

1969

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Recommended Citation

CATV-The Continuing Copyright Controversy, 37 Fordham L. Rev. 597 (1969).

Available at: <https://ir.lawnet.fordham.edu/flr/vol37/iss4/4>

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COMMENTS

CATV—THE CONTINUING COPYRIGHT CONTROVERSY*

The recent growth of CATV (community antenna television)¹ has focused considerable attention on the relationship between that mode of telecommunications and copyright law.² Characteristically, a CATV system operates by receiving the transmitted signals of television stations through a large, central antenna. These signals are then refined and strengthened through amplifiers and transmitted via coaxial cables to subscribers. When CATV was primarily confined to geographical areas of poor reception there was little conflict with copyright holders.³ Indeed, they viewed the development of CATV as a key to new markets.⁴ The pleasure of some copyright holders quickly disappeared, however, when CATV emerged in populous, urban areas where local stations could be viewed. What disturbed copyright holders was the ability of CATV to import into one area of reception the programming of another, distant area.⁵ For example, in Elmira, New York, a cable system picks up and distributes the programming of the community's one local station; it also picks up and distributes three stations from Binghamton, two from Syracuse, one from Scranton, Pennsylvania, three non-network stations from New York City, as well as time, weather, and educational broadcasts.⁶

The Copyright Act⁷ grants several exclusive rights to copyright holders, including the sole rights to "perform [non-dramatic literary works] in public for profit"⁸ and to "perform [dramatic works] publicly."⁹ This statute was obviously not written in contemplation of CATV, so the initial problem is to determine what CATV functions, if any, may violate the copyrights of TV stations

* Entered in the Nathan Burkan competition sponsored by the ASCAP.

1. The name CATV is actually a misnomer for most such systems. Originally, CATV systems were community-sponsored projects to improve television reception in areas where adequate reception was geographically difficult or impossible. The name CATV was more recently adopted by private businesses providing such service to subscribers for a fee. See *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968) for a discussion of CATV operations.

2. See Finkelstein, *Copyright Revision—Music: CATV, Educational Broadcasting, and Juke Boxes*, 53 Iowa L. Rev. 870 (1968); Note, *CATV and Copyright Liability*, 80 Harv. L. Rev. 1514 (1967).

3. Hearings Before the Subcomm. on the Revision of the Copyright Law of the House Comm. on the Judiciary, 89th Cong., 1st Sess. ser. 8, pt. 2, at 1225-26 (1965) [hereinafter cited as *Hearings on Copyright Law Revision*].

4. *Id.* pt. 3, at 1828.

5. Hearings on Copyright Law Revision pt. 2, at 1226; see Note, *CATV and Copyright Liability: On a Clear Day You Can See Forever*, 52 Va. L. Rev. 1505, 1506 (1966).

6. Gould, *Cable TV: A Pandora's Box in the Living Room?*, N.Y. Times, Nov. 10, 1968, § 2, at 19, col. 1.

7. 17 U.S.C. § 1 (1964).

8. *Id.* § 1(c).

9. *Id.* § 1(d).

or other copyright owners.¹⁰ Congress appears to have recognized that the Copyright Act does not make clear the fact or extent of its applicability to CATV, but has so far declined to clarify the Act in this regard.¹¹

The relevant sections of the Act require, for an infringement of a copyright, that there be an unauthorized performance of the copyrighted work in public, and, in the case of a non-dramatic literary work, that the performance be for profit. Thus it must be determined whether CATV in fact performs; and whether, if it performs, it performs publicly. The profit-making nature of CATV is apparently not in question.

Assuming for the moment that CATV "performs," the issue of its public nature may readily be dispatched. There seems to be no question that a television broadcast in the home is a "public" performance, relying on the decision in *Jerome H. Remick & Co. v. American Automobile Accessories Co.*,¹² where the court said that "[a] performance . . . is no less public because the listeners are unable to communicate with one another, or are not assembled within an inclosure Nor can a performance . . . be deemed private because each listener may enjoy it alone in the privacy of his home."¹³

It has been repeatedly held that broadcasters perform.¹⁴ The relevant question then becomes: Do CATV stations broadcast? Here it is necessary to distinguish the functions performed by CATV. The most common function of CATV has been the simultaneous retransmission of television broadcasting to its subscribers.¹⁵ This function has recently been considered, in terms of copyright infringement, by the Supreme Court.

