Newscasts as Property: Will Retransmission Consent Stimulate Production of More Local Television News?

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Introduction

Television broadcasters who hoped retransmission consent would bring them immediate cash were disappointed by the first round of negotiations with cable systems. By the October 1993 deadline for concluding retransmission negotiations, few stations had been able to extract cash payments for allowing cable systems to retransmit their broadcasts.(note 1) In the short term, at least, the "second revenue stream"(note 2) predicted to result from retransmission consent had been merely wishful thinking.

While retransmission consent did not produce immediate cash, it did provide many broadcasters with new opportunities to cash in on their production of local programs.(note 3) Those opportunities, in the form of new local cable channels, come with substantial risk. It is expensive to start up a cable service, and profits in this competitive arena are no sure thing. However, retransmission consent for the first time gives television broadcasters a substantial property right in their local programming. This property right could make it attractive for stations to produce more--and more diverse--local news and information programming.

For half a century, lawmakers have searched for the carrot or the stick that would encourage American television stations to produce more local news and information programs. From the vague "public interest" standard of the Communications Act(note 4) to the almost comical precision of a list of nineteen categories of community leaders whom broadcasters were to interview in their efforts to ascertain community needs,(note 5) Congress and the Federal Communications Commission (FCC or Commission) have struggled to infuse the spirit of community service into the commercial world of American broadcasting.

It has never worked. Despite cumbersome application forms and perpetually raised eyebrows, in practice the FCC has rarely granted a license, and even more rarely denied a license renewal, on the basis of local news programming.(note 6) Thus, American commercial broadcasters have never had a compelling regulatory reason to treat local news programming as anything more than a token--a symbolic exchange for the privilege of a license.

The incentive for broadcasting local news and information, like other programming, must come instead from its ability to attract viewers and advertisers. Traditionally, television stations have survived only by maximizing ratings, not by narrowcasting or niche marketing.(note 7) Broadcast television is not a cost-efficient way for advertisers to reach narrow audiences.(note 8) Narrow audiences may be eager enough for specialized local news and information to pay for it directly, but broadcasters have no physical connection to their viewers and thus no way to charge end- users for the privilege of watching specialized programming.

Programming was the "freebie" that, in David Sarnoff's early vision, would induce consumers to buy the "Radio Music Box."(note 9) The tangible box, of course, had value to the industry as a product to be sold and to the consumer as a product to be purchased. But the programming the box would receive was as free as the air over which it was transmitted. Even as broadcasting matured into an advertising medium, local news and information, in and of themselves, had no value to the broadcaster beyond their ability to attract large audiences. They certainly had no resale value.

Broadcasters, unlike filmmakers, thought of air time, rather than content, as their product. Perhaps it is an exaggeration to claim that to commercial broadcasters programming is simply the stuff that goes around commercial spots. But broadcasters' copyright in local news and information, with no resale value and no ability to generate revenue from end-users, has never had much practical value as intellectual property. Ironically, cable's ability to generate end-user revenue, combined with television stations' growing need to diversify their income sources, could for the first time make local news programming salable intellectual property in its own right--apart from its ability to garner large ratings.

This Article will trace the history of the broadcasters' battle to control cable's use of their signals. It will examine the courts' early rulings on copyright and cable retransmission and the FCC's attempts to provide copyright substitutes in the form of protective regulations. It will examine the 1976 revision of the copyright law,(note 10) which provided a compulsory licensing system as a compromise that gave a measure of compensation to program suppliers, but left local broadcast stations uncompensated.(note 11) It will also look at the Cable Act of 1992,(note 12) which for the first time gave broadcasters the ability to control cable retransmission of their signals.(note 13) This Article will examine the technological and economic changes that have altered the relationship between cable and broadcast television. Finally, it will consider ways in which the shift in the law of intellectual property may create a climate in which broadcasters have new economic incentives to produce more--and more varied--local news.

I. The Burgeoning Importance of End-User Spending

Until the mid-1980s the American communications industry (including television, cable, radio, recorded music, newspapers, books, magazines, and movies) depended almost equally on advertising revenues and end-user spending.(note 14) However, from 1985 to 1990 end-user spending, driven largely by cable, compact discs, and videocassette recorders, emerged as a significantly greater source of revenue than advertising spending. During those years the three media with the largest increases in usage were basic cable, recorded music, and home video--all dependent largely on end-user spending.(note 15) From 1986 to 1990 the compound annual growth rate of advertiser spending in all communications industry sectors was 5.7 percent.(note 16) By comparison, the compound annual growth rate of end-user spending during that same period was 10.2 percent.(note 17) In 1985 advertising spending and end-user spending were about equal: advertising spending accounted for some $63 billion and end-user spending for just less than $65 billion of the total $128 billion in communications industry revenue.(note 18) By 1990 advertising spending had increased to roughly $83 billion, while end-user spending had soared to over $105 billion-- more than 56 percent of communications industry revenue.(note 19) By 1995 advertising spending is expected to increase to about $112 billion and end-user spending to almost $151 billion per year.(note 20) Thus, by 1995 end-user spending will account for more than 57 percent of the total communications industry pie.(note 21) It is no wonder that broadcasters, heretofore totally dependent on advertising revenues, seek to find a way to capitalize on the growing importance of end-user spending.

