station's audience. Although Section 111 provides that local station programming should generate some payment in this type of situation, it does not indicate whether local station programming should give rise to the same, less, or more compensation than distant station programming. In point of fact, there is a good argument that distant station programming needs little compensation, on the ground that the distant station, and ultimately the copyright owner, gains viewers and thus advertising revenues in a new market.⁵² The new Copyright Royalty Commission hopefully will recognize this situation in allocating royalty payments.⁵³

⁵⁰ See R. Park, *supra* note 10.

⁵¹ §111 (d) (4) (A), (B) merely indicates that copyright owners should receive compensation for programming carried from both distant and local stations. Indeed, §111 (d) (4) (B) is somewhat redundant, since a system's statement of account also would include the distant signals for which §111 (d) (4) (A) requires compensation.

To a very real extent, of course, this may be a distinction without too much of a difference. Although a station may lose a certain number of viewers because of audience fragmentation, it also may gain other viewers by being carried as a distant signal in another area. As a result, programming on some stations presumably might receive compensation because of both local audience fragmentation and distant signal carriage, a form of double-payment which the Copyright Royalty Commission obviously should attempt to prevent.

⁵² L. JOHNSON, *THE FUTURE OF CABLE TELEVISION: SOME PROBLEMS OF FEDERAL REGULATION* 20-26 (1970). Although this analysis is attractive—and in fact might dispose of the whole regulatory and copyright furor over cable—it obviously does not take into account the simple fact of life that cable systems import only from particular types of stations, usually just well-programmed independent stations. Absent regulation and copyright legislation, local network and low-budget independent stations would get poorer, while a few independent stations would get richer.

⁵³ Although § 111 (d) (5) (A) provides that "every person claiming to be entitled to compulsory license fees" may apply to the Copyright Royalty Commission, in point of fact few individual copyright owners will, simply because of the inherent impossibility in proving whether or not a program was carried on each one of more than three thousand systems. The legislation deals with this problem by providing that "any claimants may agree among themselves as to the proportionate division of compulsory licensing

Moreover Section 111 does not create any relationship between a system's use of copyrighted material and its royalty payments to copyright owners. As noted later, a system's royalty payments are based solely upon its number of "distant signal equivalents", regardless of whether these equivalents are copyrighted or not. In theory, a cable system thus might import uncopyrighted material and yet still be required to pay a royalty, an obviously anomalous situation. In practice, of course, practically all television programs are copyrighted. But this failure to relate copyright consumption to copyright compensation points up Section 111's highly regulatory aspects.

A cable system thus has a compulsory license to carry any signals which are "permissible" under the Commission's rules.⁵⁴ This presumably includes both must-carry local and may-carry distant signals.⁵⁵ The issues of compulsory licensing and copyright liability thus are totally separate. A cable system may pay only for the signals which it uses.

To be sure, there may be some question as to the appropriateness of allowing the FCC to set copyright payments indirectly. After all, the Commission has no particular expertise, experience, or interest in matters of compensation for intellectual property; indeed, as noted in Section I, the Commission's prime concern with cable has been to protect broadcast television stations. On the other hand, creation of a new agency not only would be somewhat duplicative, but also would present the possibility of rather ugly conflicts between two administrative bodies. Allowing the Commission to play this role thus probably represents the best choice of a bad lot. Moreover, the Copyright Royalty Commission has the express power to alter the amount of royalties if the FCC authorizes systems to carry more distant signals.⁵⁶

Assuming that a signal is "permissible", a cable system must comply with reporting and disclosure requirements in order to obtain a compulsory license. At first blush, Section 111 appears to require a staggering amount of paperwork by cable systems, since the necessary "notice" and "statement of account" demand very detailed ownership, operational, and financial information.⁵⁷ This burden is really not too onerous, because the Commission already requires cable systems to

fees . . . and file them jointly or as a single claim. . . ." without violating the antitrust laws. *Id.* Section 111 thus recognizes the need for—and even encourages—the formation of organizations along the lines of ASCAP, BMI, SESAC, etc.

⁵⁴ § 111 (c) (1).

⁵⁵ *Supra* note 28.

⁵⁶ § 801 (b) (2) (B).

⁵⁷ § 111 (d) (1), (2).

file virtually the identical information on its Forms 325, 326, and 326-A.⁵⁸ Indeed, the Commission and the Copyright Office hopefully will develop a joint form.

The final step then is computation of a system's royalty fee for carrying distant signals. The question of "how much" naturally has generated tremendous dispute. Prior bills provided for a basic payment of up to five percent of a system's revenues, with further payments for additional distant signals.⁵⁹ For a variety of reasons, Section 111 reduces these amounts greatly.

