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Copyright Protection in the Cable Television Industry: Satellite Retransmission and the Passive Carrier Exemption

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NOTES

COPYRIGHT PROTECTION IN THE CABLE TELEVISION INDUSTRY: SATELLITE RETRANSMISSION AND THE PASSIVE CARRIER EXEMPTION

INTRODUCTION

The development of the cable television[1] industry has been fraught with copyright and regulatory problems.[2] The absence of cable copyright liability prior to 1976[3] created an imbalance in the rights enjoyed by broadcasters, copyright holders and cable operators. These parties hoped that the imbalance would be rectified by the limited copyright liability imposed on cable systems in the Copyright Revision Act of 1976 (Act)[4] and by Federal Communications Commission (FCC or Commission) regulation of cable's use of copyrighted television broadcasts pursuant to the Consensus Agreement of 1972 (Consensus Agreement).[5]

Unfortunately this hope has not been fulfilled. Whether copyright liability even exists for retransmission carriers, an important segment of the cable industry, remains unclear.[6] These carriers, through microwave or satellite facilities, provide cable systems with programming originally broadcast by television stations that are sufficiently distant from the cable market to render off-the-air pick-up impossible.[7] Whether a retransmission carrier is exempt from copyright

1. The term "cable television" refers to the use of coaxial cable to deliver television signals directly into subscribers' homes. American Enterprise Inst. for Public Policy Research, Deregulation of Cable Television 4 (P. MacAvoy ed. 1977).

2. Additional problems have arisen in connection with local franchising agreements. *See* Note, *Cable Television: The Practical Implications of Local Regulation and Control*, 27 Drake L. Rev. 391 (1977-1978) [hereinafter cited as *Local Control*]. Franchising issues are beyond the scope of this Note.

3. *See* Teleprompter Corp. v. CBS, 415 U.S. 394 (1974); Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968).

4. Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C. §§ 101-810 (Supp. V 1981)). Although entitled a "revision," the Act is in fact a complete renovation. Ringer, *First Thoughts on the Copyright Act of 1976*, 22 N.Y.L. Sch. L. Rev. 477, 479 (1977).

5. The Agreement was achieved through an industry compromise late in 1971, and was implemented in Cable Television Report and Order, Docket Nos. 18,397, 18,397-A, 18,373, 18,416, 18,892, 18,894, 36 F.C.C.2d 143 (1972) [hereinafter cited as *Consensus Agreement*]. The full text of the original agreement is appended to the Commission's Order. *Id.* at 284 app. D. See generally Meyer, *The Feat of Houdini or How the New Act Disentangles the CATV-Copyright Knot*, 22 N.Y.L. Sch. L. Rev. 545 (1977), which discusses the cable television provisions of the new copyright law.

6. *See* Eastern Microwave, Inc. v. Doubleday Sports, Inc., 534 F. Supp. 533 (N.D.N.Y.), *rev'd*, 691 F.2d 125 (2d Cir. 1982), *cert. denied*, 51 U.S.L.W. 3612 (U.S. 1983); WGN Continental Broadcasting Co. v. United Video, Inc., 523 F. Supp. 403 (N.D. Ill. 1981), *rev'd*, 685 F.2d 218 (7th Cir. 1982).

7. *See* Eastern Microwave, Inc. v. Doubleday Sports, Inc., 534 F. Supp. 533, 535 n.6 (N.D.N.Y.), *rev'd*, 691 F.2d 125 (2d Cir. 1982), *cert. denied*, 51 U.S.L.W.

liability depends primarily upon the construction of section 111(a)(3) of the Act,[8] which provides an exemption from copyright liability to a passive carrier meeting certain criteria.[9]

The passive carrier exemption, however, was drafted during the infancy of the telecommunications industry.[10] This Note contends that the exemption should be strictly construed. Carriers that are not entirely passive[11] should not be protected and therefore should obtain the permission of the copyright holder before retransmitting a copyrighted television broadcast signal. In reaching this conclusion, this Note examines the industry and legal settings of the issue, analyzes the retransmission carrier's copyright liability under the Act, and justifies the imposition of copyright liability on certain carriers on the basis of the language and intent of the Act and broader policy considerations.

I. THE CONTEXT OF THE CABLE-CARRIER CONTROVERSY

The copyright law of modern cable television is the product of a complex evolution. From humble "community antenna" beginnings, cable has developed into a multi-billion dollar industry utilizing the latest satellite communications technology.

A. *The Development of Cable Television*

Commercial cable television service began in 1950.[12] At the time, it was known as Community Antenna Television (CATV).[13] CATV systems improved television reception in remote areas where consumer antennae could not adequately receive broadcast signals.[14] This original cable service soon proved highly popular with consumers.[15] Moreover, as cable service expanded, it diversified. By 1959, cable operators were importing broadcast signals via microwave carrier from stations that were too distant even for community antenna reception.[16] By late 1965, importation of distant signals was becoming the

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3612 (U.S. 1983); WGN Continental Broadcasting Co. v. United Video, Inc., 523 F. Supp. 403, 405 (N.D. Ill. 1981), *rev'd*, 685 F.2d 218 (7th Cir. 1982).

8. 17 U.S.C. § 111(a)(3) (Supp. V 1981).

9. *Id.* See *infra* pt. III(B).

10. In 1966, the section was drafted in substantially the same form in which it exists today. See *infra* note 172 and accompanying text. The first broadcast retransmission satellite carrier was authorized ten years later. *In re* Southern Satellite Sys., 62 F.C.C.2d 153 (1976). This authorization occurred two months after the Act's passage.

11. See *infra* pt. III (B).

12. United States v. Southwestern Cable Co., 392 U.S. 157, 162 (1968).

13. *Local Control*, *supra* note 2, at 391.

14. New York Law School Communications Law Clinic and New York Law School Law Review, *The Development of Video Technology*, 25 N.Y.L. Sch. L. Rev. 789, 793-94 & n.40 (1980) [hereinafter cited as *Video Development*].

15. By 1959, 550 cable systems were serving an audience of approximately 1.5 to 2 million persons. Report and Order, Docket No. 12,443, 26 F.C.C. 403, 408 (1959).

16. *See In re* Intermountain Microwave, 24 F.C.C. 54, 54 (1958).

principal function of cable service.[17] The industry had grown explosively, tripling in size in the six years since microwave importation began.[18]

All three branches of government responded to this dynamic growth. While litigation tested whether cable systems violated the 1909 Copyright Act by retransmitting television programming,[19] Congress had already begun the lengthy process of copyright revision.[20] Finally, the FCC asserted general jurisdiction over cable television in 1966, and instituted regulations that effectively froze cable growth.[21] The FCC freeze continued during the exploration of regulatory alternatives, until negotiations among all of the affected parties produced the Consensus Agreement.[22]

With the 1972 Consensus Agreement, the cable industry achieved a substantial easing of FCC restrictions.[23] In exchange, however, it supported both copyright revision legislation establishing cable's liability for broadcast retransmission, and the continued regulation of cable's use of copyrighted broadcast material.[24]

In addition to the Consensus Agreement, a second major development occurred in 1972: FCC authorization of domestic communications satellite service.[25] Although four years passed before television retransmission via satellite was authorized,[26] it is now apparent that satellite technology,[27] much like microwave importation, has revolu-

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17. United States v. Southwestern Cable Co., 392 U.S. 157, 163 (1968).

18. By this time, 1847 communities had operating cable service. Second Report and Order, Docket Nos. 14,895, 15,233, 15,971, 2 F.C.C.2d 725, 738 (1966), *vacated in part sub nom.* Southwestern Cable Co. v. United States, 378 F.2d 118 (9th Cir. 1967), *rev'd and remanded*, 392 U.S. 157 (1968) [hereinafter cited as Second Report and Order].

19. Teleprompter Corp. v. CBS, 415 U.S. 394 (1974); Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968).

20. The copyright revision project was begun in 1955. Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 396 n.17 (1968).

21. Second Report and Order, *supra* note 18; *see* Note, *The FCC's Deregulation of Cable Television: The Problem of Unfair Competition and the 1976 Copyright Act*, 10 Hofstra L. Rev. 591, 603-04 (1982) [hereinafter cited as *Deregulation*]. See *infra* notes 100-13 and accompanying text.

22. *Consensus Agreement*, *supra* note 5, at 165; *Deregulation*, *supra* note 21, at 612.

23. *Deregulation*, *supra* note 21, at 612-17.

24. *Consensus Agreement*, *supra* note 5, at 285 app. D; *see* Note, *Cable Television's Compulsory License: An Idea Whose Time Has Passed?*, 25 N.Y.L. Sch. L. Rev. 925, 934 (1980) [hereinafter cited as *Compulsory License*].

25. *In re* Domestic Communications-Satellite Facilities, 35 F.C.C.2d 844, *modified in* 38 F.C.C.2d 665 (1972).

26. *In re* Southern Satellite Sys., Inc., 62 F.C.C.2d 153 (1976).

27. The Commissioners initially expressed doubt as to how readily and effectively satellites would penetrate the specialized communications market. *In re* Domestic Communications-Satellite Facilities, 35 F.C.C.2d 844, 846, *modified in other respects in* 38 F.C.C.2d 665 (1972).

tionized cable television.[28] While the potential inherent in satellite-cable combinations remains unrealized, the growth of "cablecasting"[29] and the possibility of direct-from-satellite consumer reception[30] portend unprecedented entertainment dissemination.

Cable's economic growth reflects its technological potential. Over the last three years, the multi-billion dollar cable industry has doubled its subscribers and quadrupled its revenues.[31] The programming for which millions of cable subscribers pay is furnished by copyright holders, either indirectly by licensing for television broadcast and subsequent importation to distant cable systems, or directly, through licensing for cablecasting.[32] Recent developments have been generally adverse to these copyright holders. Of particular concern is the first offspring of the satellite-cable marriage: the superstation.

