The Effect of the Cable Television Compulsory License on Program Supply in a Deregulated Environment

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COMPULSORY LICENSE ON PROGRAM SUPPLY
IN A Deregulated Environment

by

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Introduction

Cable television enjoys a favored status in the world of copyright law. Because of the effect of two decades of federal regulation, the 1976 revision of the Copyright Act declined to impose full copyright liability on cable television for the retransmission of distant non-network programming. Instead, Congress used a compulsory licensing system to guarantee cable television access to such programming while assuring the copyright owners some remuneration for its use.\(^2\)

The compulsory license for cable television was intended by Congress to work in tandem with the then-existing Federal Communications Commission (FCC) syndicated programming and distant signal regulations. However, in 1980 these regulations were repealed, permitting cable systems to import an unlimited number of distant signals without regard for contractual exclusivity agreements between local broadcasters and the copyright owners of syndicated television programming.\(^3\)

In response to the deregulation and the lobbying efforts of broadcast and copyright interests, Congress is at this time in the process of revising the cable television compulsory licensing system. Although the compulsory license would be retained, several changes in the copyright law are proposed, the most important being reinstatement of protection for syndicated programming exclusivity agreements.\(^4\)

This comment analyzes the effect retention of the compulsory license and other proposed changes in the copyright law will have on the supply
of television programming in the absence of FCC regulations. Specifically, the potential adverse effects on the production of television programming are identified and examined. Further, several possible effects on the availability of sports programming are also analyzed.

This comment concludes the evidence indicates retention of the cable television compulsory license in the absence of signal importation regulations and protections for sports programming will have an adverse effect on the overall supply of programming for television. Thus, given this potential for harm, it calls for the imposition of full copyright liability on cable television for the retransmission of distant non-network programming.
I. Early FCC Regulation

Cable television was a difficult medium to regulate according to the traditional concepts applied to broadcasters. Because it developed after the Communications Act of 1934 and the Copyright Act of 1909, early regulatory attempts to fit the medium into existing communications policy, the law and the copyright marketplace contributed to a history of regulation unique in this nation's experience.

Initially, the Federal Communications Commission, the federal agency empowered to regulate the nation's airwaves to protect the public interest, declined to exercise its regulatory authority over cable television on the belief it lacked the jurisdiction to do so under the Communications Act of 1934. However, following this initial uncertainty, the FCC first indirectly regulated cable television in 1962 in the case of Application of Carter Mountain Transmission Corp. This decision is notable because it is the first instance in which the FCC restrictively regulated cable television to protect a local broadcaster from the potential harm of increased competition from the presence of cable service. It was the beginning of a protectionist regulatory policy favoring established broadcasters over the developing cable industry.
II. The 1966 Regulations

This regulatory policy initially applied only to those cable systems fed by microwave transmission links, but the FCC soon extended its jurisdiction to include all systems, whether or not microwave-fed. In the 1966 Second Report and Order, the FCC restated its bases for the restrictive regulation of cable television:

(1) The failure of cable systems to carry the signals of local broadcasters and duplication by the systems of those broadcasters' programming fare were unfair competitive practices favoring the cable operator. These practices were inconsistent with the FCC's policy decision that cable television was to be a supplemental service, used primarily to enhance reception of broadcast signals and provide expanded audiences for over-the-air broadcasters.

(2) The regulations in the Second Report and Order were necessary to ameliorate the risk that cable television could have a future adverse impact on broadcast services, both existing and potential.

To implement the policy, regulations in the 1966 Second Report and Order required that cable systems carry the signals of all local stations and that "imported signals" could not duplicate programming available on a local station on the same day. More importantly, limitations were imposed on the importation of distant signals into the top 100 television markets. Cable operators were prohibited from importing distant signals into those markets without the granting of a waiver from the FCC following an evidentiary hearing. Therein, the cable operator was required to demonstrate that the importation of distant signals would be both in the public interest and not adversely affect local broadcasters. The procedure proved in time to be impossible to administrate, and resulted in a significant backlog of cases for
By restricting the entry of new cable systems into the major television markets the FCC was striving to regulate in the "public interest" by protecting both UHF and VHF broadcasters from the competitive threat of cable service. It was the belief of the FCC that permitting cable to grow would divert audiences away from local broadcasters, an effect known as "audience fragmentation". This diversionary effect would reduce the value of advertising time on the local broadcast stations and erode their revenue base, ultimately resulting in a lowering of the overall quality of television service to the public.22 Although the FCC was later to conclude that its fears of the effects of cable growth on broadcasters were based on erroneous assumptions, the effect of the 1966 regulations is clear: cable television development was virtually frozen for seven years,23 and it entered the 1970's as a small industry principally to servicing small communities in rural areas.24

The 1966 regulations had another, secondary effect. By prohibiting the same-day duplication of local programming by a cable system the regulations protected the exclusive broadcast rights for which local stations contracted when they purchased syndicated programming.25 Syndicated programming exclusivity agreements guarantee a broadcaster that he will be the only one to exhibit a given program in his market, thereby insuring a larger audience for the broadcast and greater advertising revenues. The exclusivity agreements in turn permit the program suppliers to get higher prices for their products. Thus, the FCC regulations protecting these agreements were in effect copyright protection for syndicated programming. They protected the program owners from unauthorized retransmission by cable systems of their programming carried on
imported distant signals which the Supreme Court had not found to be actionable as infringement under the Copyright Act of 1909.

However, the severe restrictiveness of the 1966 regulations on cable television growth became apparent and the FCC considered other regulatory schemes for cable television. But it was not until the early 1970's that the FCC, primarily because of a change in the Commission's membership, indicated a serious intent to relax the regulations to permit cable television to expand. In formulating such a policy the FCC had at least two major obstacles:

(1) The continuing fear that cable television would decrease the revenues of VHF broadcasters and impair the development of new UHF stations in the major markets, and

(2) The issue of protection for program copyright owners from cable retransmission of their programming, a problem which the courts and Congress had failed to resolve.

III. The 1972 Consensus Agreement and FCC Regulations

After several unsuccessful attempts at reaching a compromise, negotiations between broadcasters, cable operators, and copyright interests (primarily television producers, syndicators, and motion picture companies) resulted in an understanding which became known as the "Consensus Agreement." Pursuant to this agreement the FCC promulgated new cable television regulations in its Cable Television Report and Order which, though still protective of broadcast and copyright interests, marked a significant liberalization of regulatory policy towards cable growth.
Distant Signal Rules

The distant signal rules permitted a varying number of signals to be imported by cable systems depending on the size of the television market. In the top 100 markets enough local and distant signals to provide subscribers with at least two independent stations and one affiliate of the three national networks were permitted to be carried. Also, at least two independent signals could always be carried, and in the top 50 markets a third additional independent station. In the smaller markets (below the top 100) cable systems were permitted to import only enough signals to provide one affiliate of each network and one independent station. Systems not located within any designated television market were exempt from the rules.\textsuperscript{37}

Syndicated Exclusivity Rules

The syndicated exclusivity rules only applied to the largest 100 markets, and only acted to limit the retransmission of programs permitted to be carried by the distant signal rules. These rules were complex, but basically required deletion of any program carried on an imported signal for which a local broadcaster had contracted for the exclusive exhibition rights and if deletion was requested by the broadcaster. The deletion could be requested whether the program was scheduled for broadcast or not. In the second fifty markets slightly different rules applied. If the program on imported signal subject to deletion was being broadcast in prime time, then the cable operator was only required to delete it if also planning to exhibit it in prime time.