10. The statute appears to be the exclusive remedy for misappropriation of copyrighted material. See *Cable Vision, Inc. v. KUTV, Inc.*, 335 F.2d 348, 354 (9th Cir. 1964), cert. denied, 379 U.S. 989 (1965). Here a local broadcaster, in a counterclaim arising in an antitrust action, alleged unfair competition by the plaintiff CATV station. The counterclaim stipulated that plaintiff's simultaneous transmission of programming originated by the defendant's network infringed upon defendant's exclusive right of broadcast. The court, relying heavily on *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964), and *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964), held that such activity by a CATV service did not infringe upon any common law protected right of the defendant (the so-called common law copyright). See also Gold, *Television Broadcasting and Copyright Law: The Community Antenna Television Controversy*, 16 ASCAP Copyright L. Symposium 170, 180 (1968).

11. See Hearings on Copyright Law Revision.

12. 5 F.2d 411 (6th Cir. 1925).

13. *Id.* at 412; see *Society of European Stage Authors & Composers v. New York Hotel Statler Co.*, 19 F. Supp. 1 (S.D.N.Y. 1937); *M. Nimmer, Copyright §§ 107.42, 107.44* (1968).

14. *Associated Music Publishers, Inc. v. Debs Memorial Radio Fund, Inc.*, 141 F.2d 852 (2d Cir. 1944) (radio broadcast of a recorded program); *Jerome H. Remick & Co. v. American Auto. Access. Co.*, 5 F.2d 411 (6th Cir. 1925) (a radio broadcast); *Select Theatres Corp. v. Ronzoni Macaroni Co.*, 59 U.S.P.Q. 288 (S.D.N.Y. 1943) (a radio rebroadcast of a program received from a network).

15. Although many CATV systems have begun to originate their own programming, the primary function of CATV is still simultaneous retransmission.

In *United Artists Television, Inc. v. Fortnightly Corp.*¹⁶ the defendant operated CATV systems in the area of Clarksburg and Fairmont, West Virginia, where the hilly terrain made normal television reception nearly impossible. The plaintiff, an owner of copyrights to certain motion pictures licensed stations in Pittsburgh, Pennsylvania, Steubenville, Ohio, and Wheeling, West Virginia to broadcast them during the course of normal television programming. Defendant received the signals of these copyright-licensed stations and transmitted them by coaxial cable to paying subscribers. The district court held that such an operation of the CATV system constituted an unlicensed public performance which infringed plaintiff's rights under the Copyright Act.¹⁷ The court of appeals affirmed,¹⁸ but the Supreme Court reversed, holding that the CATV system did not perform the copyrighted motion picture within the meaning of the Copyright Act. Thus, the Court upset what appeared to be settled,¹⁹ though not uncriticized²⁰ law.

The legislative history of the Copyright Act suggests that Congress envisioned a situation in which the dialogue of a play was transcribed by someone sitting in the audience and thereafter used by another party to produce the play.²¹ The classic case was *White-Smith Music Publishing Co. v. Apollo Co.*,²² in which the Court held that "piano rolls" did not infringe the copyrights of the songs they played when used in a player piano. The Court said that to be a copy it must be so clearly recognizable "as to give every person seeing it the idea created by the original."²³ Hence the traditional view suggests the necessity for for "a written . . . record of . . . intelligible notation"²⁴ in order for there to be an infringement. It is questionable whether a CATV simultaneous retransmission could satisfy this tangibility requirement.²⁵ However, the question has not been considered because the courts have recently been employing a different approach.

The more modern view is illustrated by the district court's decision in *Fortnightly* which centered around an electronic analysis of the operation of CATV. The court found, in the method by which CATV receives and amplifies the signals from the regular broadcasting stations, that "there are created [by CATV] output signals which are replicas in electronic terms of the input signals"²⁶ and that these replicas duplicate the original broadcast. Thus, the court concluded

16. 392 U.S. 390, rehearing denied, 393 U.S. 902 (1968).

17. 255 F. Supp. 177 (S.D.N.Y. 1966).

18. 377 F.2d 872 (2d Cir. 1967).