B. *Retransmission Carriers and the Superstation*

1. Stations and Superstations

Commercial broadcasters are divided into network affiliates and independents.[33] In either case, programming is generally not produced at the station, but rather is obtained from outside sources.[34] A

28. *See* Schwartz, *Cable TV Programmers Find Problems Amid Fast Growth*, N.Y. Times, Sept. 28, 1982, at 1, col. 1. Schwartz reports that satellite systems were being added at the rate of one per month in 1982. *Id.* at col. 2. "Almost all sizeable cable systems today . . . use either microwave relays or . . . [satellite] earth stations to receive distant signals or pay programming." Botein, *Jurisdictional and Antitrust Considerations in the Regulation of the New Communications Technologies*, 25 N.Y.L. Sch. L. Rev. 863, 870 (1980) [hereinafter cited as Botein I].

29. The term "cablecasting" refers to cable system origination of programming, as opposed to broadcast retransmission. United States v. Midwest Video Corp., 406 U.S. 649, 653 n.6 (1972). Cablecast programming is generally available only as a premium product for which an additional subscription fee must be paid. For this reason, it is sometimes referred to as "pay cable." *See* Home Box Office, Inc. v. FCC, 567 F.2d 9, 24 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).

30. Rice, *Regulation of Direct Broadcast Satellites: International Constraints and Domestic Options*, 25 N.Y.L. Sch. L. Rev. 813, 813 (1980). At present this technology is expensive, but efforts are underway to bring down its cost and increase its availability. Perle, *Is the Bird Pie in the Sky?*—Communications Satellites and the Law, 27 Bull. Copyright Soc'y U.S.A. 325, 326-27 (1980).

31. In 1979, cable industry revenue was one billion dollars. *Compulsory License*, *supra* note 24, at 943. Subscribership has increased from 14 million in 1979 to 28 million in 1982. Schwartz, *supra* note 28, at col. 2. Cable's 1982 revenue is expected to exceed four billion dollars. *Id.*

32. See *supra* note 29, *infra* notes 33-40 and accompanying text.

33. *See* 17 U.S.C. § 111(f) (Supp. V 1981). A "network station" transmits a "substantial part of the programming supplied" by its affiliated network. *Id.* All other stations are independents. *Id.* The FCC defines a network station as one that carries in weekly prime time 85% of the programming offered by its affiliated network. 47 C.F.R. § 76.5(*l*) (1981).

34. *Compulsory License*, *supra* note 24, at 935-36. High production costs are partly responsible for this practice. *Id.* Local news and public affairs programs, however, may be produced at the station. *Id.*

network affiliate's programs are usually provided by its network "parent."[35] All affiliates that will show the program in the same time zone are simultaneously furnished with the program,[36] and are compensated by the network according to the size of the local market.[37]

An independent station, on the other hand, purchases syndicated programming.[38] This material is not simultaneously transmitted, but is furnished to the broadcaster for a period of time,[39] during which the station has exclusive local broadcast rights.[40]

Superstations are independent stations[41] whose programming is retransmitted by satellite carriers to a technologically unprecedented number of cable systems.[42] The superstation's impairment of copy-

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35. *Id.* at 936. The affiliates are granted a right of first refusal. *Id.* The network parent either produces the program itself, or purchases it on the syndicated market. *Id.*

36. *Id.* The networks have generally used terrestrial means, such as AT&T lines, to provide programming to their affiliates. Broadcasting, Mar. 27, 1978, at 66. The networks use satellites, however, for live news and sports coverage. Perle, *supra* note 30, at 328.

37. *Compulsory License, supra* note 24, at 936. This is accomplished by a system under which the participants share in the revenue from the national advertising carried by each affiliate as part of the program. *Deregulation, supra* note 21, at 610.

38. *Deregulation, supra* note 21, at 610. The syndicated market consists of the fare available directly from program producers and suppliers. *Compulsory License, supra* note 24, at 936. Like network affiliates, independent stations are advertiser-supported. Unlike the affiliate, however, whose time is largely pre-sold, the independent station must sell its own time.

39. *Compulsory License, supra* note 24, at 936. The programming is often furnished by means such as airmail or air freight. Perle, *supra* note 30, at 327. This provides a stark contrast to satellite retransmission, by which cable systems obtain syndicated programming.

40. *Compulsory License, supra* note 24, at 936.

41. *See* Brotman, *Cable Television and Copyright: Legislation and the Marketplace Model*, 2 Comm/Ent L.J. 477, 481-82 (1979-1980). Brotman discusses the superstation phenomenon in terms of "[c]opyright owners who originally contracted with local independent television stations." *Id.* at 482. A network affiliate is unlikely to become a superstation: If its signal duplicates that of a local affiliate in the distant market, the imported affiliate's signal may be required to be blacked out. This results from the FCC "network nonduplication" rules. *See* 47 C.F.R. §§ 78.1-.115 (1981). Elimination of these rules would have a potentially devastating effect on the networks, by permitting network affiliates to compete with each other. The effect on copyright holders might be less dramatic: To the extent that alternate means of dissemination are made available, see *supra* notes 29-30 and accompanying text, copyright holders need not remain economically linked to network television.

42. By 1979, superstations were reaching over five million homes. Brotman, *supra* note 41, at 481. Three years later, one superstation alone was reaching over five million viewers. Brief for Defendant-Appellee at 4, Eastern Microwave, Inc. v. Doubleday Sports, Inc., 691 F.2d 125 (2d Cir. 1982), *cert. denied*, 51 U.S.L.W. 3612 (U.S. 1983). Prior to the advent of satellites, superstation carriage was not deemed feasible, chiefly because of the high cost of microwave point-to-point retransmission. *See* Report and Order, Docket No. 20,487, 57 F.C.C.2d 625, 630-31 (1976). As cable continues to grow, however, even terrestrial point-to-point retransmission is ap-

right stems from the nationwide distribution of locally licensed material.[43] After national distribution, the value of syndicated programming in an already competitive market declines substantially, because fewer viewers are attracted to what they have already seen.[44]

Although their name seems to imply otherwise, many superstations actively avoid this extensive distribution of their programming.[45] Instead, superstation distribution results from the efforts of a separate entity, the satellite retransmission carrier.[46] These carriers engage in activities markedly different from those of their technologically primitive ancestors.[47]

2. The Varieties of Carriers

The first retransmission carrier,[48] Intermountain Microwave, was a communications common carrier[49] authorized by the FCC in 1958 to furnish a point-to-point microwave retransmission service.[50] This type of service takes its name from the means by which the carrier relays a television signal: The signal is transmitted, from the point of its off-the-air pick-up to the point of its distribution, by means of line-of-sight microwave "repeaters" located about twenty-five miles apart.[51]

As distant signal importation increased, the number of terrestrial retransmission carriers grew commensurately.[52] The next major devel-

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proaching satellite superstation dimensions. See *infra* note 211 and accompanying text.

43. *See* Brotman, *supra* note 41, at 482.

44. Note, *Regulatory Versus Property Rights Solutions for the Cable Television Problem*, 69 Calif. L. Rev. 527, 531 (1981) [hereinafter cited as *Property Rights Solutions*]. Although it might be argued that the superstation could charge higher advertising rates, reflecting its increased audience and thus enabling it to license programming at higher rates, this has not proven practicable. *See* Perle, *supra* note 30, at 330 n.6; *Property Rights Solutions*, *supra*, at 530. Whether the broadcaster can be "forced" to attempt to secure national advertising is also questionable. Perle, *supra* note 30, at 330.

45. *See* Brotman, *supra* note 41, at 482. For example, the broadcaster in WGN Continental Broadcasting Co. v. United Video, Inc., 685 F.2d 218 (7th Cir. 1982), sought to enjoin a satellite carrier from retransmitting copyrighted television programming. *Id.* at 220.

46. Perle, *supra* note 30, at 329.

47. See *infra* notes 150-52 and accompanying text.

48. For the purposes of this Note, all carriers whose function is the further transmission ("retransmission" or "secondary transmission") of television broadcast signals will be referred to as "retransmission carriers."

49. A communications common carrier is required to provide its services to all qualified customers. See *infra* note 88.

50. *In re* Intermountain Microwave, 24 F.C.C. 54, 54 (1958).

51. *Video Development*, *supra* note 14, at 794 n.42. Each repeater receives the signal, amplifies it, and retransmits it to the next repeater. *Id.*

52. Within a year of Intermountain's authorization, 50 such carriers were operating, importing signals to 75 communities. Report and Order, Docket No. 12,443,

opment[53] in the retransmission carrier industry took place in 1976, when the FCC authorized satellite retransmission service.[54] Satellite owners generally lease their facilities to other carriers who furnish the material to be retransmitted.[55] "Lessee" carriers are termed "resale" carriers, and the lessors are called "underlying" carriers.[56]

Thus, a satellite resale retransmission carrier is a carrier that leases space on a satellite from an underlying carrier and uses the leased space to retransmit superstation broadcast signals to cable systems. Both the resale and the underlying carriers are retransmission carriers.

The major advantage of satellite service over point-to-point microwave retransmission is that the distance over which a signal is retransmitted, and the number of its recipients, are eliminated as cost factors in retransmission.[57] When a signal is transmitted to the satellite, it returns to earth in a "footprint" covering an immense geographic area.[58] Regardless of its point of origin, the satellite-retransmitted signal costs no more to receive in Los Angeles than it does in New York.[59] Although at present the customers of resale carriers are primarily commercial entities,[60] including many cable systems,[61] the possibility of a national satellite network transmitting directly to the consumer appears increasingly likely.[62]

Thus, the cable industry uses two major varieties of carriers: the more sophisticated satellite carriers and their traditional counterparts, the microwave point-to-point carriers. In evaluating the superstation phenomenon, it is important to distinguish the copyright liability of the carrier from that of the cable system. Superstation carriage is

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26 F.C.C. 403, 409 (1959). By 1965, 250 cable systems were microwave-served. First Report and Order, Docket Nos. 14,895, 15,233, 38 F.C.C. 683, 695 (1965) [hereinafter cited as First Report and Order]. The following year, 200 more systems were utilizing microwave carriers, for a total of 450 microwave-served systems. Second Report and Order, *supra* note 18, at 772.

53. In an interim development, non-common carrier microwave service was authorized by the FCC. First Report and Order and Further Notice of Proposed Rulemaking, Docket No. 15,586, 1 F.C.C.2d 897 (1965). Dubbed "Community Antenna Relay Service" (CARS), these carriers serve affiliated cable systems rather than the general public. *Id.* at 907; *see* 47 C.F.R. §§ 78.1-.115 (1981).