In all of the top 100 markets, copyright owners, as well as local broadcasters, were entitled to request deletion. The length of time deletion that could be requested by the copyright owner depended on the nature of the programming and the size of the market involved.\textsuperscript{38}
The regulations were an attempt to balance the competing interests involved in the compromise. They were intended to bring to a greater segment of the public the benefits of a more complete cable service, providing not only enhanced reception of local signals but also greater variety of programming ("diversity") by permitting increased importation of distant signals and requiring origination of programming by the cable system itself.\textsuperscript{32} Broadcasters and copyright interests continued to be protected by regulations permitting greater but still limited importation of distant signals\textsuperscript{33} and protection for contractual exclusivity agreements covering syndicated programming.\textsuperscript{34} The syndicated exclusivity rules were the core of protection for copyright owners, while the distant signal rules were intended to limit cable television's diversionary effect on local broadcasters' audiences.

The 1972 regulations also contained signal carriage rules which required deletion of network programming from imported distant signals when it would simultaneously duplicate that network's local affiliate broadcast.\textsuperscript{35} Further, protection for sports programming interests was provided for by prohibiting cable systems from broadcasting a home game if it was not available on a local broadcast station.\textsuperscript{36}

As the distant signal and syndicated exclusivity rules had a significant impact on the development of cable television, they warrant closer examination.
The syndicated exclusivity rules had several effects. First, because the most attractive programs would be ones subject to exclusivity agreements in the largest markets, the rules acted to curtail importation of syndicated programming into those markets. This not only protected the local broadcaster from competition by cable carriage of desirable program fare, but also allowed a broadcaster to extract the full market value of his exclusive exhibition rights. By being able to enforce his contractual agreement against a cable system, the broadcaster could prevent a simultaneous showing of the program which would fragment the audience, or a prior showing from "spoiling" the market. Either situation could reduce the value of advertising time on the broadcast.39

Second, because the syndicated exclusivity rules could also be invoked by copyright owners in the largest, most lucrative markets, the rules acted to provide substantial protection for copyrighted programming carried on retransmitted distant signals for which the courts had not imposed copyright liability.40 The rules gave owners up to two years' protection (depending on the type of programming and market involved) for their programs from being shown on cable systems, whether or not sold to a local broadcaster in the system's market, after the programming was first licensed to a broadcast station anywhere in the United States. Thus, the rules protected program owners from the diminution of value that would result from cable exhibition in an unsold market prior to licensing to a broadcaster in that market.41
IV. The 1976 Copyright Act Revision

The Consensus Agreement was only partly implemented by the 1972 regulations promulgated by the FCC. Not only did the agreement provide for the distant signal and syndicated exclusivity rules, it also was agreed that (1) cable television operators would be subject to a compulsory license for the retransmission of copyrighted programming carried on imported signals and (2) broadcasters would have the right to sue for copyright infringement if a cable operator violated an exclusivity agreement. The latter two provisions of the Consensus Agreement were implemented in the 1976 revision of the Copyright Act.

The 1976 Copyright Act expressly imposed copyright liability on cable operators for retransmission of copyrighted programming by stating that such retransmission was a "performance" within the meaning of the copyright law. In Section 111 the Copyright Act of 1976 set up a system of compulsory licensing for retransmission of copyrighted programming by cable systems. If a cable system meets the requirements of the compulsory license, it is free to retransmit copyrighted programming carried on imported distant signals and incur no further copyright liability. A cable operator who fails to comply with the requirements of the compulsory license is liable for an act of copyright infringement with a variety of remedies including damages and injunctions.

The Cable Television Compulsory License

Section 111 requires cable operators to pay a semi-annual fee into a fund administered by the Register of Copyrights. The funds are distributed to the owners of copyrighted programs retransmitted by cable systems according to the determination of the Copyright Royalty Tribunal (CRT), an entity created
for that purpose by the 1976 revision. The portion of the semiannual distribution each copyright owner is entitled to receive depends on the volume of their copyrighted material retransmitted by cable systems during the six-month accounting period, documented by mandatory records kept by the cable operators. The distribution decision may be contested before the CRT, whose final decision is subject to judicial review.

The use of a compulsory license to solve difficult copyright problems posed by new technologies is not new to the Copyright Act of 1976. The Copyright Act of 1909 used the scheme to guarantee remuneration to composers for use of their musical works in phonograph records. However, the compulsory license is a mechanism that runs counter to the basic concept of the author's right to control the use of his or her work, and its use in the Copyright Act of 1976 was seen by some authorities as inappropriate to the American system of copyright. Nonetheless, Congress used it in four situations in the 1976 revision to guarantee certain users access to copyrighted works while assuring the owner of those works some compensation for their use.

The cable television compulsory licensing system in the Copyright Act of 1976 represents a balancing of competing interests. On one side was a cable industry perceived to be unable to shoulder the burden of negotiating with individual copyright owners for the right to retransmit their programs. On the other side were copyright owners whose property was being regularly retransmitted by cable systems with no compensation for its use. As noted above, use of the compulsory license was based on an agreement between these two interests, and Congress agreed that it was the best solution to the cable copyright problem, despite the compromise of copyright principles it
Use of the compulsory licensing system in the Copyright Act of 1976 had another effect besides stripping copyright owners of the right to control use of their property by cable systems. Because the compulsory licensing rates are set by a statutory fee schedule, the price determination is removed from the demands of the marketplace. Thus, although copyright owners were assured of compensation for use of their property, the prices paid by cable operators did not reflect the true value of that use.

With the enactment of the Copyright Act of 1976 the industry compromise reached in the Consensus Agreement was complete. It was understood by all parties to the 1972 agreement that the FCC regulations were to work in tandem with the 1976 revision, dividing the responsibility for protecting copyright owners between the regulations (which controlled signal distribution by cable systems and protected syndicated exclusivity agreements) and copyright law (which specified the nature and degree of a cable operator's liability for retransmission.)

The 1976 House Report indicates that Congress had the same view of bifurcated responsibilities and the need for continuance of the 1972 regulations to insure the operation of the compulsory licensing system,

"We would, therefore caution the FCC ... not to rely upon any action of this Committee as a basis for any significant changes in the delicate balance of regulation in areas where Congress had not resolved the issue. Specifically, we would urge the Federal Communications Commission to understand that it was not the intent of this bill to touch on issues such as pay cable regulation or increased use of imported distant signals. These matters are ones of communications policy and should be left to the appropriate committees in the Congress for resolution."
V. 1972-77: FCC Reevaluation of Cable Television Regulatory Policy

Despite the apparently clear indications by Congress of the importance of maintaining the FCC regulations existing at the time of the 1976 copyright law revision, the FCC soon initiated inquiries into the need for the distant signal carriage and syndicated exclusivity rules. These inquiries were a reflection of the changing political attitude of the mid-seventies, one which encouraged the elimination of costly, inflation-feeding regulations wherever possible.

This period of reevaluation is not notable for the actual changes in cable television policy which occurred, although certain restrictive regulations were relaxed or repealed. What is important was the shift in attitude that was taking place at the FCC away from the assumption that broadcasters needed regulatory protection from cable television competition. The detailed inquiry initiated in 1977 into the economic relationship between broadcast and cable television was an indication that the FCC was ready to consider total deregulation of the cable industry only five years after the fashioning of the Consensus Agreement.