19. See text accompanying notes 26-33 *infra*.

20. See, e.g., 80 Harv. L. Rev., *supra* note 2.

21. See H.R. Rep. No. 2222, 60th Cong., 2d Sess. 4 (1909).

22. 209 U.S. 1 (1908).

23. *Id.* at 17.

24. *Id.*

25. See 80 Harv. L. Rev., *supra* note 2, at 1516. It has also been suggested that a fundamental objection to the White-Smith test is its obsolescence. *Id.*

26. 255 F. Supp. at 192.

that "[w]hen a CATV system brings the acting or the playing to the audience and makes available to that audience a reproduction of a primary performance . . . it is executing a function that is so closely akin in result to the primary performance of the copyrighted work that . . . [the court should] attach to it the consequences resulting from an unauthorized primary performance."²⁷ In fact the court went so far as to state that "the only significant difference between . . . [regular] broadcasting stations and CATV . . . [is] that broadcasting stations transmit through the air while CATV transmits through cables."²⁸

The court seemed to place its concern squarely upon what has been termed the "doctrine of multiple performance,"²⁹ a theory emphasizing the idea of mechanically reproducing the original copyrighted material. The doctrine was most clearly enunciated in *Buck v. Jewell-LaSalle Realty Co.*,³⁰ where the Court held that the unauthorized acts of a hotel proprietor in playing over loud speakers in his hotel a radio broadcast of a copyrighted musical composition constituted a performance in public of the composition within the meaning of the Copyright Act.³¹ Justice Brandeis, in *Buck*, said "[t]he transmitted radio waves require a receiving set for their detection and translation into audible sound waves [T]he original program [is not] heard Reproduction . . . amounts to a performance."³² The *Fortnightly* district court, in applying this doctrine, said, "[w]hat defendant passes on to its subscribers are not the same signals that were received but electronic reproductions of them, containing, however, the same program information" ³³ By this reasoning CATV performs by reproducing a facsimile of the original broadcast and would be liable for copyright infringement for everything it transmits to its subscribers.

It is generally agreed that there are difficulties attending such an electronic analysis. To assume that CATV reproduces and therefore performs all that it receives, amplifies, and transmits from regular broadcasters suggests that CATV incurs copyright liability for every minute of such transmissions. Carrying this reasoning to its logical conclusion, liability might extend to anyone who participates in this process of reproduction; the suppliers of amplifying equipment and cable lines, the installers of equipment, the man who hooks up the home receiver,

27. *Id.* at 204.

28. *Id.* at 205. The court further concluded that the section of the statute pertaining to public performances for profit would be infringed when CATV performed plaintiff's motion pictures other than those which were photoplays (non-dramatic literary works) and the section requiring merely public performance would both be infringed when the motion pictures were photoplays (dramatic works). *Id.* at 215. This distinction follows the reasoning of *MGM v. Bijou Theatre Co.*, 59 F.2d 70 (1st Cir. 1932), which held that films based upon copyrighted dramatic compositions are protected under the Copyright Act § 1(d), 17 U.S.C. § 1(d) (1964).

29. See M. Nimmer, Copyright § 107.42 (1968).

30. 283 U.S. 191 (1931).

31. See *Society of European Stage Authors & Composers, Inc. v. New York Hotel Statler Co.*, 19 F. Supp. 1 (S.D.N.Y. 1937).

32. 283 U.S. at 200-01.

33. 255 F. Supp. at 204; see M. Nimmer, Copyright § 107.44 (1968).

or even the viewer who participates by turning on his set or paying the monthly CATV fee all might be liable.³⁴

The court of appeals, in affirming *Fortnightly*, seemed less concerned with the technical aspects of electronic reproduction. Relying heavily on the decision in *Buck v. Jewell-LaSalle Realty Co.*,³⁵ the court thought the issue was "how much did [CATV] do to bring about the viewing and hearing of a copyrighted work?"³⁶ The decision was based on the court's judgment that the efforts of Fortnightly in bringing about the viewing of the programs exceeded the efforts of the hotel owner in *Buck*.³⁷ Hence, Fortnightly, by the same reasoning, was liable for infringement. The reasoning of the court of appeals is also open to criticism regarding its unclear extension of the chain of liability and the economic impracticality of imposing liability on CATV for every moment of transmission.