54. *In re* Southern Satellite Sys., Inc., 62 F.C.C.2d 153 (1976). Other communications satellite uses were FCC-approved in 1972. *In re* Domestic Communications Satellite Facilities, 35 F.C.C.2d 844, *modified in* 38 F.C.C.2d 665 (1972).

55. *See In re* Southern Satellite Sys., Inc., 62 F.C.C.2d 153, 157-58 (1976).

56. *In re* Resale and Shared Use of Common Carrier Servs. & Facilities, 60 F.C.C.2d 261, 271 (1976).

57. *See* Perle, *supra* note 30, at 328.

58. *Id.* at 326. For a more detailed discussion of communications satellite technology, see *Video Development, supra* note 14, at 808-12.

59. Perle, *supra* note 30, at 328; *Video Development, supra* note 14, at 808.

60. *See* Perle, *supra* note 30, at 327-28.

61. *Video Development, supra* note 14, at 796.

62. See *supra* note 30.

made possible solely by the satellite resaler.[63] Unlike the point-to-point carriers, the satellite resalers engage in the active marketing and promotion of the signals they retransmit,[64] and conduct surveys of cable systems to determine which signals may most profitably be retransmitted.[65] The destruction of copyright holders' markets resulting from unlimited superstation carriage of television programming[66] has reincarnated the cable-copyright problem in the form of a satellite-copyright question.

II. The History of the 1976 Cable-Copyright Provisions

Before the promulgation of the Act, the Supreme Court held that cable systems did not violate the Copyright Act of 1909 (1909 Act)[67] by retransmitting broadcasts without the permission of the copyright holder.[68] At the same time, however, the FCC's protection of broadcasters benefited copyright holders by limiting cable's unlicensed use of copyrighted broadcast material.[69] The cable television provisions of the Act, which became effective in 1978,[70] were in large part premised on these developments.[71]

A. *The Cable-Copyright Controversy Under the 1909 Act*

The question of a cable system's copyright liability first came before the Court in *Fortnightly Corp. v. United Artists Television, Inc.*[72] Fortnightly was a CATV system—that is, it improved its subscribers' reception of local broadcasts without providing additional, distant signals.[73]

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63. See *supra* notes 45-46 and accompanying text.

64. *See* Eastern Microwave, Inc. v. Doubleday Sports, Inc., 534 F. Supp. 533, 538 (N.D.N.Y.), *rev'd on other grounds*, 691 F.2d 125 (2d Cir. 1982), *cert. denied*, 51 U.S.L.W. 3612 (U.S. 1983).

65. *Id.* at 537. See *infra* notes 150-52, 220-21 and accompanying text.

66. See *supra* note 44, *infra* notes 126, 181-83, 196-200 and accompanying text.

67. Ch. 320, 35 Stat. 1075 (codified as amended at 17 U.S.C. §§ 1-216 (1976)), *amended by* 17 U.S.C. §§ 101-810 (Supp. V 1981).

68. Teleprompter Corp. v. CBS, 415 U.S. 394 (1974); Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968).

69. *See Property Rights Solutions, supra* note 44, at 527 (stating that although never explicitly acknowledged as such, the FCC's regulatory efforts were attempts to protect property rights through prophylactic restraints); *Deregulation, supra* note 21, at 593. See *infra* pt. II(B).

70. Pub. L. No. 94-553, § 102, 90 Stat. 2541, 2598 (1976).

71. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 88-89 (1976) [hereinafter cited as House Report], *reprinted in* 1976 U.S. Code Cong. & Ad. News 5659, 5703, *and in* 17 Omnibus Copyright Revision Legislative History (1977).

72. 392 U.S. 390 (1968).

73. The most distant signal provided by Fortnightly originated 82 miles away. *Id.* at 392.

Under the 1909 Act, the crucial cable-copyright issue was whether a cable system "performed" the copyrighted works.[74] In deciding this question, the Court contrasted the functions of viewers and broadcasters.[75] Stating that "Broadcasters perform. Viewers do not perform,"[76] the Court concluded that Fortnightly's systems fell "on the viewer's side of the line."[77]

The *Fortnightly* holding, however, did not extend to distant signal importation.[78] That issue came before the Court in *Teleprompter Corp. v. CBS.*[79] Again the Court found no violation of the 1909 Act: Distant signal importation was considered irrelevant to copyright liability on the theory that cable systems remained limited to "essentially a viewer function,"[80] and thus did not "perform."[81]

B. *The FCC and the Kama Sutra*

At the same time the 1909 Act was failing to protect copyright holders in the Supreme Court, the FCC was adopting "a veritable Kama Sutra of regulatory positions"[82] in an attempt to protect the broadcasting industry from the competition of cable.[83] Copyright holders benefited substantially, albeit indirectly, from these regulatory efforts.[84] Indeed, the Commission was to have a major impact on the way in which the Act resolved the cable-copyright controversy.[85]

1. FCC Jurisdiction

The FCC has two sources of jurisdiction[86] under the Communications Act:[87] Title II jurisdiction over common carriers,[88] and Title III

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74. *See id.* at 394-95; Note, *Cable Television and Copyright Royalties*, 83 Yale L.J. 554, 558 & n.21 (1974).

75. 392 U.S. at 397-98.

76. *Id.* at 398 (footnotes omitted).

77. *Id.* at 399.

78. *Fortnightly* was expressly limited to its facts. *Id.* at 399 n.25.

79. 415 U.S. 394 (1974).

80. *Id.* at 408.

81. *Id.* at 408-09.

82. Botein, *The New Copyright Act And Cable Television—A Signal Of Change*, 24 Bull. Copyright Soc'y U.S.A. 1, 2-3 (1976) [hereinafter cited as Botein II].

83. *Id.* at 2.

84. See *infra* notes 115-21 and accompanying text. The rules limited cable's free access to copyrighted works. *Compulsory License, supra* note 24, at 937.

85. *See* Botein II, *supra* note 82, at 5.

86. Rice, *supra* note 30, at 837.

87. Communications Act of 1934, 47 U.S.C. §§ 151-609 (1976 & Supp. IV 1980).

88. *Id.* §§ 201-224. A "common carrier" is defined as "a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy." *Id.* § 153(h). By reference to common-law common carrier theories, Professor Botein defines a common carrier in this context as one "which

jurisdiction over broadcasters.[89] Cable systems are neither common carriers nor broadcasters;[90] thus, when first faced with cable, the Commission declined jurisdiction.[91]

In 1965, however, the Commission asserted jurisdiction over cable systems that used microwave carriers to import distant signals.[92] The following year, it extended its jurisdiction to all cable systems, whether or not microwave-served.[93] The FCC's new responsibility was affirmed by the Supreme Court,[94] which held that the Commission has regulatory authority "reasonably ancillary to the effective

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holds itself out by its business practices or is required by law to provide transmission services to any properly qualified customer." Botein I, *supra* note 28, at 864; *see* National Ass'n of Regulatory Util. Comm'rs v. FCC (NARUC I), 525 F.2d 630, 640-42 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976).

A common carrier's services need not be useful or available, in a practical sense, to the entire public; the services may be so specialized as to be of use to only a fraction of the total population. *Id.* at 641. However, a carrier that makes "individualized decisions" as to "whether and on what terms to deal" is not a common carrier. *Id.*

Finally, a common carrier does not choose the material it transmits; rather, its customers "transmit intelligence of their own design and choosing." *Id.* at 641 n.58 (quoting Report and Order, Docket No. 16,106, RM-139, 5 F.C.C.2d 197, 202 (1966)); *see* National Ass'n of Regulatory Util. Comm'rs v. FCC (NARUC II), 533 F.2d 601, 609 (D.C. Cir. 1976) (same); Report and Order, Docket No. 12,443, 26 F.C.C. 403, 427-28 (1959); Frontier Broadcasting Co. v. Collier, 24 F.C.C. 251, 254 (1958).

89. 47 U.S.C. §§ 301-399 (1976). Title III is designated "Special Provisions Relating to Radio." *Id.* This covers entities other than broadcasters per se. Professor Botein breaks down Title III jurisdiction into three categories. Botein I, *supra* note 28, at 865. The first covers broadcasters. *Id.* The second involves the necessity of a Title III license for those Title II common carriers that use over-the-air radio transmissions. This applies, for instance, to microwave relay carriers, who as a result are regulated under both Title II and Title III. *Id.* Finally, Title III jurisdiction also extends to radio spectrum users that are neither common carriers nor broadcasters; for example, it covers citizens band radio. *Id.*

90. Cable systems do not use the radio frequency spectrum; hence, they are not covered by Title III. Report and Order, Docket No. 12,443, 26 F.C.C. 403, 429-30 (1959). Rather than permitting their subscribers to choose, cable systems themselves choose which signals to retransmit. *Id.* at 427-28. Even if a cable system were to poll its subscribers and retransmit the signals they wanted, they would not be exercising "control" over the retransmitted material, because the minority of subscribers could not effect their choice. *Id.* at 428. The choice is clearly not the subscriber's; thus, cable systems are not common carriers for the Commission's purposes under Title II. *Id.*

91. Frontier Broadcasting Co. v. Collier, 24 F.C.C. 251 (1958).

92. First Report and Order, *supra* note 52. The FCC predicated its jurisdiction on a perceived need to regulate competition between the growing cable industry and broadcasters. *See id.* at 713-15. See *infra* notes 94-95 and accompanying text.