These two inquiries, conducted by the FCC's Cable Bureau aided by economists specializing in communications research, produced two significant reports, the "Syndicated Report" and the "Economic Inquiry". The reports drew several conclusions that undermined the belief that broadcasters needed protection from cable:

(1) The reports concluded that the distant signal and syndicated exclusivity rules acted to deny the public the benefits of expanded cable service by artificially restricting competition in favor of
broadcasters. The effect was to deny consumers services they were willing to buy, and also to restrict program diversity.72

(2) The 1972 regulations needlessly protected local broadcasters from a non-existent threat of cable television growth. Increased competition from cable would not adversely effect local broadcasters73 but would actually act to improve their performance.74

(3) The 1972 regulations were adopted as a substitute for the copyright liability later imposed by the 1976 revision of the copyright law. In light of the subsequent Congressional action, elimination of the distant signal and syndicated exclusivity rules would not adversely effect the supply of television programming by reducing the economic returns to copyright owners.75

VI. The 1980 FCC Deregulation

Based on these conclusions, the FCC balanced the benefits to the public foreseen from the repeal of the 1972 regulations against the prediction of negligible harm to broadcasters. In the 1980 Report and Order,76 the FCC summarized the findings of the earlier reports, considered comments filed by industry interests, and confidently concluded,

"... that elimination of the distant signal carriage and syndicated exclusivity rules will enhance consumer welfare by promoting competition in both the economic marketplace and the marketplace of ideas."77

On July 22, 1980, the FCC repealed the distant signal and syndicated exclusivity rules, with three Commissioners dissenting in whole or part.78 To the ire of many broadcasters and program suppliers, the
FCC's order did not include any "grandfathering" provisions for contracts negotiated under the syndicated exclusivity rules. The FCC stated that the lack of any public benefit to accrue from providing a period for the old contracts to expire and the absence of any evidence the public would be harmed made such grandfathering unnecessary.79

**Reaction to the 1980 Deregulation**

The FCC's action in repealing the distant signal and syndicated exclusivity rules can best be described as a sweeping of the regulatory underpinnings out from under the compulsory licensing scheme of cable copyright liability. There seems little question that the FCC did not act in harmony with the intent of Congress when it enacted Section III. The language of the 1976 House Report80 seems clear on its face that Congress based the compulsory license on maintenance of the 1972 regulations. This reading is further supported by other sources of legislative intent. Then Register of Copyrights Barbara Ringer, in a statement before the House Subcommittee, has said that Congress,

"... did not anticipate that the Commission would eliminate entirely either the distant signal or the syndicated exclusivity rules. Piecemeal revision of the regulation, rather than outright repeal, was clearly what Congress had in mind."81

The understanding of the Copyright Office about the legislative intent behind the 1976 revision is supported by the Congressmen themselves. House Subcommittee Chairman Robert Kastenmeier has stated,

"The 1976 Copyright Act was written against the backdrop of existing communications law and regulations ... It is impossible to completely separate copyright law and communications policy as the Copyright Act is now written ... We did not contemplate such a sweeping change in the regulatory structure when we drafted Public Law 94-533."82
The legislators' view was shared by at least several of the FCC Commissioners. In his dissenting opinion in the 1980 Report and Order, Commissioner Robert E. Lee stated,

"As one who lived through the 'Consensus Agreement', the development of our 1972 rules, and the Copyright Act, I can assure my colleagues that maintaining syndicated exclusivity was the understanding of all the participants. It was one of the premises of the copyright legislation."\(^{83}\)

Furthermore, it can only be concluded that complete deregulation by the FCC, if it was inevitable, was done at an inappropriate time. At the time of the 1980 deregulation, hearings and negotiations were underway in Representative Kastenmeier's subcommittee to revise the Section 111 compulsory license scheme. Several congressional leaders urged the FCC not to act until the revision had been completed. At least two of the Commissioners agreed, stating they felt that the deregulation was "ill-timed".\(^{84}\) Although the effect of the 1980 Report and Order on the negotiations directed towards producing a revision of Section 111 are not a matter of public record, it can be speculated that this clear shift of FCC policy towards promoting cable television expansion significantly improved the bargaining position of cable television interests.\(^{85}\)

Broadcasting interests moved quickly to protect themselves in the courts. In *Malrite T.V. v. F.C.C.*,\(^{86}\) the court consolidated several lawsuits seeking to set aside the 1980 Report and Order. The *Malrite* court held that the repeal of the 1972 regulations was not an abuse of the FCC's regulatory authority,\(^{87}\) and refused to set aside the order.\(^{88}\) In doing so, it rejected every objection the broadcasting and copyright interests put forth to undermine the findings in the Syndicated Report
and Economic Inquiry and the conclusions of the FCC in the 1980 Report and Order. However, it is not the purpose of this article to comment on or critique the *Malrite* decision, although several of the petitioners' contentions will be reviewed in the course of evaluating the effects of the deregulatory action on copyright interests.\(^{89}\)

The attempts to have the FCC's action set aside ended when the Supreme Court refused to grant certiorari to review the *Malrite* decision.\(^{90}\) Industry reactions were predictable. Thomas Wheeler, President of the National Cable Television Association, said he was "pleased" that the Supreme Court had "... agreed there was no rational basis for the FCC's signal carriage and exclusivity rules."\(^{91}\) Jack Valenti, President of the Motion Picture Association of America, stated he believed that in repealing the syndicated exclusivity rules the FCC had made "... one of the most stupid blunders any federal agency ever made or ever will make."\(^{92}\) Vincent Wasilewski, President of the National Association of Broadcasters, said that, "... issues of copyright and fundamental fairness are at stake. We look to Congress to rectify this inequitable situation."\(^{93}\)

As will be discussed in the following section, Congress has heard the broadcasters' cries with a sympathetic ear, and is attempting to legislatively lessen the impact of the FCC deregulation of cable television.
Congress, at the time of writing this comment, is in the process of amending the compulsory licensing system contained in Section 111 of the 1976 Copyright Act. These changes, the result of long negotiations, reflect the give and take between the cable television industry on one side and broadcasters allied with copyright interests on the other. However, the most important feature of the legislation is not the proposed changes, but the retention of compulsory licensing for cable retransmission of copyrighted programming carried on distant non-network signals.

I. Opposition to Retention of the Compulsory License

The retention of the compulsory license is contrary to the desire of many communications policymakers who favor the imposition of full copyright liability on cable television. Mark Fowler, Chairman of the FCC, has stated, "I believe that the proposed cable copyright compromise is not a marketplace solution. I am inclined to favor the imposition of full copyright liability on cable television systems."95

Continuance of the compulsory license for cable is also opposed by the Justice Department. In a letter to House Judiciary Committee Chairman Peter Rodino, Assistant Attorney General for Legislative Affairs Robert A. McConnell urged the Committee to reject any legislation that would continue the compulsory licensing system. McConnell stated that continuation of the system would unfairly subsidize the cable industry and hinder development of programming for cable television by
inadequately compensating program suppliers for their product.96

McConnell called the compulsory license "unnecessary" in light of
the competitiveness of cable television in the syndicated programming
market. Citing a report released by the National Telecommunications and
Information Administration,97 he argued that the compulsory license
could unfairly work to the cable industry's competitive advantage by
permitting it to market its programming to the public at prices lower
than other media (including broadcast and subscription television,
multi-point distribution services and videocassettes) who must negotiate
in the open marketplace for their rights. McConnell concluded,

"While we recognize there may be a need for some
period of transition, the only practical remedy is
full copyright liability."98

The position of the FCC and the Justice Department echoes that of
the Copyright Office, which has long opposed compulsory licensing for
cable television. The Register of Copyrights has called for the
elimination of the compulsory license, subject to two exceptions.99 The
Register recommended a phase-in time for full copyright liability of
three to five years to facilitate the development of middlemen to clear
retransmission rights and the development of alternative sources of
programming for cable television.100