A cable system which imports no distant signals—and some do not—thus pays a small royalty fee.⁶⁰ And if a cable system does import distant signals, it pays only .675 percent of its gross receipts for the first signal and .425 percent a piece for the second, third, and fourth signals.⁶¹ A cable system thus would pay a grand total of 1.525 percent of its gross receipts in order to carry three distant signals—more distant signals than most systems carry in the first place. Under Section 111, royalty payments thus are considerably lower than under prior bills. And these percentages are not likely to change in the immediate future, since the Copyright Royalty Commission has limited

⁵⁸ 5 P&F Radio Reg. Current Service ¶98.325, .326, .326-A has sample forms, though it should be noted that the Commission changes them from year to year. One possible difference between the FCC's and Section 111's requirements, however, is that the Form 326-A is not public, since it contains confidential financial information. Although § 111 is silent on the question of public disclosures, and § 705 does not apply to this information, presumably this type of proprietary information would fall within the Freedom of Information Act's exemption from public disclosure for "commercial or financial information obtained from a person and privileged or confidential". 5 U.S.C. § 552 (b) (4) (Supp. 1976).

⁵⁹ See bills cited in note 48 *supra*. In fact, an amendment was offered on the floor of the House which essentially would have returned to the notion of a basic payment for a "minimum complement" of signals. But the amendment was rejected quickly. 122 Cong. Rec. 10902-10906 (1976).

⁶⁰ § 111 (d) (2) (B) thus requires a system to pay only for either a "distant signal equivalent", as discussed in the text accompanying note 69 *infra*, or for a signal imported from "beyond [its] local service area. . ." But § 111 (f) then defines "local service area" as the area where a "station is entitled to insist upon its signal being retransmitted by a cable system. . ." under the Commission's rules. The result is simply that all must-carry signals fall within the definition of "local service area"; the intent, though, is that systems pay a pro forma .5 or .675 percent fee.

⁶¹ *Id.* As noted later in the text accompanying note 69 *infra*, the concept of "distant signal equivalents" makes some distant signals more equal—and expensive—than others.

power to adjust cable television royalty rates,⁶² apparently as a concession to the cable industry.

Moreover, Section 111 limits even these payments in three major ways. First, a system pays a percentage only of "the gross receipts from subscribers . . . for the basic service of providing" broadcast signals.⁶³ This provision will greatly reduce royalty payments by larger cable systems. By implication this language excludes revenues from pay television programming—which may constitute as much as forty percent of a system's gross receipts.⁶⁴ If and when a "wired nation" ever materializes, cable operators may pay this hypothetical 1.525 percent on only a third or a quarter of their total revenues.

Second, Section 111 explicitly provides a bargain basement rate for cable systems with semi-annual gross subscriber receipts of less than \$80,000 or \$160,000.⁶⁵ For example, a cable system with semi-annual gross revenues of \$40,000 would pay a royalty based on \$3,000⁶⁶—or, the sum of \$15.00. This result would not be uncommon, since this hypothetical system would have slightly more than 1,000 subscribers—just about the median number for all cable systems in the country.⁶⁷ Many systems thus will pay only nominal royalties.⁶⁸

⁶² Although the Commission thus may adjust rates in light of inflation or increased subscriber rates under § 801 (b) (2), it may not raise royalty payments simply because systems raise their subscriber rates faster than inflation. The Commission also must consider whether local or state regulatory authorities have prevented systems from raising their rates, a very significant provision in light of increasingly closer scrutiny of cable rates.

⁶³ § 111 (d) (2) (B). In this regard, § 111 thus follows the Commission's rules. 47 C.F.R. § 76.31 (b) (1976).

⁶⁴ "Pay" appears to be attracting new customers at an increasingly rapid rate. Although "pay" has been in existence for only two or three years, informal estimates are that more than twenty percent of all cable subscribers buy it; moreover, on fully developed systems with a pay option, almost half of the total subscribers apparently buy it.

⁶⁵ § 111 (d) (2) (C), (D). Moreover, cable operations will be deemed separate "systems", and thus have lower gross receipts, if they are not commonly owned or operated, or if they are not in "contiguous" areas. § 111 (f).

⁶⁶ § 111 (d) (2) (C). The reduction is accomplished by subtracting from the system's receipts the amount by which \$80,000 exceeds this and then requiring the system to pay royalties based only on that amount, subject to a \$3,000 floor.

⁶⁷ CATV AND STATION COVERAGE ATLAS, *supra* note 29 at 9a.