93. Second Report and Order, *supra* note 18.

94. United States v. Southwestern Cable Co., 392 U.S. 157 (1968).

performance of [its] various responsibilities for the regulation of television broadcasting."[95]

2. FCC Protection of Broadcasters

Pursuant to its common carrier jurisdiction, the FCC in 1962 had refused permission to a microwave carrier[96] to retransmit broadcast signals, on the grounds that a local broadcaster might fold under the competitive pressure of an importing cable system.[97] In 1965, when the Commission extended its jurisdiction to include microwave-served cable systems, it promulgated two sets of complementary rules for the broadcasters' protection. Mandatory signal carriage rules required a cable system to carry the programming of local broadcasters,[98] while nonduplication rules prohibited the importation of programming duplicating that required to be carried.[99]

In the following year, essentially the same rules were extended to all cable systems,[100] with the addition of a new and stringent restriction: Cable systems proposing to import distant signals into the top 100 television markets were required to show in an evidentiary hearing that the development of broadcasting, especially the newer UHF stations, would not be adversely affected.[101] This restriction resulted in a virtual freeze on cable growth.[102]

The FCC attempted to thaw the freeze in 1968 by adopting interim regulations which substituted for the hearing a requirement that cable operators obtain the "retransmission consent" of broadcasters whose signals they wished to import.[103] Although only one experimental

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95. *Id.* at 178; *see* Botein I, *supra* note 28, at 865. This "reasonably ancillary" jurisdiction is not an expansion of Title II or Title III jurisdiction; rather, it is a grant of jurisdiction where none previously existed. *Id.*

96. *In re* Carter Mtn. Transmission Corp., 32 F.C.C. 459 (1962), *aff'd*, 321 F.2d 359 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963).

97. *See id.* at 463-64.

98. 47 C.F.R. §§ 21.710, .712(c)-(f), 91.557, .559(a)-(d) (1966); *see* First Report and Order, *supra* note 52, at 742.

99. 47 C.F.R. §§ 21.710, .712(g)-(i), 91.557, .559(e)-(g) (1966); *see* First Report and Order, *supra* note 52, at 742-43.

100. 47 C.F.R. §§ 74.1101-.1105 (1967); *see* Second Report and Order, *supra* note 18.

101. 47 C.F.R. §§ 74.1107, .1109 (1967); *see* Second Report and Order, *supra* note 18, at 782. A "grandfather" clause provided that systems importing signals before Feb. 15, 1966 need not make the required showing, unless they proposed to begin importing a new signal. 47 C.F.R. § 74.1107(d) (1967); *see* Second Report and Order, *supra* note 18, at 784.

102. American Enterprise Inst. for Public Policy Research, *supra* note 1, at 26; *Deregulation*, *supra* note 21, at 604.

103. Notice of Proposed Rulemaking and Notice of Inquiry, Docket No. 18,397, 15 F.C.C.2d 417 (1968). The interim regulations were to be codified at 47 C.F.R. § 74.1107(a)-(c). *See* 15 F.C.C.2d at 459-61. Although the Commission noted that

attempt was made[104] to gain the consent of broadcasters, the FCC ultimately rejected this proposal as unworkable.[105]

The FCC again attempted a regulatory alternative in 1970[106]—the "public dividend plan."[107] This proposal involved the substitution of local commercials in imported programming and cable support of public broadcasting,[108] but met with the unanimous opposition of broadcast and copyright interests.[109]

By the summer of 1971, the Commission had decided that none of its three proposals was feasible.[110] Cable operators, desiring renewed growth, were already negotiating with copyright holders, hoping to arrive at a compromise that would permit distant signal importation.[111] Soon, broadcasters joined in the discussions, and the FCC and the White House began to mediate.[112]

These negotiations resulted in the 1972 Consensus Agreement, which effectively lifted the restrictions on cable growth.[113] The Agreement had both regulatory and copyright components, the former implemented by the 1972 FCC rules, and the latter by the Act.[114]

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requiring broadcaster consent for importation resembled copyright protection, *see id.* at 433, the varying economic bases from which copyright holders and broadcasters proceed render the proposal distinguishable from copyright protection per se. *See Property Rights Solutions, supra* note 44, at 549-54. See *supra* note 41.

104. *Consensus Agreement, supra* note 5, at 153. A second experiment was authorized, but was terminated before any useful results were obtained. *Id.* n.24. Broadcaster reactions to solicitation of consent were varied. *Id.* at 153. Proffered justifications for refusing consent included the FCC's indecision about the propriety of signal importation as a general matter and uncertainty regarding pending legislation, judicial decisions and Commission regulations. *Id.*

105. *Id.* at 165. Why the attempt failed is less than clear. Professor Botein simply states that "the cable operators somehow never were able to get consent." Botein II, *supra* note 82, at 4. It seems likely that broadcasters, fearful of cable's competition, simply were not going to license their broadcasts to competitors. See *supra* note 104. Broadcasters were then, and remain, prohibited from rebroadcasting a work without the permission of the original broadcaster. 47 U.S.C. § 325 (1976).

106. Second Further Notice of Proposed Rulemaking, Docket No. 18,397-A, 24 F.C.C.2d 580 (1970).

107. Botein II, *supra* note 82, at 4.

108. *Consensus Agreement, supra* note 5, at 146.

109. *Id.* at 154-55. The opposition resulted from the proposal's technical complexity and its compulsory copyright licensing feature. *Id.* Interestingly, after 1976 a cable system's substitution of commercials would constitute copyright infringement under the Act. 17 U.S.C. § 111(c)(3) (Supp. V 1981). Moreover, copyright holders eventually agreed to support compulsory licensing for cable. *Consensus Agreement, supra* note 5, at 285 app. D.

110. *Consensus Agreement, supra* note 5, at 164-65; Botein II, *supra* note 82, at 4.

111. *Deregulation, supra* note 21, at 612.

112. *Id.*

113. Botein II, *supra* note 82, at 4; *Deregulation, supra* note 21, at 612-13.

114. The Agreement stipulated the parties' support for a copyright revision that would grant cable operators a compulsory license to use television broadcast signals.

The 1972 rules were of essentially three kinds. The "anti-leapfrog" rules[115] limited the distance over which a signal could be imported, benefiting copyright holders by proscribing the nationwide retransmission of locally licensed programming.

The signal carriage provisions divided broadcast programming into local signals, which cable systems were required to carry,[116] and distant signals, carriage of which was permitted[117] but restricted to a maximum number proportionate to the size of the local television market.[118] Copyright holders derived protection from these provisions because they limited the number of copyrighted works that could be used without a license.

Finally, the syndicated program exclusivity[119] and network nonduplication[120] provisions required cable operators to honor exclusive licensing for programming obtained by a broadcaster. In particular, syndicated exclusivity granted copyright holders the right to a cable blackout of a program for one year after it was licensed to any broadcaster,[121] thus preventing non-licensed uses for a limited time.

III. The Copyright Liability of a Retransmission Carrier

The copyright component of the Consensus Agreement was implemented in 1976 with the passage of the Act and its cable television provisions.[122] The Act stands as a compromise, casting cable's copy-

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Consensus Agreement, *supra* note 5, at 285 app. D; *see Deregulation*, *supra* note 21, at 613; *Compulsory License*, *supra* note 24, at 934.

115. 47 C.F.R. §§ 76.59(b), .61(b), .63 (Oct. 1972). Importation of network affiliates was limited to the closest affiliate of each network. *Id.* §§ 76.59(b)(1), .61(b)(1), .63(a). Importation of independent stations from the top 25 television markets was also restricted, so that a cable system could import only stations from the two closest top 25 markets. *Id.* §§ 76.59(b)(2), .61(b)(2), .63(a). For example, a cable system in St. Louis would be permitted to import only independent stations from Kansas City and Indianapolis, the two closest top 25 markets. *See id.* § 76.51 (giving a list of the top 100 television markets); *Property Rights Solutions*, *supra* note 44, at 538-40.

116. 47 C.F.R. §§ 76.55, .57(a), .59(a), .61(a), .63 (Oct. 1972).

117. *Id.* §§ 76.55, .57(b), .59(b)-(e), .61(b)-(f), .63.

118. *Id.* For example, a cable system operating in the top 50 television markets could provide its subscribers with up to three network and three independent signals, including the local signals carried. *Id.* § 76.61(b). If the market already had three operating independents, two additional independents could be imported. *Id.* § 76.61(c). In the next 50 markets, only two, rather than three, independents could be carried. *Id.* § 76.63(a). In smaller markets, only one independent signal could be carried. *Id.* § 76.59(b).

119. *Id.* §§ 76.151-.159.

120. *Id.* §§ 76.91-.99.

121. *Id.* §§ 76.151, .153(a).

122. See *supra* note 114 and accompanying text.

right liability almost completely in the mold of the Consensus Agreement.[123]

A. *The Copyright Liability of Cable Systems*

Section 111[124] of the Act, governing the copyright liability of the cable industry, has been termed "by far the longest and most technical section of the new Copyright Act."[125] The thrust of section 111 is the grant to eligible cable systems of a compulsory license to carry all signals permissible under FCC regulations, and the requirement of a copyright royalty payment for the use of distant, non-network signals, based on the cable systems' revenues.[126] Once calculated, the royalty is

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123. *Copyright Issues: Cable Television and Performance Rights: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 71 (1979) (remarks of Chairman Kastenmeier, addressing a copyright industry representative: "I give you credit for that agreement you made with the cable industry. You brought it in, and almost precisely we enacted the new law as you presented it to us."), *quoted in Deregulation, supra* note 21, at 624 n.236.

124. 17 U.S.C. § 111 (Supp. V 1981).

125. Samuels, *Copyright and the New Communications Technologies*, 25 N.Y.L. Sch. L. Rev. 905, 911 (1980).

126. Local signals need not be paid for, because their retransmission does not damage the copyright holder. House Report, *supra* note 71, at 90, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 5704. Availability of the program to the entire local audience is assumed in the fee the local broadcaster pays for the use of the program. *Compulsory License, supra* note 24, at 941. Similarly, retransmission of network programming does not injure the copyright holder because a national audience is assumed and the work is licensed accordingly. House Report, *supra* note 71, at 90, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 5704. Retransmission of a distant, non-network signal, however, damages the copyright holder through distribution of the program beyond the area for which it has been licensed, thereby adversely affecting the ability of the copyright holder to exploit the work in the distant market. *Id.*, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 5704-05. Cable systems must nevertheless pay for the use of network broadcast signals, because even network stations carry a small amount of non-network programming. *Id.*, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 5705. Section 111 accomplishes this by requiring cable payments on the basis of the number of "distant signal equivalents" retransmitted by the system. 17 U.S.C. § 111(d)(2)(B)(ii)-(iv) (Supp. V 1981). An independent station is assigned a value of one distant signal equivalent, while network stations count as one-quarter of a distant signal equivalent. *Id.* § 111(f). It is noteworthy that even cable systems that do not import any distant signals must make a pro forma payment of at least .5% of subscriber revenues, "for the *privilege* of further transmitting any nonnetwork programming." *Id.* § 111(d)(2)(B)-(D) (emphasis added). This payment will be applied to any royalties that may come due in the semiannual period. *Id.* § 111(d)(2)(B)(i).