The Register, commenting on the proposed revision of Section 111,
expressed the view that the bill does balance program suppliers'
concerns against those of continued access by cable television to
programming and cure some of the "apparent deficiencies" of the present
compulsory licensing system. However, the Register took the position
that "The proposal's emphasis is misplaced ... Rather than attempt to
revise the compulsory license, Congress should seize the opportunity to
use the marketplace."\textsuperscript{101}

The former Chairman of the Copyright Royalty Tribunal, Clarence James, has stated his belief that compulsory licensing, as administered by the Tribunal, is not working. In his letter of resignation to President Reagan, James stated, "... copyright owners would be more confidently assured" of compensation if it were determined by the marketplace or by contract. He recommended that the Tribunal should be eliminated because it was "a blatant waste of taxpayer's money."\textsuperscript{102}

II. \textbf{Outline of the Proposed Cable Copyright Revision}

Despite the calls for elimination of the compulsory license, it will probably be retained as the cornerstone of copyright liability for cable television transmission of imported syndicated programming. It is, admittedly, a compromise giving cable interests continuation of the compulsory license as a quid pro quo for partial reinstatement of syndicated programming exclusivity protection and codification of the mandatory carriage regulations\textsuperscript{103} which broadcasters fear are destined for repeal by the FCC.\textsuperscript{104}

The final version of the bill, H.R. 5949, has seven key features:

(1) As described above, the bill retains the compulsory license system of cable copyright liability for retransmission of copyrighted programming carried on imported non-network signals;

(2) The bill restores protection for syndicated programming exclusivity agreements in all television markets\textsuperscript{105} phased-in over a two-year period;\textsuperscript{106}

(3) The bill retains the current royalty fee schedule,\textsuperscript{107} but
shortens the period between reviews by the Copyright Royalty Tribunal (to adjust the rates for inflation) from 5 years to 3, beginning in 1983;\textsuperscript{108}

(4) The bill exempts cable systems which carry no distant signals from any liability for a compulsory license;\textsuperscript{109}

(5) The bill amends the Communications Act of 1934 to codify the compromise must-carry rules;\textsuperscript{110}

(6) The bill codifies the existing FCC sports programming exclusivity rule.\textsuperscript{111} Also, cable systems would be expressly liable for copyright infringement for retransmissions in violation of the rule or for retransmissions of intercollegiate football games beyond the local area served by the broadcast station carrying the game;\textsuperscript{112}

(7) The bill liberalizes the exemption in Section 111(a)(3) for "passive carriers", so as to make it clear that such carriers may exert control over the selection of the transmissions they carry and still be exempt from any copyright liability.\textsuperscript{113}

III. \textbf{Highlights of Proposed Cable Copyright Revision}

Of the seven changes in copyright and communications law outlined above, three will have the most effect in decreasing or increasing cable's impact on the future supply of television programming. These are (1) protection for syndicated exclusivity agreements and simultaneous duplication of network programming, (2) clarification of the must-carry rules, and (3) provisions relating to sports programming protection. These proposed changes merit a closer look.
Syndicated Programming Exclusivity Protection

The most significant proposed change in Section 111 of the 1976 Copyright Act is the grant of exclusive rights to broadcast stations over syndicated programming within their respective "market areas". The amendment makes the "... willful or repeated secondary transmission to the public by a cable system of a broadcast station ..." embodying a syndicated program to which the station is entitled to assert exclusivity an act of copyright infringement under Section 501 if the station requested deletion of the programming.

This proposed protection for exclusive exhibition rights is significantly different than was afforded by the repealed FCC regulations. First, the amendment applies to all television markets, whereas the FCC rules only were enforceable in the top 100 markets. Second, deletion of a protected program may be requested under the proposed amendment only by a broadcast station the cable system is required to retransmit under the proposed must carry rules. Under the FCC regulations, deletion could be requested by any local station which owned the exclusive exhibition rights or the copyright owner of the syndicated program.

Further, the amendment to Section 111 does not define the rights of broadcasters to request deletion based upon a graduated scheme of restrictions relative to the television market size as did the FCC rules. Instead, it confers upon commercial stations protection for (1) all series program packages for which a station owns the exclusive exhibition rights in its market, and (2) a limited number of feature film titles to which the station owns the exclusive exhibition rights in its market, the number being dependent on whether the station is a
network affiliate or independent broadcaster. Finally, the amendment contains several exemptions to its syndicated exclusivity protections not contained in the repealed FCC regulation.

The proposed syndicated exclusivity is to be phased in over transitional periods of up to two years, depending on the size of the television market. Specifically, the protections would become effective in the largest 50 markets six months after the date of enactment, in the second 50 one year after, and in all other markets two years after passage.

**Network Programming Non-Duplication Protection**

A proposed addition to the Communications Act of 1934, Section 332, would codify the existing FCC regulations which presently require cable systems to delete "simultaneously duplicating network signals" carried on an imported distant signal. The new section closes a loophole that could permit cable systems in Western time zones to retransmit network programming carried on imported signals from Eastern time zones hours earlier than the network affiliates in their market.

**Must Carry Rules**

The second major feature of the bill is the compromise between competing interests on amending the Communications Act of 1934 to specify which broadcast stations cable systems are required to retransmit. The bill creates two new sections in the 1934 Act designed to complement the changes in the Copyright Act. The first proposed addition, Section 331, would codify the principle long embodied in FCC regulations that cable systems must carry the signals of local broadcast
stations in whose market they operate. However, the amendment provides some relief from the rule for small-capacity cable systems from mandatory carriage of little-viewed and pay-television stations located in their market.

Sports Programming Protection

The third important feature of the proposed legislation are the protections it embodies — and those it does not — for sports programming. Professional sports interests lobbied extensively for prohibition of cable retransmission of an imported station in a league member's market on the day of a home game if the signal carried the game of another league member. Professional sports interests fear that such importation of same league games would compete for the home town sports audience and reduce attendance at home games. However, no such protection for home game attendance is included in the current proposed legislation.

The bill does propose an addition to Section 111 of the 1976 Copyright Act codifying the existing FCC sports programming exclusivity rule, which permits professional sports teams to order the blackout of home game retransmissions by cable systems within 35 miles of the game site unless it is being broadcast on a local station. The bill also proposes to grant intercollegiate teams the right to blackout retransmission of broadcasts of their games by cable systems outside the local area where the game is being played. This provision codifies existing NCAA practice of allowing colleges to authorize live broadcasts of their games in distant communities to supplement network coverage while still assuring the local availability of those games over both
cable and broadcast television.  

IV. Prospects for Passage of the Proposed Revision

The exact shape of this long-negotiated legislation is at the time of writing still evolving. Although encountering continued opposition from some members of Congress, the parties to the compromise appear unwilling to reject or amend the proposed legislation. If the bill is passed by the full House, it is predicted to face easy acceptance in the Senate.

In the final analysis, the words of National Association of Broadcasters President Vincent Wasilewski perhaps best express the feeling of all concerned when he said, "I just hope we have finally put [the cable copyright controversy] to bed."
PART THREE: THE EFFECT OF COMPULSORY LICENSING IN A DEREGULATED ENVIRONMENT

I. THE EFFECT ON PROGRAM PRODUCERS

As noted, the elimination of the compulsory license has been called for by many authorities\textsuperscript{134}. Nevertheless, it has been retained by Congress in the legislative revision of Section 111 and will continue to function as the system of remuneration to copyright owners for retransmission by cable systems of their programs carried on imported distant signals.

Because cable retransmission of imported signals will increase as a result of the repeal of the distant signal rules, an increasingly greater share of a television program producer's income will come through the compulsory licensing mechanism\textsuperscript{135}. How will this shifting of the source of income caused by the 1980 deregulation and legislative retention of the compulsory license affect the supply of television programming?