The Supreme Court recognized many of these criticisms in its decision reversing the court of appeals. The Court divided the process of television viewing into the activities of broadcasters and viewers.³⁸ The Court said "[t]he broadcaster selects and procures the program to be viewed He then converts the visible images and audible sounds . . . into electronic signals, and broadcasts the signals at radio frequency for public reception."³⁹ The Court further maintained that "[m]embers of the public, by means of television sets and antennas . . . receive the broadcaster's signals and reconvert them into the visible images and audible sounds of the program The viewer . . . provides the equipment to convert electronic signals into audible sound and visible images."⁴⁰ Hence the Court also accepted the proposition that "[v]iewers do not perform."⁴¹

Under this reasoning, to decide that CATV does not perform within the meaning of the Copyright Act, the Court had to characterize CATV as a "viewer" rather than a "broadcaster." For this proposition the Court relied on dictum in *Lilly v. United States*⁴² to the effect that "community antenna service was a mere adjunct of the television receiving sets with which it was connected"⁴³ Thus the Court stated that "a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals. . . . CATV

34. See 80 Harv. L. Rev., supra note 2, at 1518.

35. 283 U.S. 191 (1931).

36. 377 F.2d at 877.

37. *Id.* at 879.

38. 392 U.S. at 397.

39. *Id.* (footnotes omitted).

40. *Id.* at 397-98.

41. *Id.* (footnotes omitted). The Court bases this conclusion on *Buck v. Debaum*, 40 F.2d 734 (S.D. Cal. 1929), where the court said: "One who manually or by human agency merely actuates electrical instrumentalities, whereby inaudible elements that are omnipresent in the air are made audible to persons who are within hearing, does not 'perform' within the meaning of the Copyright Law." *Id.* at 735. Also relied upon was *Jerome H. Remick & Co. v. General Electric Co.*, 16 F.2d 829 (S.D.N.Y. 1926), where the court said that "these who listen do not perform" *Id.*

42. 238 F.2d 584 (4th Cir. 1956).

43. *Id.* at 587.

equipment[’s function] . . . is little different from that served by the equipment generally furnished by a television viewer.”⁴⁴ But the most critical point for the Court seemed to be that in all practical considerations the function of CATV is unlike that of a broadcaster, in that CATV merely carries the programming and does not “procure programs and propagate them to the public.”⁴⁵

It is important to note that the Court here viewed CATV merely in its function as a receiver and transmitter, and not as a program originator. Hence the actual, limited holding is that “CATV operators, like viewers and unlike broadcasters, do not perform the programs that they receive and carry.”⁴⁶ By reserving its holding to such programs, the Court implied that if CATV, in initiating its own programming, takes on the characteristics of a broadcaster by “procuring” and “propagating” programming, it might be liable for copyright infringement *in that programming* on a set of standards similar to those applicable to regularly licensed broadcasting stations. Interestingly, one week before *Fortnightly*, the Court decided *United States v. Southwestern Cable Co.*⁴⁷ in which the Court confirmed the regulatory power of the Federal Communications Commission over CATV. The decision in *Southwestern Cable* seems couched in the idea that, in the absence of modern congressional copyright legislation⁴⁸ the best recourse for the regulation and protection of CATV lies in the power of the FCC.

Unfortunately, the fact is that the FCC has not acted with any consistency toward CATV.⁴⁹ Originally renouncing any power over CATV, the FCC did exercise control by regulating the signal carriers, such as the telephone company, which served CATV. In *Carter Mountain Transmission Corp.*,⁵⁰ for example, the FCC refused such a carrier the right to expand its facilities where this would result in a harmful anticompetitive effect on a local station. By 1966, however, the FCC had issued rules for CATV.⁵¹ Basically these regulations provided that CATV must carry, upon request, the signals of any station within whose defined broadcast area it operates.⁵² It is obliged to black-out transmissions from distant stations which conflict with the same programming by local

44. 392 U.S. at 399 (footnote omitted).

45. *Id.* at 400.

46. *Id.* at 400-01 (footnote omitted).

47. 392 U.S. 157 (1968).