The same subparagraphs specify the amount of the royalty payable by a cable operator. *Id.* § 111(d)(2)(B)-(D). Subparagraphs (C) and (D) apply to cable systems having gross receipts from broadcast retransmission of less than $160,000. *Id.* Subparagraph (B) applies to all remaining cable systems, and provides for a payment of .675% of gross receipts from subscribers for the first "distant signal equivalent" semiannually deposited with the Register of Copyrights,[127] whence it is annually distributed by the Copyright Royalty Tribunal to copyright claimants.[128] In the event of a dispute, the Tribunal is empowered to conduct a proceeding to determine how the fees should be distributed.[129] The Tribunal also has authority to modify the rates for distant signal importation, in order to compensate for changes in subscriber rates, inflation or FCC regulations.[130]

Fully complied with, section 111's compulsory license provisions discharge all copyright liability for cable systems.[131] The compulsory license is not available, however, to retransmission carriers.[132] Never-

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imported, and lower payments for additional distant signal equivalents. *Id.* § 111 (d)(2)(B). These payments were deliberately made "modest" so as not to "retard the orderly development of the cable television industry." House Report, *supra* note 71, at 91, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 5705.

127. 17 U.S.C. § 111(d)(2)(B) (Supp. V 1981).

128. *Id.* § 111(d)(5)(A).

129. *Id.* § 111(d)(5)(B). In fact, there has been considerable controversy over fee distribution. The first disbursement was made in 1980, two years behind schedule. Copyright Royalty Tribunal, 1978 Cable Royalty Distribution Determination, 45 Fed. Reg. 63,026 (1980). The validity of the disbursement was still being challenged in 1982. National Ass'n of Broadcasters v. Copyright Royalty Tribunal, 675 F.2d 367, 370-71 (D.C. Cir. 1982).

130. 17 U.S.C. § 801(b)(2)(A)-(D) (Supp. V 1981). Unfortunately, this is proving to be a cumbersome process. *See Deregulation*, *supra* note 21, at 623. The first attempt to raise the rates was begun in January 1980. *See* 45 Fed. Reg. 63 (1980). It was promptly challenged by both cable operators and copyright holders, and was finally affirmed in 1982 with the exception of an "apparent mathematical error," concededly worth "millions of dollars." National Cable Television Ass'n v. Copyright Royalty Tribunal, 689 F.2d 1077, 1091 (D.C. Cir. 1982). Cable operators have petitioned, however, to delay the effective date of the increase. Wall St. J., Nov. 30, 1982, at 12, col. 2. Finally, the flamboyant cable entrepreneur Ted Turner successfully lobbied the Senate to pass an amendment to an appropriations bill, Pub. L. No. 97-377, § 143, 96 Stat. 1830, 1916 (1982), blocking the Tribunal's rate increase until the cable industry's latest challenge could be resolved. N.Y. Times, Dec. 18, 1982, at D1, col. 3. It is clear that the Tribunal is unlikely to be effective in compensating copyright holders for cable's use of their product.

131. The Act is somewhat unsatisfactory in that it leaves the source of the underlying liability of a cable operator unclear. *See* 2 M. Nimmer, Nimmer on Copyright § 8.18[B], at 8-196 to 8-197 (1982); Samuels, *supra* note 125, at 914. The intent of Congress, however, was clearly to provide for liability for the retransmission, or "secondary transmission," of a copyrighted work. 2 M. Nimmer, *supra*, § 8.18[B], at 8-197; *see* House Report, *supra* note 71, at 89-90, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 5704 (noting that failure to comply with § 111 subjects a cable system to a suit for copyright infringement).

132. The compulsory license is available only to cable systems. 17 U.S.C. § 111(c)-(d) (Supp. V 1981). Although the definition of "cable system" is arguably broad enough to include a retransmission carrier, *see id.* § 111(f), Congress's intent was to make the license available only to cable systems as defined in this Note. *See* House Report, *supra* note 71, at 88, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 5702-03. In any event, at present carriers are not paying any licensing fees whatsoever. *See* Perle, *supra* note 30, at 333.

theless, an exemption from copyright liability under section 111(a)(3) is available to certain carriers.[133]

B. *The "Passive Carrier" Exemption*

1. Statutory Requirements

Under the language of section 111(a)(3),[134] a carrier must meet four discrete requirements to gain an exemption.[135] First, the carrier may not exercise control over the content of the primary transmission.[136] This prohibition includes editing or similar interference either with the program itself or with advertising and station announcements.[137]

Second, the carrier is not permitted to control the particular recipients of the retransmission or "secondary transmission."[138] The carrier

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133. 17 U.S.C. § 111(a)(3) (Supp. V 1981).

134. *Id.* Section 111(a)(3) provides:

> The secondary transmission of a primary transmission embodying a performance or display of a work is not an infringement of copyright if— . . . (3) the secondary transmission is made by any carrier who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others: *Provided*, That the provisions of this clause extend only to the activities of said carrier with respect to secondary transmissions and do not exempt from liability the activities of others with respect to their own primary or secondary transmissions.

135. *Id.* Exempt carriers are those "that act solely as passive carriers." House Report, *supra* note 71, at 92, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 5706. Qualifying carriers will hereinafter be referred to as "exempt" or "passive" carriers.

The statutory language makes it clear that a carrier's retransmission under circumstances not specified in the exemption constitutes copyright infringement. In this connection, the Seventh Circuit has pointed out that a carrier cannot claim copyright immunity on the grounds that it retransmits only to cable systems, and does not thereby infringe an exclusive right because it does not perform the work publicly. WGN Continental Broadcasting Co. v. United Video, Inc., 685 F.2d 218, 220-21 (7th Cir. 1982); *see* 17 U.S.C. § 106(5) (Supp. V 1981). If retransmission carriers did not publicly perform, they would never be infringers, and could violate the terms of the exemption at will without incurring copyright liability. 685 F.2d at 221. Moreover, as the *WGN* court noted, the definition of "public performance" is sufficiently broad to encompass a carrier's retransmissions to cable systems. *Id.*; *see* 17 U.S.C. § 101 (Supp. V 1981) ("To perform or display a work 'publicly' means . . . (2) to transmit or otherwise communicate a performance or display of the work . . . to the public, by means of any device or process . . . .").

136. 17 U.S.C. § 111(a)(3) (Supp. V 1981).

137. The legislative history is not clear about the meaning in § 111(a)(3) of "content." *See* House Report, *supra* note 71, at 92, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 5706 (merely quoting the statutory language). However, § 111(c)(3) provides that *cable system* interference with "content" is actionable, and refers to "changes, deletions, or additions" to the program or to commercial advertising and station announcements. 17 U.S.C. § 111(c)(3) (Supp. V 1981).

138. 17 U.S.C. § 111(a)(3) (Supp. V 1981).

meets this requirement when it functions as a common carrier,[139] making its services available to all.[140]

Third, the carrier's activities must consist solely of providing communications channels for the use of others.[141] Thus, the exempt carrier will not originate its own programming, or otherwise put to its own use the communications service it provides.

Fourth, the carrier may not possess any direct or indirect control over the selection of the primary transmission.[142] A "selecting" carrier is subject to full copyright liability.[143]

Under this scheme, a traditional common carrier such as AT&T is exempt from copyright liability. Because the sender rather than the carrier controls the content, selection and the recipients of a telephone transmission, the telephone company does no more than provide communications channels for the use of others. Indeed, the primary purpose of the passive carrier exemption was to ensure AT&T's freedom from copyright liability for certain of its retransmissions.[144]

A traditional point-to-point microwave carrier is also exempt under the statute when the cable system using the carrier selects which signal it wishes to import. Historically, this has been the case.[145] Thus, provided the carrier does not edit the retransmission, it neither selects nor controls the content of the primary transmission. Assuming it does not control the recipients of the secondary transmission, it is doing no more than providing communications channels for the use of others.

In carrying on nationwide superstation distribution, however, a satellite resaler plays a role that is far less passive than that of its traditional counterparts.[146] Nevertheless, a 1982 federal appellate decision extended the passive carrier exemption to a satellite resaler.[147]

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139. See *supra* note 88.

140. Eastern Microwave, Inc. v. Doubleday Sports, Inc., 691 F.2d 125, 131 (2d Cir. 1982), *cert. denied*, 51 U.S.L.W. 3612 (U.S. 1983). A carrier that serves only affiliated cable systems, that is, one that functions exclusively as a CARS carrier, see *supra* note 53, should be deemed to be exercising control over the particular recipients of the secondary transmission. Because only a common carrier does not choose the recipients of its retransmissions, Congress' use of the term "any carrier" appears anomalous. *See* 17 U.S.C. § 111(a)(3) (Supp. V 1981).

141. 17 U.S.C. § 111(a)(3) (Supp. V 1981).

142. *Id.*

143. But see *supra* note 131.

144. See *infra* pt. III(B)(2).

145. *See* Report and Order, Docket No. 12,443, 26 F.C.C. 403, 427 (1959). In authorizing the first microwave retransmission carrier in 1958, the FCC noted that the cable systems themselves would perform the off-the-air pickup of broadcast signals, while the carrier would "merely [perform] the transmission of the signals." *In re* Intermountain Microwave, 24 F.C.C. 54, 54 (1958).

146. *See* Perle, *supra* note 30, at 332-33. See *infra* notes 149-52 and accompanying text.