Effect of the Restoration of Syndicated Exclusivity Protection

To some degree, the 1982 copyright revision as it is currently drafted will mitigate the effects on producers of retaining the compulsory license by the reinstatement of protection for syndicated exclusivity agreements\textsuperscript{136}. In those markets subject to such agreements, a producer will be protected from cable carriage of his property if the broadcaster who owns the rights in the local market notifies the cable system of the agreement\textsuperscript{137}.

However, even with protection for syndicated exclusivity agreements, there will continue to be a number of situations where program producers will be receiving compensation through the compulsory license:

(1) Broadcasters will be allowed to assert exclusivity to only a limited
number of feature films in any calendar year, depending on whether they are a network affiliate or independent station;¹³⁸

(2) Not all cable systems are subject to the syndicated exclusivity provisions of the 1982 Copyright Revision;¹³⁹

(3) The syndicated exclusivity provisions are subject to waivers granted by the FCC;¹⁴⁰

(4) Programming carried on signals imported prior to March 31, 1972 is not subject to the syndicated exclusivity provisions;¹⁴¹

(5) There will be markets where the producer's program has not yet been sold and thus not the subject of an exclusivity agreement with a broadcaster in that market.

There are three ways in which the greater role of the compulsory license in determining producers' revenues could affect program supply:

(1) In those situations where syndicated exclusivity protections would not apply, it is uncertain if producers receive adequate returns through the compulsory licensing system to provide incentive for the continued production of television programming;

(2) It is not known whether the compulsory license sufficiently compensates producers for the reduction in value of a program caused by a cable exhibition of the program prior to its sale to a broadcaster in that market;

(3) If the revenues of local broadcasters are reduced by cable fragmentation of their audience, their ability to purchase syndicated programming will be reduced. Thus, unless stations whose signal is imported into distant markets are able to receive additional compensation
in the form of increased advertising revenues and in turn pay producers more for their programming, the compulsory license will be the only source of compensation for the loss to producers caused by the reduced financial ability of local broadcasters to purchase their programming. If the compulsory license is inadequate to compensate for this loss, the financial incentives to produce television programming may be reduced.

Adequacy of the Compulsory License and Incentive to Produce

Does the compulsory license system provide sufficient financial incentive for the continued production of programming? This question may be divided into two parts, asking (1) whether the compensation a producer receives through the system is in parity with the returns open marketplace negotiations would produce, and (2), if the compensation is less, is it still sufficient financial incentive to produce?

Addressing the first question, it is fundamental to understand that the compulsory licensing system takes the place of marketplace negotiations between producers and consumers of programming. Because the statutory rates are fixed by law, they need bear no relationship to the prices the marketplace would set. Thus, unless the compulsory license statutory rate is in reasonable parity with marketplace prices, the producer is receiving less than the true value of his program and is in effect being undercompensated for the use of his property.

There is general agreement that the compulsory license rates are below the prices marketplace negotiations would yield. This opinion is shared by program producers, the Register of Copyrights and the FCC, and is the conclusion reached in a report issued by the National Telecommunications and Information Administration. The 1981 NTIA Report calculated that if cable
systems had to negotiate in an open market for the same rights as broadcasters (program exhibition rights and the right to sell commercial advertising time) they would pay almost four times the 1979 compulsory license rate.147

Thus, because the compulsory license system prevents producers from capturing the true value of their programs, they will experience a decline in revenues as cable penetration and distant signal importation increases.148 Will this decrease in financial incentive to produce adversely effect the supply of television programming?

Producers strongly assert a decrease in their revenues will result in a decline in the production and supply of programming.149 This view of the supply of programming as being price elastic is supported by the 1981 NTIA Report150 and several studies by industry analysts.151 One noted study concluded that not only will lower payments to producers reduce the number and variety of television programs, but also have an adverse effect on the quality of those programs.152

There is some disagreement with the conclusion that reduced payments to producers will adversely effect program supply. This opinion is based on the theory that a disproportionate share of program prices are paid for popular performers' fees to appear in those programs. Thus, increases or decreases in the revenues producers receive for programming would be absorbed by the performers' fees, and any change in revenues would have only a small effect on the financial incentive to produce and thus on the supply of programming.153

However, the validity of this theory is questionable in light of its assumption the supply of popular talent is price elastic. The FCC, in its analysis of the effect of repealing the syndicated exclusivity rule, stated it could not support such an assumption with any empirical data.154 Further, to what extent the television talent unions would consent to reduced fees for
their members in this situation is speculative.

In conclusion, it may be stated that the evidence indicates that the compulsory license system fails adequately to compensate program producers for the retransmission of their programs by cable systems. Although there is a difference of opinion, this undercompensation is likely to reduce the financial incentive to produce and have an adverse effect on the supply of television programming.

**Early Importation and Market Spoilage**

The undercompensation discussed above is only for the direct use by cable systems of a producer's programming. The compulsory license system can also cause a reduction in producers' revenues in two indirect ways. One such indirect effect is caused by an "early exhibition."

Early exhibition (retransmission by a cable system before exhibition on a local broadcast station) of a producer's programming on an imported signal by a cable system can spoil the market for a later broadcast of that program. Since the program has a lower audience appeal after the first run, it will command a lower price when being sold to a local broadcaster.\(^{155}\)

If the compulsory license mechanism provided adequate compensation to the producer for the reduced prices caused by an early cable showing, he would suffer no net loss of revenues. Unfortunately, no empirical data has been analyzed to establish a direct correlation between early importation and subsequent program prices.\(^{156}\) It is therefore impossible to authoritatively conclude whether or not the compulsory license system adequately compensates the producer in this situation.

However, it has been noted that broadcasters pay significantly higher prices than cable systems for equivalent rights in the same market.\(^{157}\) Given
the strong correlation between program prices and advertisers' demand for commercial time based on anticipated audience appeal, a conclusion that low compulsory license rates will not adequately compensate the producer for the loss of audience appeal caused by an early cable showing is not unreasonable, even if not supported by empirical studies.

Broadcasters' Revenues and Ability to Purchase Programming

A second indirect effect on producers' revenues is caused by cable competition for the local audience. As noted, the presence of cable television can fragment the audience of a television market and reduce the revenues of local broadcasters. The FCC, in its analysis of the effect of repealing the distant signal and syndicated exclusivity rules, predicted that their elimination would cause broadcasters to lose some part of their local audience. However, the FCC stated it anticipated this loss would take place in the context of offsetting factors, notably increases in population and the demand for commercial advertising time, that would insure the continued financial viability of local broadcasters. Overall, the FCC foresaw no lessening of the ability of broadcasters to purchase syndicated programming as a result of increased cable competition from repeal of the rules.

However, if the result of the 1980 deregulation is a lowering of local broadcasters' revenues that are not offset as the FCC predicts, it could have an adverse effect on the supply of television programming. In such a situation, unless program producers receive income from the compulsory license system or some other source to compensate for the reduced revenues from sales to local broadcasters, they will have less incentive to produce.

Several studies conclude that the compulsory license rate is insufficient to make up the reduced revenues from local sales. The 1981 NTIA report
estimates the compulsory license rates would need to be at least 50% higher to compensate producers for the losses caused by cable diversion of local audiences on local broadcasters' revenues.\textsuperscript{162}

In theory, program producers should suffer no loss of revenues because of the increased value of commercial time on those stations whose signals are imported by distant cable systems. The imported stations, because of their expanded coverage, should be able to demand more for commercial time and in turn be able to pay producers more for their programming. This theory was adopted by the FCC as one reason program suppliers would not be adversely effected (or perhaps benefit from) the repeal of the syndicated exclusivity rule and increased cable carriage of their programs into distant markets.\textsuperscript{163}

However, the experience of broadcasters since the 1980 deregulation has shown that advertisers have not been willing to pay for audiences in distant markets, and carriage on distant cable systems has proved to be of little financial benefit to independent stations.\textsuperscript{164} These stations have not received or passed on to producers the additional revenues foreseen by the FCC.