⁶⁸ To be sure, very large systems will pay amounts running into the tens of thousands of dollars. But there are comparatively few very large systems; at present, there are only 224 systems in the whole country with more than 10,000 subscribers. *Id.* And these systems are precisely the ones which have been most active in pay programming—thus decreasing the amount of their "gross receipts" under Section 111.

Finally, cable systems pay on the basis not of individual distant signals, but rather of "distant signal equivalents". In recognition of the simple fact that educational stations often do not attract large audiences, Section 111 treats them as only one quarter of a "distant signal equivalent". Moreover, the previously-discussed bits and pieces of available distant signal programming—i.e., "specialty" and "late-night" programs—count towards a distant signal equivalent only in fractional amounts.⁶⁹ A cable system thus could carry two distant independent signals and four educational signals—all for the previously-discussed 1.525 percent of gross receipts.

To be sure, the decision as to "how much" is enough involves obviously normative and speculative judgments; indeed, the cable, copyright, and broadcast interests consistently have failed to articulate even any general policy basis—i.e., cost of production, benefit to cable systems, burden on systems. In fact, the Register of Copyrights recently noted that "[l]acking economic data, the Copyright Office has no basis for an opinion as to the fairness of the present amounts in the bill."⁷⁰ And at present the cable industry probably could not af-

⁶⁹ § 111 (f). A system thus pays for these on the basis of a "ratio of the broadcast hours of such station carried by the cable system to the total broadcast hours of the station." If a system carried one-half hour of network news per day, it would pay roughly for .075 of one-quarter of a distant signal equivalent. If a system's *only* distant signal equivalents were these types of programming, however, it would pay .675 percent under § 111 (d) (2) (B) (i). This is a perfectly reasonable general approach, since these programs obviously do not have huge audience attraction. On the other hand, Congress has given absolutely no indication as to the basis, if indeed there was one, for assigning these values. This seems quite unfortunate, since fairly detailed information on a program's number of viewers on cable is available from the national ratings services. Moreover, it is inconsistent to assign arbitrary values to educational stations but treat every independent station as one distant signal equivalent. As noted before, text accompanying note 45 *infra*, systems must black out substantial portions of independent stations' programming under the syndicated exclusivity rules. Accordingly, it would seem only reasonable to assign a lesser distant signal equivalent value to independent stations too. To be sure, this involves sweeping judgments which sometimes will miss the mark; but it certainly is no more arbitrary than the one quarter value assigned to educational stations. After all, § 801 (b) (1) (B) specifically empowers the Copyright Royalty Commission to adjust royalty rates if the FCC expands the number of available distant signals.

⁷⁰ Statement of Barbara Ringer, Register of Copyrights, before the House Subcommittee on Courts, Civil Liberties, and Administration of Justice, 94th Cong., 1st Sess. at 29. Ms. Ringer was commenting on H.R. 2223, 94th Cong., 1st Sess. (1975); *see also* S. Rep. No. 94-473, 94th Cong., 1st Sess. 81 (1975).

ford the five or more percent royalty fee proposed in prior bills.⁷¹

Aside from comparatively small annual fees to the Commission,⁷² cable systems must pay local and sometimes also state governments for permission to operate. Before the 1972 rules, these franchise or certification fees were often wildly extravagant; they averaged five to six percent, and some were as high as thirty-six percent.⁷³ Although the Commission's rules now limit these fees, most cable systems still pay at least three and often five percent of gross receipts,⁷⁴ a cost which broadcast television stations do not bear. Since cable systems start out with this burden, it may be quite reasonable to minimize their copyright payments. To be sure, the division between copyright royalties and franchise or certification fees probably calls for restructuring. However, Congress is not likely to do so when some cities are on the verge of bankruptcy.

CONCLUSION

Obviously enough, the new legislation is no victory for any interest group. On the one hand, cable operators will face additional costs which they deem unjustified. On the other hand, copyright owners will receive comparatively little additional compensation. But as the discussion in Section III indicates, the legislation will neither make cable operators poor nor copyright holders rich. After a decade of useless and vicious infighting, this may show that Congress struck a sound compromise.

⁷¹ *Supra* note 48.

⁷² 47 C.F.R. § 1.1116 (1976). This is less than one-tenth of one percent of most systems' gross revenues.

⁷³ Cable Television Report and Order, *supra* note 15 at 3276. Although the Commission pre-empts local or state bodies in its regulation of broadcast television, it has not attempted, and may lack the legal authority, to do so with cable.

⁷⁴ 47 C.F.R. § 76.31 (b) (1976). Since it is questionable whether the Commission has the statutory power to pre-empt local and state governments, the rule prohibits any cable operator from getting FCC permission to operate if a franchise or certificate fee is too high, thus indirectly coercing local and state governments into following the Commission line.