147. Eastern Microwave, Inc. v. Doubleday Sports, Inc., 691 F.2d 125 (2d Cir. 1982), *cert. denied*, 51 U.S.L.W. 3612 (U.S. 1983). The Seventh Circuit has also

In *Eastern Microwave, Inc. v. Doubleday Sports, Inc.*,[148] the carrier sought a declaratory judgment establishing that its microwave and satellite retransmissions of New York Mets baseball games broadcast over WOR-TV (New York) did not infringe Doubleday's copyright in the broadcasts.[149] Before choosing WOR's signal for retransmission, EMI had conducted a survey to determine the marketability of various independent broadcast signals.[150] Thereafter, EMI conducted a vigorous promotional campaign, marketing its choice to cable systems.[151] The district court held the exemption unavailable, on the grounds that EMI controlled both the selection of the primary transmission and the recipients of the secondary transmission, and had failed to limit its activities to providing communications channels for the use of others.[152]

The Second Circuit, however, reversed.[153] While acknowledging that the choice of the WOR signal was a type of "selection,"[154] the court went on to hold that such a selection was not precluded by the statute.[155] The court reasoned that interpreting the Act to preclude signal selection "would . . . require that the exemption be denied to any carrier that did not retransmit every television broadcast of every

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decided a case involving satellite retransmission service. WGN Continental Broadcasting Co. v. United Video, Inc., 685 F.2d 218 (7th Cir. 1982). In that case, however, the carrier deleted material from the "vertical blanking interval" of the broadcast signal. *Id.* at 220. The "vbi" is the interval, too brief to be perceived, during which the electron gun that generates a television picture switches off and returns to the top of the screen to scan a new picture. *Id.* at 219. The carrier's deletion of this material was held to render the passive carrier exemption unavailable, since the carrier "did not retransmit [the broadcaster's] signal intact." *Id.* at 221. The Seventh Circuit did not indicate specifically which term of the exemption had been violated. It would seem that a carrier's failure to retransmit an intact signal would amount to carrier control over the content of the primary transmission. See *supra* note 137 and accompanying text. Apparently the Seventh Circuit believed that this was what the carrier was doing. The court went on, however, to determine whether the broadcaster's copyright covered the deleted "vbi" material. 685 F.2d at 221-23. Proper analysis would dictate that this determination be made before passing on the availability of the exemption. If the "vbi" were not covered by copyright, the carrier would not be controlling the content of the primary transmission, and hence its failure to retransmit an intact signal would not alone be grounds for denying the exemption. The connection between the availability of the exemption and the question whether the "vbi" was covered by the broadcaster's copyright was made by the district court which found, however, the exemption to be available. 523 F. Supp. 403, 413 (N.D. Ill. 1981), *rev'd*, 685 F.2d 218 (7th Cir. 1982).

148. 691 F.2d 125 (2d Cir. 1982), *rev'g*, 534 F. Supp. 533 (N.D.N.Y.), *cert. denied*, 51 U.S.L.W. 3612 (U.S. 1983).

149. *Id.* at 126.

150. 534 F. Supp. at 537.

151. *Id.* at 538.

152. *Id.* at 537-38.

153. 691 F.2d at 133-34.

154. *Id.* at 130.

155. *Id.* at 130-31.

television station in the country."[156] The Second Circuit further found that EMI met the remaining requirements for the exemption.[157] In particular, it held that EMI did no more than provide communications channels for the use of others—that is, EMI was selling only its services, not the copyrighted Mets games.[158]

The Second Circuit's holding thus amounts to a grant of immunity to satellite resalers, who on this basis are free to select, market, and retransmit signals from coast to coast. After *EMI*, neither copyright holders nor broadcasters can license or control this activity.

In extending this immunity to satellite carriers, however, the Second Circuit misconstrued section 111(a)(3). First, while the court's holding that marketing and promotion do not constitute using communications channels for one's own purposes[159] appears correct, this is not to say that certain marketing practices cannot be evidence of such use.[160] The Second Circuit apparently overlooked the distinction drawn by the district court between the marketing of a communications *service*, which is permissible, and the marketing of a copyrighted *product*, the broadcast signal, in which an exempt carrier may not engage.[161]

The court's analysis of the non-selection requirement is also troublesome. Notwithstanding the court's assertion that such a construction would require a carrier to retransmit all broadcast signals,[162] it would seem that a carrier could avoid copyright liability merely by not selecting the signal to be retransmitted. For example, if the cable system selected the signal, and then dealt with a carrier, the selection would be attributed to the cable system.[163] Similarly, RCA, from whom EMI leased its satellite transponder,[164] could not be held to

156. *Id.* at 130.

157. *Id.* at 130-34.

158. *Id.* at 131-32 & n.15. In support of its conclusion, the court noted that EMI transmitted nothing of its own creation, and that EMI charged cable systems a maximum of $3000, irrespective of the number of subscribers. *Id.* at 131-32. The relevance of the latter argument is questionable because EMI could obviously market a signal in hopes of attracting *more* cable systems as customers, thereby putting its communications channels to work for its own purposes.

159. *Id.* at 131 & n.15.

160. Evidence at trial included samples of EMI's advertising, featuring prominent baseball motifs. *See* 534 F. Supp. at 538; Brief for Defendant-Appellee at 29, 691 F.2d 125 (2d Cir. 1982).

161. 534 F. Supp. at 538. The FCC, too, has expressed the view that the marketing of a signal is inappropriate for a retransmission carrier. In authorizing the first satellite retransmission carrier, the Commission noted that "[the carrier] expressly disclaims any promotional activity to market particular television signals or programs to its customers." *In re* Southern Satellite Sys., Inc., 62 F.C.C.2d 153, 160 (1976).

162. See *supra* text accompanying note 156.

163. This is generally the case with the traditional point-to-point microwave carriers. See *supra* note 145 and accompanying text.

164. 691 F.2d at 128.

have "selected" WOR's signal. Assuming it could meet the other requirements of section 111(a)(3), RCA would remain exempt irrespective of the number of signals it carried.[165]

Finally, although the court held that station selection "cannot be the type [of selection] precluded by the statute,"[166] it failed to provide an alternate meaning of the word "selection." Thus, while the court spoke of its duty to uphold statutory provisions,[167] it seems to have substantially diluted the requirements of the exemption.

2. The Legislative History of the Exemption

The section's legislative history demonstrates that a carrier's selection and aggressive marketing of broadcast signals take it out of the exemption. The copyright bill proposed in 1964 contained a definition of "public performance" which arguably would have immunized even a non-passive carrier against copyright liability.[168] This expansive language was almost immediately deleted[169] on the recommendation of the Register of Copyrights, due to fears that it "might be extended unjustifiably to some commercial transmitters to the public."[170] Upon the elimination of this language, the late Professor Derenberg wrote to Congress, pointing out that without any exemption, a carrier such as AT&T might be found liable as an infringer in cases in which it

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165. The Second Circuit apparently believed that denial of the exemption to EMI would mandate its denial to RCA also. *Id.* at 133 n.19. The court, however, did not indicate in what sense RCA would run afoul of the exemption.

166. *Id.* at 130.

167. *Id.* ("To hold that 'selection' means station selection would . . . emasculate the exemption . . . with respect to intermediate carriers, in derogation of the duty of upholding statutory provisions not contrary to reason, logic, common sense or the Constitution.").

168. "To perform or exhibit a work 'publicly' means: . . . to transmit to the public a broadcast of any performance or exhibition *otherwise than as a common carrier.*" S. 3008, 88th Cong., 2d Sess. § 5(b)(3)(B) (1964), H.R. 11,947, 88th Cong., 2d Sess. § 5(b)(3)(B) (1964), H.R. 12,354, 88th Cong., 2d Sess. § 5(b)(3)(B) (1964) (identical bills) (emphasis added), *reprinted in* 2 The Kaminstein Legislative History Project 170 (A. Latman & J. Lightstone eds. 1982), *and in* 4 Omnibus Copyright Revision Legislative History (1976).

169. H.R. 4347, 89th Cong., 1st Sess. § 106(b)(3)(B) (1965) (as introduced), S. 1006, 89th Cong., 1st Sess. § 106(b)(3)(B) (1965), H.R. 5680, 89th Cong., 1st Sess. § 106(b)(3)(B) (1965), H.R. 6831, 89th Cong., 1st Sess. § 106(b)(3)(B) (1965), H.R. 6835, 89th Cong., 1st Sess. § 106(b)(3)(B) (1965) (identical bills), *reprinted in* 2 The Kaminstein Legislative History Project, *supra* note 168, at 175, *and in* 4 Omnibus Copyright Revision Legislative History (1976).

170. *Supplementary Report of the Register of Copyrights on the General Revision of the United States Copyright Law: 1965 Revision Bill, House Comm. on the Judiciary*, 89th Cong., 1st Sess. 25 (1965), *reprinted in* 4 Omnibus Copyright Revision Legislative History (1976).

merely passively leased cables to cable operators for distribution of programming to subscribers.[171]

Thus, in 1966 a passive carrier exemption was reinstated[172] in substantially the same form in which it exists today.[173] That nothing esoteric was meant by the prohibition of "selection" was evidenced by a contemporaneous House Report,[174] which simply noted that "[s]ince community antenna systems necessarily select the primary transmissions . . . the exemption . . . would in no case apply to them."[175] This language makes obvious that "selection" simply means "choosing"—cable systems "select" which signals they want to import.[176] This statement was accurate at the time it was made: In 1966, cable operators were in fact the ones who did the selecting, even when microwave carriers were used.[177]

Both the language of the statute and its legislative history militate against the conclusion that a retransmission carrier may itself select a profitable signal and market it to cable systems without infringing copyright. A carrier that does so is using its communications channels for its own purposes, not solely for the use of others, as required by the Act.[178]

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171. Eastern Microwave, Inc. v. Doubleday Sports, Inc., 691 F.2d 125, 132 n.16 (2d Cir. 1982), *cert. denied,* 51 U.S.L.W. 3612 (U.S. 1983). The *EMI* court mentions the Derenberg letter in pointing out that holding a satellite carrier not to "publicly perform" would not necessarily render the exemption superfluous, since there are carriers such as AT&T that unquestionably perform publicly, and for whom the exemption would remain effective. *Id.* It would remain true, however, that if a carrier did not publicly perform, it could violate the terms of the exemption at will and no copyright recourse could be had against it. See *supra* note 135.

172. H.R. 4347, 89th Cong., 2d Sess. § 111(a)(1)(C) (1966) (as reported out by the Committee on the Judiciary), *reprinted in* 2 The Kaminstein Legislative History Project, *supra* note 168, at 195, *and in* 11 Omnibus Copyright Revision Legislative History (1976).

173. *Compare id. with* 17 U.S.C. § 111(a)(3) (Supp. V 1981).