In conclusion, the evidence indicates the cable television compulsory license reduces the revenues of program producers. If such reduction in revenue lowers the financial incentive to produce,\textsuperscript{165} then retention of the compulsory license will have an adverse effect on program supply by both indirectly and directly by undercompensating producers for cable carriage of their programming.\textsuperscript{166} Further, by preventing program producers from reaping the full value of their programs, the compulsory licensing system can be viewed as frustrating the basic purpose of American copyright law to reward
II. THE EFFECT ON SPORTS PROGRAMMING

Sports programming, due to its "ephemeral" nature is a unique commodity. Once a sports event has taken place, there is little or no market for repeat broadcasts of it. Because of the "perishable" nature of sports programming, the promoter usually has but one opportunity to capitalize on the public's interest in the event. In large part, this lack of residual value for the programming is offset by receipts from attendance at the event.

The FCC recognized the unique nature of sports programming and the need to protect teams and promoters from the reduction of home game attendance by cable importation of distant stations' coverage of those games. The sports programming exclusivity rule, the "blackout rule" which survived the 1980 deregulation of cable television, permits the holder of broadcast rights to a sports event to order the deletion of broadcasts carrying it by cable systems within a 35 mile radius of the site of the event. In practice, this allows sports teams to order the blackout of all coverage of their home games within 35 miles of the stadium. Under the blackout rule, cable systems may carry a broadcast of the home game only if it is being broadcast on a local station that the cable system is required to carry under FCC regulations.

Gate Attendance

The FCC's repeal of the distant signal rules and retention by Congress of the compulsory license in the pending revision of Section 111 has the potential to adversely effect the supply of sports programming. Since cable
systems are only liable for the compulsory license rate when they import distant signals carrying a sports event, the increased importation of sports broadcasts is likely. Although teams will still have the right to order the blackout of their own home games, there are no restrictions on importation of other league members' games into their market. Sports interests fear such increased importation will threaten the existence of the weaker franchises and the viability of the league system. As stated by Bowie Kuhn, Commissioner of Baseball,

"... as we have long understood, the introduction of substantial amounts of competing telecasts over either conventional television or cable television poses a serious threat to the very determinants of a club's success—the size of its gate, the value of its broadcast rights and the following of its hometown fans—and thus to the competitive stability of the entire league."

What is the potential for harm to sports teams, and in turn to sports programming, if weaker franchises and sports leagues are financially injured by a cable-caused reduction of attendance at home games?

**Potential Effects on Sports Programming Supply**

Sports interests assert that home gate revenues are vital to their financial well-being. For example, it has been stated that major league baseball clubs derive approximately 75% of their revenues from the sale of tickets and concessions at home games. Because of the high costs of operating a professional major league club, any reduction in this major source of income could have serious effects on the club's financial well-being. Although sports interests have produced no empirical data correlating the effect of increased cable penetration and importation of competing sports broadcasts with decreased gate
attendance, at least one major league club in an area of high cable penetration and importation of competing sports broadcasts on satellite superstations has suffered significant reduction in home game attendance, its fine record notwithstanding.\textsuperscript{177}

In response to the allegations of sports industry, the FCC considered the effect of increased distant signal importation on sports teams in the 1980 Report and Order. The FCC noted several studies that concluded cable television carriage of competing league games had no adverse effect on paid gate attendance of a league member's home games.\textsuperscript{178} According to one study, home game attendance is more affected by other external factors such as weather conditions, the caliber of the opposing team, and the home team's season record.\textsuperscript{179} Also, a distinct viewer preference for watching home team games over those of other league members was noted.\textsuperscript{180} Based on this evidence, the FCC foresaw no harm to sports interests from increased cable carriage of sports events into distant markets.\textsuperscript{181}

Whether increased cable importation of competing sports broadcasts will undercut the financial underpinnings of sports teams is uncertain and in need of further empirical study. If such a threat is real, it could adversely effect the supply of sports programming by reducing the number of teams and therefore of events to be televised.

The threat of cable importation may reduce the amount of sports programming in another way. The inability to prevent importation of a sports event into a distant market is essentially a loss of control by the owner of broadcast rights over his property. Since league members cannot prevent the importation of their signal into another league
member's home market, they are powerless to stop any adverse effects the broadcast could cause to the other league member. Also, if the team does wish to license broadcast rights in a distant market, they would be unable to guarantee the broadcaster exclusivity, which would reduce the value of the broadcast rights.\textsuperscript{182}

Sports interests could regain control over their broadcasts by selling the rights to one or more non-broadcast mediums such as local pay-cable or a national cable sports network. By doing so, a team could prevent unauthorized importation of its broadcasts into distant markets by resale carriers.\textsuperscript{183} and thus control distribution of its programming to prevent injury to other league members and maximize revenues from the sales of broadcast rights in distant markets. Although this would protect the sports interests, it would adversely affect the supply of sports programming on "free" broadcast television.\textsuperscript{184}

\textbf{Proposed Protections for Sports Programming}

The pending revision of Section 111 contains no changes in the copyright liability of cable systems for the retransmission of sports broadcasts carried on imported stations, nor does it include any limitations on the number or type of professional sports broadcasts that may be retransmitted other than codification of the existing blackout rule.\textsuperscript{185} Sports interests have been strident in their criticism of the legislation, and had lobbied for a prohibition against importation by cable systems of a league member's game within a 50-mile radius of another league member's home game.\textsuperscript{186} The Judiciary Committee refused to include such a provision, as well as an amendment that would have imposed full copyright liability on cable systems for retransmission of
a competing league game within 35 miles of a league member's home game. 187

In conclusion, it is impossible at this time to foresee the effects of the compulsory license on the supply of sports programming. Whether the increased importation of sports broadcasts will act to reduce the supply of sports programming or encourage its removal to pay television will become evident only as cable penetration and importation of competing broadcasts increases. The issue of cable liability for the retransmission of sports broadcasts is an area where the rights of the affected parties are in great need of clarification. As the pending revision of Section 111 will not be the vehicle for such clarification, the public may be the ultimate losing party as the affected interests act to protect their property rights.
CONCLUSION

The FCC cable television regulations and the statutory compulsory license will probably be viewed in retrospect as quaint anachronisms in the history of television regulation and copyright law. However, in the immediate future retaining the compulsory license in the absence of supporting regulations will have pronounced and most likely detrimental effects on the supply of television programming.

The evidence strongly indicates the compulsory licensing system reduces the revenues of producers and in turn the amount of programming produced.\textsuperscript{188} Further, sports interests are likely to suffer from continuance of the compulsory license in the absence of special protections, which could lead to a reduction in the supply and availability of sports programming.\textsuperscript{189}

In conclusion, the potential adverse effect on the overall supply of programming presented by the compulsory licensing system outweighs any benefits to be gained from its continued existence. Thus, it should be discarded and cable television systems made fully liable for the retransmission of copyrighted programming carried on imported signals. This solution is in agreement with the position of numerous copyright and communications law policymakers that the efficiency and equity of an open marketplace is preferable in this situation to an artificial one created by statutory directive.\textsuperscript{190}
FOOTNOTES

1. The author wishes to acknowledge the guidance of Professor J. Thomas McCarthy in the preparation of this comment.

2. See infra nts. 43-60 and accompanying text.

3. See infra nts. 63-79 and accompanying text.

4. See infra nts. 94-133 and accompanying text.

5. See infra nts. 134-167 and accompanying text.


7. See infra nts. 188-190 and accompanying text.


13. The regulation was indirect, as it was a denial of authorization for microwave transmission facilities to bring distant signals to the cable system, not of authorization to build or operate the system itself. See In re rules re Microwave-served CATV (First Report & Order in Dockets Nos. 14895 & 15233), 38 F.C.C. 683 (1965).