48. Congress has considered the problem and gone so far as to draw up a bill, one section of which dealt with CATV. H.R. 2512 § III, 90th Cong., 1st Sess. (1967); H.R. Rep. No. 83, 90th Cong., 1st Sess. (1967). It sought to be a compromise of CATV and copyright interests. See 80 Harv. L. Rev., *supra* note 27, at 1532-35. However the entire section of the proposed bill was deleted on the floor of the House prior to the Supreme Court decisions in *Southwestern* and *Fortnightly*. 113 Cong. Rec. 3857, 3859 (daily ed. April 11, 1967).

49. See 52 Va. L. Rev., *supra* note 5, at 1517-21.

50. 32 F.C.C. 459, *aff'd*, 321 F.2d 359 (D.C. Cir. 1962), cert. denied, 375 U.S. 951 (1963).

51. 47 C.F.R. §§ 21.710, 21.712, 21.714, 74.1, 74.1001, 74.1031, 74.1033, 74.1101, 74.1103, 74.1105, 74.1109, 91.557, 91.559, 91.561 (1968). For a full discussion of the 1966 FCC regulations see Note, *The Wire Mire: The FCC and CATV*, 79 Harv. L. Rev. 366 (1965).

52. This is the grade B contour, which is the area in which 50% of the viewers receive a satisfactory picture 90% of the time. 47 C.F.R. §§ 21.710, 73.683(a) (1968).

stations⁵³ and may not carry outside signals into the 100 most important television markets. Obviously these regulations seem indirectly to favor the copyright holders in preserving market areas not already licensed for possible future exploitation.⁵⁴

The Court in *Fortnightly* was hence faced with three alternatives. By the first of these it could affirm the lower court view of traditional copyright law and accept the view of Justice Fortas' dissent that "[t]he task of caring for CATV is one for the Congress."⁵⁵ In this way the Court could have avoided a decision which may be construed as quasi-legislative in its construction of copyright law, but it would have left the immediate future of CATV to the vagaries of congressional action—heretofore anything but satisfactory.⁵⁶ The second alternative would have been to either accept or reject the reasoning of the lower courts and leave the matter entirely to the will of the FCC under the authority of *Southwestern*. However, this action would relegate CATV to the historically inconsistent control of the FCC, whose latest regulations seem strongly favorable to the copyright holders. The third alternative, and the one adopted by the Court in *Fortnightly*, was to establish a no-liability rule for this limited situation of programming received and carried. So deciding *Fortnightly* on its facts established a precedent favorable to CATV. The fact that the Court rejected both copyright liability and present FCC determination suggests that the decision was grounded on policy considerations such as protection of a fledgling industry. This action by the Court will clearly render some temporary stability to an area of great inconsistency in the law while still allowing regulation by the FCC⁵⁷ pending congressional action.

53. This regulation precludes the situation whereby a CATV station might transmit the same program being broadcast by a local television station but obtain the transmission from a station in another city (with different advertisers, sponsors, etc.).

54. See 80 Harv. L. Rev., supra note 2, at 1532.

55. 392 U.S. at 408.

56. See note 48 supra.

57. In December, 1968 the Federal Communications Commission released a new set of proposed rules for the regulation of CATV, noting that "[f]ollowing the . . . decision in *Fortnightly* . . . there are substantial indications that in the 91st Congress there will be enactment of a copyright law providing for a fair and reasonable revision as to CATV," and stating: "Since Congress is considering the copyright matter, we should afford the opportunity for Congressional resolution We therefore propose to proceed with our rulemaking proceeding We shall, however, not take [definitive] action until an appropriate period is afforded to determine whether there will be . . . Congressional guidance in this whole field." 33 Fed. Reg. 19028, 19034 (1968). Under these proposals, only CATV systems in the 100 largest market areas would be prohibited from bringing in programming from outside the area without permission from the originating broadcaster. In lesser market areas the CATV system would be allowed to bring in programming from the closest possible source of the three major networks, an independent station, and an educational station. A CATV system more than 35 miles from any local broadcaster would be permitted to bring in as many stations as it desired so long as the closest possible source for any given program is used. Also proposed is a requirement to make CATV systems originate some of their own programming, a profitable enterprise already being undertaken by many CATV systems. *Id.* at 19028-40; see N.Y. Times, Dec. 14, 1968, at 91, cols. 1-3.