174. H.R. Rep. No. 2237, 89th Cong., 2d Sess. (1966), *reprinted in* 11 Omnibus Copyright Revision Legislative History (1976).

175. *Id.* at 82. Significantly, virtually identical language was used in every legislative report until 1974. *See* S. Rep. No. 983, 93d Cong., 2d Sess. 131 (1974), *reprinted in* 13 Omnibus Copyright Revision Legislative History (1977); H.R. Rep. No. 83, 90th Cong., 2d Sess. 53 (1967), *reprinted in* 11 Omnibus Copyright Revision Legislative History (1977). Apparently Congress had not understood the meaning of "select" to change. Later reports do little to shed light on the exemption other than clarifying that a carrier must act solely as a "passive" carrier to qualify. *See* S. Rep. No. 473, 94th Cong., 1st Sess. 78 (1975), *reprinted in* 13 Omnibus Copyright Revision Legislative History (1977); House Report, *supra* note 71, at 92, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 5706.

176. This view was shared by the FCC. See *supra* note 90.

177. See *supra* note 145 and accompanying text.

178. 17 U.S.C. § 111(a)(3) (Supp. V 1981). See *supra* pt. III(B)(1)–(2). It should also be pointed out that although a congressional committee has recently expressed a belief that satellite carriers are exempt under the present statute, *see* Eastern Micro-

IV. Market Considerations: Policy, Deregulation and Restraint

Imposition of copyright liability on retransmission carriers not described in the passive carrier exemption is not only mandated by a reasonable construction of the Act, but will serve important underlying policy considerations.

A. *The Philosophy of Copyright*

The primary purpose of statutory copyright protection—furthering maximum public access to an author's work—is accomplished through its secondary purpose of rewarding the copyright holder.[179] That is, copyright protection assures a continued output of creative works; the output is assumed to be positively correlated with the returns provided to copyright holders.[180]

Extending the passive carrier exemption to satellite resalers will inevitably have an adverse effect on these purposes. The compulsory license fees paid by cable systems are inadequate to maintain a continued supply of programming,[181] and the distribution of them by the Copyright Royalty Tribunal is invariably delayed.[182] Challenges to the Tribunal's rate adjustments make it likely that any adjustment will be out of date before it is instituted.[183] Yet as long as satellite carriers are deemed passive and thus exempt, they remain free to retransmit copyrighted works nationwide, subject only to the cable systems' payment of the compulsory license fee.

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wave, Inc. v. Doubleday Sports, Inc., 691 F.2d 125, 129 n.11 (2d Cir. 1982) (quoting H.R. Rep. No. 559, 97th Cong., 2d Sess. 4 (1982)), *cert. denied*, 51 U.S.L.W. 3612 (U.S. 1983), the views of one Congress as to the construction of a statute adopted years before by another Congress have little, if any, significance. United States v. Southwestern Cable Co:, 392 U.S. 157, 170 (1968) (quoting Rainwater v. United States, 356 U.S. 590, 593 (1958)). Moreover, others involved in the copyright revision have expressed an opposite view of satellite carrier liability. *See Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 23 (1979) ("In enacting section 111(a)(3), Congress certainly did not consider the then unanticipated activities of superstations and satellite relay services. . . . [S]ection 111(a)(3) . . . was intended to insulate the telephone company only—that was really the only thought that anybody had in mind at the time . . . .") (statement of Barbara Ringer, Register of Copyrights), *quoted in* Brief for Defendant-Appellee at 34-35, Eastern Microwave, Inc. v. Doublday Sports, Inc., 691 F.2d 125 (2d Cir. 1982), *cert. denied*, 51 U.S.L.W. 3612 (U.S. 1983).

179. *See, e.g.*, Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975); Mazer v. Stein, 347 U.S. 201, 219 (1954); *see also* U.S. Const. art. I, § 8, cl. 8.

180. 87 Harv. L. Rev. 665, 671-72 (1974).

181. *See Compulsory License*, *supra* note 24, at 940. See *supra* notes 126-30 and accompanying text. The rates were purposely set low. See *supra* note 126.

182. See *supra* note 129 and accompanying text.

183. See *supra* note 130 and accompanying text.

B. *The FCC-Copyright Balance*

Despite its drawbacks, the compulsory license/Copyright Royalty Tribunal scheme is now settled law. Courts should not further diminish copyright control and compensation by extending the passive carrier exemption to entities not originally within its scope. It must be remembered that the cable-copyright provisions of the Act were designed to interact in a delicate balance with the then existing FCC regulations.[184] Under those regulations, the number and kind of importable signals was limited, cable operators were required to honor exclusive licensing agreements, and cable retransmissions duplicative of a local broadcaster's programming were prohibited.[185] All of these rules worked to the benefit of copyright holders.[186]

Subsequent to the passage of the Act, however, the FCC substantially deregulated the cable industry. In a controversial 1980 action,[187] the Commission voted four to three to eliminate the syndicated program exclusivity rules, which had given broadcasters and copyright holders the right to request a cable blackout of exclusively licensed programming.[188] Also eliminated was the limit on the number of distant signals importable.[189] The anti-leapfrog restrictions, limiting the distance over which a signal could be imported, had already been deleted in 1975.[190]

The elimination of these rules works to the detriment of copyright holders, who in 1972 had supported the Act on the basis of a much more limited cable use of broadcast material.[191] Although copyright issues are not within the FCC's jurisdiction,[192] the Commission recognized the adverse impact of deregulation on copyright holders.[193] It relied, however, on the authority of the Copyright Royalty Tribunal to raise the compulsory license fees to provide adequate compensation to copyright holders.[194] The Tribunal's ability to discharge this responsibility is highly questionable.[195]

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184. House Report, *supra* note 71, at 89, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 5703. See *supra* notes 122-23 and accompanying text.

185. See *supra* notes 115-21 and accompanying text.

186. *Id.*

187. *Deregulation, supra* note 21, at 593.

188. Report and Order, Docket Nos. 20,988, Rm-2721, 21,284, Rm-3324, Rm-3346, 79 F.C.C.2d 663, 815 (1980), *aff'd sub nom.* Malrite T.V. v. FCC, 652 F.2d 1140 (2d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982). See *supra* note 121 and accompanying text.

189. 79 F.C.C.2d at 815. See *supra* notes 117-18 and accompanying text.

190. Report and Order, Docket No. 20,487, 57 F.C.C.2d 625 (1975). See *supra* note 115 and accompanying text.

191. See *supra* notes 113-21 and accompanying text.

192. Second Report and Order, *supra* note 18, at 768.

193. *See* Report, Docket No. 20,988, RM-2721, 71 F.C.C.2d 951, 968 (1979).

194. *Id.*

195. See *supra* note 130 and accompanying text.

In the absence of these regulations, cable operators are unrestricted in the number of signals they may add to their retransmission roster. A broadcaster in a market into which a given program has been or will be imported is unlikely to purchase broadcast rights to the program, since the audience has already been or soon will be exposed to the program originating elsewhere.[196] Because carriers are now free to distribute the syndicated programming of large-market independents without the risk of forced blackouts,[197] the number of markets copyright holders may effectively license has been sharply reduced.

Yet another barrier to the relatively uncompensated exploitation of copyrights—the formerly high cost of nationwide broadcast importation—fell with the advent of satellite technology and the appearance of the superstation.[198] The cumulative effect of deregulation and satellite technology has been a near-total loss of control by the affected copyright holders over their works.[199] This loss of control will inevitably reduce the program producers' incentive to create copyrighted works, and by extension, the public availability of such works.[200]

C. *The Effects of Carrier-Copyright Liability*

Although the compulsory license scheme alone is inadequate to compensate for the absence of these barriers, this does not lead to the conclusion that it must be eliminated. The primary danger to the copyright holder in television programming is superstation distribution, which is under the sole control of the satellite resaler.[201] Imposition of copyright liability on satellite carriers will neither destroy the existing copyright scheme nor create an untenable market position for either exempt or non-exempt carriers.

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196. See *supra* notes 44, 66, 126, 181-83 and accompanying text.

197. This resulted from the deletion of the syndicated exclusivity rules. See *supra* note 188 and accompanying text.

198. See *supra* notes 42, 57 and accompanying text.

199. Such a loss of control occurs in other contexts as well. One commentator refers to technology permitting increasingly widespread dissemination of copyrighted works as "second-order" technology, as contrasted with "first-order" technology which results in new media for expression. Note, *Toward a Unified Theory of Copyright Infringement for an Advanced Technological Era*, 96 Harv. L. Rev. 450, 450 (1982).

200. Although the imposition of copyright liability on non-exempt retransmission carriers would not necessarily result in greatly increased revenues for copyright holders, see *infra* notes 208-09 and accompanying text, it would certainly restore a measure of control by the copyright holder over copyrighted works. Gilliam v. ABC, 538 F.2d 14, 21 (2d Cir. 1976) ("[T]he ability of the copyright holder to control his work remains paramount in our copyright law.").

201. See *supra* notes 42-46 and accompanying text.

1. The Survival of the Compulsory License

The concern expressed by the Second Circuit in *EMI*[202] that the imposition of copyright liability on satellite resalers would effectively "freeze" cable and thus frustrate the compulsory licensing scheme[203] is unwarranted. Concededly, the FCC attempt to require retransmission consent for cable importation[204] did little to lift the freeze previously imposed by the Commission.[205] The cable industry's growth, however, has provided it with a far better bargaining position today.[206] Moreover, while that FCC proposal imposed restrictions on cable systems,[207] the imposition of copyright liability on retransmission carriers engaging in activities taking them outside the passive carrier exemption would not have as significant an effect on the cable industry.

Because a cable system would remain free to import signals using traditional carriers, no freeze on cable growth would result. A cable system might, however, be restricted to importing signals available via exempt carriers for the period of time necessary for the satellite resaler to negotiate licenses with copyright holders.

Although such licenses seemed difficult to obtain during the FCC's retransmission consent experiment fourteen years ago,[208] the situation today is different in two important respects. First, while it may have been difficult for many cable systems individually to negotiate licenses, the difficulty is obviously lessened when only the satellite resaler must negotiate. Second, a cable system is now free to import programming by exempt means. It would be fruitless for a copyright holder to refuse to license a non-exempt carrier. Given the opportunity to increase their revenues, and the alternative of no retransmission revenue at all, copyright holders are likely to negotiate.