14. FCC jurisdiction over all cable television systems was upheld in United States v. Southwestern Cable, 392 U.S. 157 (1968).


16. Id. at 736.

17. An "imported signal" is that of a station located in another community and fed to the cable system via land transmission lines, a microwave link or satellite relay for retransmission.
18. 2 F.C.C.2d at 743.

19. A "television market" is defined as the area within a radius of 35 miles from a specified point in the station's community of license. Markets are ranked according to the size of the community they designate, with the top 100 being a common cut-off for FCC regulations. See 47 C.F.R. §§76.5(f)-(i), 76.51, 76.53(1980).

20. 2 F.C.C.2d at 804-05.


23. LEDUC, supra nt. 21, at 182-83.

24. Bensen & Crandall, supra nt. 10, at 93.

25. There are three sources of programming for a television broadcaster: (1) A national network, (2) the station's own production facilities, and (3) through independent program suppliers (known as syndicators) or directly from the copyright owner. The owner or program supplier of the "syndicated programming" sells the usually exclusive broadcast rights on a market-by-market basis. The programming may consist of re-runs of a network series, a first-run series, single programs or feature films first released to theaters. See 47 C.F.R. §76.5(p)(1980).


27. The Supreme Court refused to impose copyright liability on cable systems in two landmark decisions. In Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968), the Court held a simultaneous retransmission by a cable system of a local broadcast station's copyrighted programming was not a "performance" under the Copyright Act of 1909. The Court in Fortnightly found that the role of the cable system was more akin to that of the viewer, who is not "performing" when he merely converts the broadcast signal to sight and sound with receiving equipment, than that of the broadcaster in transmitting the electronic signals over the air, which was a "performance" under the earlier judicial interpretations of the 1909 Act. Then, in Teleprompter Corp. v. Columbia Broadcasting System, Inc., 415 U.S. 394 (1974), the Court extended the Fortnightly rationale to relieve cable systems of copyright liability for programming carried on distant signals not otherwise available in the local market. As a result of these two decisions, cable systems were free to retransmit any programming available on broadcast stations and incur no copyright liability.

28. Green, supra nt. 26, at 274-75.

29. Bensen & Crandall, supra nt. 10, at 94.

31. Id.

32. 47 C.F.R. §§76.57, 76.59(a), 76.64(a) ("must-carry regulations"), §§76.205-76.258 ("cablecasting regulations") (1976).

33. 47 C.F.R. §§76.59(b)-(e), 76.61(b)-(f), 76.63 (1976) [hereinafter cited as distant signal rules].

34. 47 C.F.R. §§76.151-76.161 (1976) [hereinafter cited as syndicated exclusivity rules].

35. 47 C.F.R. §§76.92-76.99 (1976) [hereinafter cited as network exclusivity rules].


37. See also 1980 Report & Order, supra nt. 10, at 668.

38. See also Id. at 668-69, and Greene, supra nt. 26, at 276-78.


40. See nt. 27, infra.

41. Comment, supra nt. 39, at 542-43.

42. 1972 CATV Report & order, supra nt. 30, at 284 App. D.


46. Id. §111(c)(1).

47. Id. §§111(c)(2), 502-506, 509.

48. Id. §111(d)(2).

49. Id. §111(d)(4), 801-810.

50. Id. §111(d)(4).
51. Id. §111(d)(2).
52. Id. §§111(d)(5), 804(d)(e).
53. Id. §810.
54. Copyright Act of 1909, supra nt. 9, §2(e).
56. Id. at 58, and Green, supra nt. 26, at 281 nt. 73.
58. 1976 House Report, supra nt. 37, at 89.
60. 1976 House Report, supra nt. 44, at 89.
62. See supra nts. 143-147 and accompanying text.
63. Copyright Issues: Cable Television and the Compulsory License; and Performance Rights in Sound Recordings: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 96th Cong., 1st Sess. 22 (1979) (prepared statement of Barbara Ringer, Register of Copyrights) [hereinafter cited as 1979 House Hearings].
64. 1976 House Report, supra nt. 37, at 89.
68. Id. at 99-100.
69. Id. at 101.
70. In re Cable Television Syndicated Program Exclusivity Rules (Report in Docket No. 20988), 71 F.C.C.2d 951 (1979) [hereinafter cited as
Syndicated Report.


73. Id. at 814.

74. Id. at 757.

75. Id. at 769.

76. 1980 Report & Order, supra nt. 10.

77. Id. at 814.

78. Id. at 890-900 (statements of all Commissioners).

79. Id. at 768.

80. See supra nt. 64 and accompanying text.

81. 1979 House Hearings, supra nt. 63, at 22.


83. 1980 Report & Order, supra nt. 10, at 892.

84. Id at 893-94, 896-97.


86. 652 F.2d 1140 (2d Cir. 1981), cert. denied 50 U.S.L.W. 3547 (No. 81-522) (U.S. Jan. 12, 1982).

87. Id. at 1149.

88. Id. at 1152.

89. See supra nts. 134-184 and accompanying text.


91. BROADCASTING, Jan. 18, 1982, at 28.


93. BROADCASTING, Jan. 18, 1982, at 28.


97. National Telecommunications and Information Administration, "Cable Television Copyright: Alternatives to the Compulsory License" (Dec. 11, 1981) [hereinafter cited as 1981 NTIA Report].

98. McConnell, supra. nt. 96.

99. The two exceptions are for (1) retransmission of local broadcast signals, and (2) retransmission of imported distant signals carrying network programming if necessary to provide the local market with a full complement of network signals.

100. LaDue, et al., supra nt. 55, at 59-62.

101. Id. at 65.


103. The mandatory carriage regulations ("must-carry rules") specify which local broadcast stations, both commercial and non-commercial, must be retransmitted by a cable system in any given market. See 47 C.F.R. §§76.51-76.65 (1980).


105. H.R. 5949, supra nt. 94, §101(d).

106. Id. at §104(a).

107. Id. at §101(e).

108. Id. at §103(c).

109. Id. at §101(e).

110. Id. at §201.

111. 47 C.F.R. §76.67 (1980).

112. H.R. 5949, supra nt. 94, §401.

113. Id. at §101(a). See infra nt. 183.

114. "Syndicated programming" includes both series program packages and motion

115. H.R. 5949, supra nt. 94, §101(d). See also, 1982 House Report, supra nt. 114, at 5-6. Section 101(f) of the bill amends Section 111(f) of the 1976 Act to include a definition of "local service area" as the primary service area pursuant to the rules and regulations of the FCC. Thus, "market area" would be defined as the area within a radius of 35 miles from a specified point in the community of license of the broadcast station. See supra nt. 19.

116. As defined in §111(A) and (B).

117. H.R. 5949, supra nt. 94, §101(d). See also 1982 House Report, supra nt. 114, at 5-6.


119. Independent stations would be entitled to assert exclusivity to no more than 300 feature film titles in any quarter of a calendar year, and for each title in no more than two quarters of a calendar year. Network affiliates would be entitled to assert exclusivity to no more than 100 titles in any quarter, also in no more than two quarters per year for each title. H.R. 5949, supra nt. 94, §101(d). See also 1982 House Report, supra nt. 114, at 5-6.