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202. Eastern Microwave, Inc. v. Doubleday Sports, Inc., 691 F.2d 125 (2d Cir. 1982), *cert. denied*, 51 U.S.L.W. 3612 (U.S. 1983).

203. *Id.* at 132-33.

204. Notice of Proposed Rulemaking and Notice of Inquiry, Docket No. 18,397, 15 F.C.C.2d 417 (1968).

205. *See Consensus Agreement, supra* note 5, at 153-54.

206. See *supra* notes 23-31 and accompanying text. The increase in cable's strength is illustrated by the fact that "pay cable" distributors who formerly charged cable systems for carriage of their programming now actually pay the systems for this service. *See* Schwartz, *supra* note 28, at C22, col. 1. Pay cable programming is cablecast; that is, it is purchased or produced for cable origination rather than for broadcasting. It is supported by subscription fees paid in return for reception of the additional programming. *See* Home Box Office, Inc. v. FCC, 567 F.2d 9, 24 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977); *Property Rights Solutions, supra* note 44, at 529 n.13.

207. Notice of Proposed Rulemaking and Notice of Inquiry, Docket No. 18,397, 15 F.C.C.2d 417, 432-33 (1968).

208. *See Consensus Agreement, supra* note 5, at 153-54.

In such negotiations a number of factors will operate to limit the amount of the royalty payment. First, satellite carriers are precluded from raising the rates to their cable system customers above the ceiling imposed in their FCC common carrier tariffs.[209] Second, should copyright holders attempt to extract a fee higher than that which the carrier can pay, the cable systems will turn to exempt carriers who will pay nothing, just as they would if the copyright holders had refused to negotiate altogether. Under these circumstances, it is unlikely that copyright holders will refuse to negotiate or demand exorbitant fees.

Nationwide cable distribution of an independent station's signal without satellites is improbable, because satellites are much more cost-effective than their exempt terrestrial counterparts.[210] In the course of cable's growth, however, terrestrial microwave networks serving cable systems have nevertheless expanded rapidly, facilitating widespread access to television signals.[211] Copyrighted works are distributed broadly by exempt terrestrial carriers, and nationwide by satellite carriers. In either event, massive distribution occurs. This, however, does not mean that the passive carrier exemption should be extended to carriers less passive than those contemplated by the Act. In the absence of a negotiated carrier license, cable operators should be permitted to use only carriers traditionally considered exempt.

2. Carrier-Copyright Liability and the Marketplace

Although no cable freeze would result from recognition of the non-exempt status of certain carriers, the video marketplace would not remain unaffected. Cable system use of an exempt carrier would, of course, maintain the status quo; that is, the only copyright payments involved would flow from cable operators to the Copyright Royalty Tribunal pursuant to the provisions of section 111.[212]

Cable use of a non-exempt carrier, however, would generate two copyright royalties—a negotiated license between the copyright holder and the carrier, and the compulsory license fee paid to the

209. At present, satellite resalers are regulated as common carriers. *In re* Resale and Shared Use of Common Carrier Servs. & Facilities, 60 F.C.C.2d 261, 265 (1976). Common carriers must operate under FCC-approved tariffs. *See In re* Eastern Microwave, Inc., 70 F.C.C.2d 2195, 2203 (1979). These tariffs limit, inter alia, the amount which a carrier may charge its customers. *See* Eastern Microwave, Inc. v. Doubleday Sports, Inc., 691 F.2d 125, 133 (2d Cir. 1982), *cert. denied*, 51 U.S.L.W. 3612 (U.S. 1983).

210. See *supra* notes 42, 57-58 and accompanying text.

211. One commentator argues that such terrestrial distribution is equivalent to satellite superstation retransmission. Brotman, *supra* note 41, at 486 n.46.

212. See *supra* pt. III(A).

Tribunal.[213] Although the amount of the carrier copyright payment will be limited by the present structure of the cable and carrier industries,[214] in the short run copyright holders will at least have achieved a limited degree of control over and participation in the distribution of their works.

Moreover, changes in the marketplace partly lifting the barriers to adequate compensation of copyright holders are both appropriate and likely to follow a judicial recognition that satellite carriers "select" the signals they market. The FCC and the courts have indicated that common carriers may not choose the material to be transmitted to their customers.[215] Continued regulation of "selecting" satellite carriers as common carriers would thus be inappropriate. FCC deregulation of satellite carriers would allow them to charge according to the demand for their product, and would lift one barrier to adequate copyright compensation.[216] Because the other barrier is maintained by the existence of the statutory exemption for passive carriers and compulsory license scheme,[217] its removal would require legislative action. While this would certainly be desirable, the probability that it will take place in the near future appears rather limited.[218] Nevertheless,

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213. This is appropriate, since two entities—the carrier and the cable system—are using copyrighted works for their own purposes and profit. *See* Sailor Music v. The Gap Stores, 668 F.2d 84 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 2012 (1982). The court held The Gap Stores liable for infringement resulting from the playing of radio broadcasts in its stores. As a result, both the radio station and The Gap Stores will make copyright payments, although the latter's retransmissions reach only one group of listeners—those present in the stores. *See* Broadcast Music, Inc. v. United States Shoe Corp., 678 F.2d 816 (9th Cir. 1982) (similar holding on similar facts).

214. See *supra* note 209 and accompanying text.

215. *See, e.g.*, National Ass'n of Regulatory Util. Comm'rs v. FCC (NARUC II), 533 F.2d 601, 609 (D.C. Cir. 1976); Report and Order, Docket No. 12,443, 26 F.C.C. 403, 427-28 (1959). See *supra* note 88.

216. Were the FCC to fail to recognize the non-common carrier status of satellite resalers, the courts could prevent the continuation of common carrier regulation. *See* FCC v. Midwest Video Corp., 440 U.S. 689 (1979) (FCC may not regulate cable systems as common carriers). Moreover, "[t]he common law definition of common carrier is sufficiently definite as not to admit of agency discretion in the classification of operating communications entities. A particular system is a common carrier by virtue of its functions, rather than because it is declared to be so." National Ass'n of Regulatory Util. Comm'rs v. FCC (NARUC I), 525 F.2d 630, 644 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976) (footnote omitted).

217. See *supra* pt. III.

218. Many have argued that the compulsory license scheme should be eliminated. *See* Eastern Microwave, Inc. v. Doubleday Sports, Inc., 691 F.2d 125, 133 n.18 (2d Cir. 1982), *cert. denied*, 51 U.S.L.W. 3612 (U.S.1983). Recent remarks of legislators indicate, however, that this is unlikely. *See id.* at 129 n.11 (discussing the continuation of the present scheme, and asserting that Congress did not intend it to be undercut). Although Congress has expressed concern that denial of the exemption would undermine the compulsory license, *see id.*, such a result is improbable. See *supra* notes 202-14 and accompanying text.

incomplete relief is better than no relief at all, and it would be a clear improvement to restore even a limited degree of copyright compensation and control to the television programming marketplace.

D. *The Role of the Courts*

In view of the delicate balance that was achieved in the Consensus Agreement and the Copyright Act, courts should be reluctant to rearrange the elements of either. That the FCC has already done so[219] ought to strengthen a court's resolve to tread lightly, lest an already undermined structure collapse altogether. An exemption for satellite retransmission, though initially expanding public access to copyrighted works, will ultimately reduce public availability. The reduction in the number of markets to which a program may practically be licensed will destroy the incentive of authors to create programs.

Courts considering the copyright liability of new participants in the cable industry should therefore strictly construe the Act. It would be unwise to broaden an exemption from copyright liability when it appears that no such result was intended by Congress, and it is especially dangerous to do so when the FCC has lifted the limited protection it had provided against widespread, relatively uncompensated uses of copyrighted works.

The better approach would be to refuse to extend copyright immunity to any entity not clearly entitled to it. Repairing a structure built by painstaking compromise and partly dismantled by the FCC and technological growth is the task of Congress. Courts should not make it more difficult by liberal construction of exemptions and their extension to entities not satisfying the statutory criteria.

Satellite resaler "selection" of broadcast signals is inevitable in the current market. The need to recoup a substantial investment[220] mandates both retransmission of only the most profitable signals and their effective marketing to as many cable systems as possible.[221] In this light, a satellite resale retransmission carrier, by selecting and marketing a signal, should be presumed to have strayed beyond the confines of the passive carrier exemption.

Just as such a presumption would not freeze cable growth, it need not stifle satellite-carrier growth. The deregulation which would follow recognition of the copyright liability of satellite carriers would allow both the carrier and the copyright holder to charge what the

219. See *supra* notes 184-97 and accompanying text.

220. The cost of leasing a satellite transponder for broadcast retransmission is approximately one million dollars annually. *See In re* Eastern Microwave, Inc., 70 F.C.C.2d 2195, 2197 (1979).

221. This need is even more pressing with respect to common carriers, which are limited in what they may charge each customer. See *supra* note 209.

market will bear.[222] Even in the absence of deregulation, a copyright holder should not be deprived of the ability to control and participate in the profits accruing from the wholesale distribution of his works. Certainly any gain in this respect would be significant from the copyright holders' point of view.[223]

Conclusion

Cable television arrived over thirty years ago. Nevertheless, it continues to present the courts with novel legal problems. The emergence of new patterns of program distribution, notably the satellite-distributed superstation, has further complicated the cable problem and, together with the FCC deregulation of cable, has seriously compromised the position which copyright holders had laboriously achieved in the Consensus Agreement and Copyright Act of 1976.

The remedy for copyright holders need not lie in the emasculation of the compulsory license. Rather it may be found in the strict construction of the exemption from copyright liability on which satellite resalers rely as they destroy program producers' markets. A strict construction of the Act would result in the loss of this exemption to certain carriers. Thus, while cable systems would generally remain free to use distant broadcast signals, superstation distribution would not proceed without more adequate copyright control and compensation.

Entertainment technology will continue to progress. Effective resolution of the inevitable legal problems accompanying our telecommunications future will depend on careful adherence by courts to the letter and spirit of legislation carefully developed to guide them.

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222. See *supra* notes 215-18 and accompanying text.
223. See *supra* notes 196-200 and accompanying text.