120. The syndicated exclusivity protections are (1) not enforceable against small cable systems (3000 or fewer subscribers), (2) not applicable to programming carried on a broadcast signal retransmitted by a cable system (or any other cable system located in the same community) prior to March 31, 1972, (3) not enforceable against a cable system granted a waiver by the FCC of the previously existing syndicated exclusivity rules. The section provides for the granting of new waivers by the FCC in special situations where the markets of the local station and imported station overlap. The FCC is required by the bill to promulgate regulations reasonably necessary to carry out the syndicated exclusivity provisions. H.R. 5949, supra nt. 94, §101(d). See also 1982 House Report, supra nt. 114, at 5-6.

121. H.R. 5949, supra nt. 94, §104(a). See also 1982 House Report, supra nt. 114 at 7-8. Section 104(b) of the bill includes a grandfather exception for satellite superstations which have contracted for programming prior to the effective date of the bill to continue to have such programming retransmitted by cable systems for the term of those contracts. This provision was included to specifically exempt WMBG-Atlanta from application of the exclusivity protections to its current contracts.

122. 47 C.F.R. §§76.92-76.99 (1980).

123. H.R. 5949, supra nt. 94, §201. See also, 1982 House Report, supra nt. 114, at 11. The provision would not apply to programming on any station whose signal was carried by a cable system prior to Oct. 1,
1981.

124. H.R. 5949, supra nt. 94, §201. See also, House Report, supra nt. 115, at 8-11.

125. "Local broadcast stations" include all UHF, VHF and translator stations, but not stations which were not listed with the FCC as of Nov. 1, 1981, any direct broadcast satellite service, multi-point distribution service, or "other radio communication intended for direct reception by members of the public." The amendment includes a proviso that the FCC's authority to require cable carriage of any video or audio service on a lease basis is not restricted, an important provision for broadcasters who foresee greater future growth of subscription television services. H.R. 5949, supra nt. 94, §201.

126. Under the provisions of Section 331, cable systems with 36 or fewer channels could elect not to carry any station which does to attract either a 1% share of viewing hours or a 2% share of television households in the county where the system is located. Such systems would be required to carry a new local broadcast station for only one full Nielsen rating period (about 15 months), before dropping it if it does not attract sufficient viewership. These systems would be required to carry at least two public broadcast stations, unless such carriage "saturates" the system (fills all the channel capacity), in which case it may elect to drop a more distant station whose programming duplicates that of a more local network affiliate. Cable systems with 12 or fewer channels may elect not to carry any station broadcasting subscription television (STV) programming, unless such a station is a local network affiliate, in which case the system may not carry it only if its programming is "predominantly" (defined as more than 50%) STV programming. H.R. 5949, supra nt. 94, §201. See also 1982 House Report, supra nt. 114, at 9-11.

127. See infra nts. 173-181 and accompanying text.

128. See infra nts. 185-187 and accompanying text.

129. 47 C.F.R. §76.67 (1980).

130. The area protected would be a radius of more than 120 miles from a VHF station or 45 miles from a UHF station broadcasting the game. H.R. 5949, supra nt. 94, §401.

131. H.R. 5949, supra nt. 94, §401. See also 1982 House Report, supra nt. 114, at 12.


133. BROADCASTING, Mar. 29, 1982, at 36.

134. See supra nts. 95-102 and accompanying text.

135. Rensen, Manning & Mitchell, "Copyright Liability for Cable Television:

136. See supra nts. 114-121 and accompanying text.

137. See supra nts. 116-117 and accompanying text.

138. See supra nt. 119 and accompanying text. There are no limits on the number of series packages a broadcaster may protect.

139. See supra nt. 120.

140. Id.

141. Id.


143. See, e.g., 1979 House Hearings, supra nt. 63, at 42 (testimony of Jack Valenti, Pres., Motion Picture Association of America).

144. 1979 House Hearings, supra nt. 63, at 32-33 (testimony of Barbara Ringer).

145. See, e.g., Speech by FCC Chairman Mark Fowler, Washington, D.C. (reported in BROADCASTING, Feb. 1, 1982 at 38.)


147. Id.


150. 1981 NTIA Report, supra nt. 97, at 50-51.


152. Bensen, et al., supra nt. 135, at 95.

153. Syndicated Report, supra nt. 70, at 983-94 (citing R.NOLL, M.PECK & J.MCGOWAN, ECONOMIC ASPECTS OF TELEVISION REGULATION 177-78 (1973)).

154. Syndicated Report, supra nt. 70, at 984.

155. Id. at 975 (citing FCC staff report prepared for the Senate Commission on Interstate and Foreign Commerce, "The Television Inquiry: The Problem of Television Service for Smaller Communities" (Dec. 26, 1958)).

156. See, e.g., Syndicated Report, supra nt. 70, at 977.

158. Syndicated Report, supra nt. 70, at 979-80

159. See supra nt. 22 and accompanying text.


161. 1981 NTIA Report, supra nt. 97, at 134-35. See also Bensen, et al., supra nt. 135, at 89-90.

162. 1981 NTIA Report, supra nt. 97, at 135.

163. Syndicated Report, supra nt. 70, at 987.


165. See supra nts. 149-151 and accompanying text.

166. See supra nts. 155-164, 143-147 and accompanying text.


168. Ladd, et al., supra nt. 55, at 35. See also 1979 House Hearings, supra nt. 63, at 128 (testimony of Bowie Kuhn, Commissioner of Baseball (Nov. 26, 1979)).

169. 1980 Report & Order, supra nt. 10, at 808-09.

170. 47 C.F.R. §76.67 (1980).

171. Id. §76.67(a).

172. Id.

173. 1979 House Hearings, supra nt. 63, at 109 (prepared statement of Bowie Kuhn (Nov. 26, 1979)).


175. Id. at 13-14

176. Id. at 16.

177. Id at 24-27.

179. Id. (citing Fifth Annual Report of the Federal Communications Commission on the Effects of the Public Law No. 93-107, 95th Cong., 2d Sess. 21-43 (committee print) (1978)).

180. Id. (citing Fifth Annual Report of the FCC, supra, at 5, 19).

181. Id. at 809-10. However it should be noted that the Malrite court stated the effect of repeal of the distant signal rules on sports programming was an issue which "... was not thoroughly reviewed by the Commission in the preliminary stages of the rulemaking process as other issues ..." Malrite v. F.C.C., supra nt. 86, at 1150.

182. Id. at 29-32.

183. Under 17 U.S.C. §111(a)(3), "passive carriers" (including satellite resale carriers) are free to retransmit to cable systems the signals of any over-the-air broadcast station and incur no copyright liability as long as the signal is unaltered. The copyright owners cannot prevent the resale carrier from retransmitting their programming and the receiving cable systems incur no copyright liability beyond the compulsory license. The pending revision of Section 111 amends it to preserve the passive carrier exemption which is threatened by a recent case wherein a satellite resale carrier was found liable for copyright infringement for the retransmission of over-the-air broadcasts of the N.Y. Mets baseball games. See Eastern Microwave v. Doubleday Sports, ___ F.Supp. ___ , 573 PAT. TRADEMARK & COPYRIGHT J. (BNA) A-1 (N.D.N.Y. Mar. 12, 1982).


185. See supra nts. 127-131 and accompanying text.


188. See infra nts. 142-167 and accompanying text.

189. See infra nts. 168-184 and accompanying text.

190. See infra nts. 95-102 and accompanying text.
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