II. Cable as a Consumer Service

Cable began as a viewer-funded antenna service, not as an advertiser-funded medium.(note 22) Thus, cable focused first on its ability to charge end-users based on their perception of programming value. Cable now enjoys a dual revenue stream because it has become an advertising vehicle as well as a programming service. End-user fees, however, remain the most important source of cable's revenue, with subscribers' spending more than $13 billion for cable, as compared to advertisers' $1.8 billion in 1990.(note 23)

The battle between broadcast stations and cable historically has been a battle not over property rights in programming but over audience--the broadcaster's perceived "end product" to be sold to advertisers. As cable eroded broadcasters' audience share, broadcasters began to perceive cable as a significant competitor because audience share affects advertising revenue. Until recently, the battle over programming copyrights had been between cable systems and national program producers and suppliers. Broadcasters viewed audience share, not property rights in programming, as the value to be protected from cable.

Only after having lost the battle to keep cable systems from fragmenting audiences have broadcasters come to view their programming as a valuable, salable commodity. It is only now that the property right in local programming has begun to take on a value to broadcast stations as a source of revenue in and of itself. Only because of cable retransmission of broadcast signals, which provides a connection to consumers and a means of charging users for programming, can broadcasters begin to consider charging viewers who want more local news.

III. Broadcasters and Cable

During the FCC's freeze on television station licensing in the late 1940s and early 1950s, community antenna television (CATV) sprang up in areas that were not served by broadcast television.(note 24) Therefore, early cable television systems had no adverse impact on broadcasters. If anything, cable systems increased broadcast audiences by bringing signals to otherwise unreachable viewers.(note 25) Viewers who lived in towns too small to support more than one or two television stations began to subscribe to cable to increase program choices with distant signals imported by cable operators via microwave.(note 26) Viewers in large cities were lured to cable by the promise not only of better reception of local signals, but also of alternatives to local broadcast fare. By the 1960s industry observers predicted that cable would one day bring innovative new services, including two-way communications. Many broadcasters began to look at cable as a "real and present danger."(note 27)

Broadcasters feared they would have to compete for local viewers against an adversary that did not have to pay for programs.(note 28) If cable systems imported distant signals, audiences would be fragmented, and the rate the local broadcaster could charge for advertising would drop. A few broadcasters tried unsuccessfully in court to hold off cable's "unfair competition."(note 29) Broadcasters produced relatively little of their own programming, and most of what they did produce--local news--had no resale market. Cable retransmission of copyrighted works was thus an issue primarily of concern to those who supplied the movies and syndicated programs licensed to broadcasters. The copyright holders' chances of selling their syndicated programs to small market stations, at least at the price they were accustomed to demanding for exclusive licensing, could be substantially reduced if the programs had already been retransmitted to the market from a distant station on a microwave-fed cable system. Therefore, program suppliers, not broadcasters, first sought to protect the value of their copyrights from being diluted by cable retransmission.

A. Retransmission Rights Under the 1909 Copyright Law

Fortnightly Corporation operated CATV systems in West Virginia, providing subscribers in small mountain towns with signals from West Virginia, Pennsylvania, and Ohio television stations. The contracts between United Artists Television and the stations whose signals Fortnightly retransmitted expressly forbade cable distribution of the movies licensed for broadcast by the stations.(note 30) In 1960 United Artists sued Fortnightly.(note 31) Fortnightly lost at trial and again on appeal.(note 32) Then, surprisingly, the Supreme Court overturned the lower court decisions.(note 33) The Supreme Court decided Fortnightly was, like a television viewer, merely a "passive beneficiary" of broadcasters' licensed performance of copyrighted works.(note 34) Copyright holders could be protected against reception for profit by cable only if Congress changed the copyright law.(note 35) Under the 1909 copyright law,(note 36) which predated cable by some forty years, cable systems performing their "historic role" had an implied-in-law license to retransmit works already licensed to broadcasters.(note 37)

If cable systems performing in their "historic" role were not infringing copyrights, what about large systems providing more than local antenna service? Another copyright suit had been brought against the nation's largest multiple cable system operator (MSO) while *Fortnightly* was pending in the same district.(note 38) After an unsuccessful attempt to consolidate the two cases, the parties in the other case, *CBS, Inc. v. Teleprompter Corp.*,(note 39) agreed to a stay pending a final disposition of *Fortnightly*.(note 40)

CBS named five of Teleprompter's many cable systems as defendants in the complaint. The systems were in communities as disparate as New York City and Rawlins, Wyoming.(note 41) The court was asked to decide whether an MSO the size of Teleprompter was a "performer" under the 1909 copyright law.(note 42)

Unlike Fortnightly, Teleprompter systems made varying uses of microwave links to import programming from distant markets to many of their cable systems.(note 43) The trial court said that even importing distant signals did not make Teleprompter a performer.(note 44) The court of appeals disagreed, finding that importing distant signals was a copyright violation.(note 45) But the Supreme Court proved as conservative as the court of appeals had been "imaginative."(note 46) It found no "copyright significance" in Teleprompter's distant signal importation.

> Even in exercising its limited freedom to choose among various broadcasting stations, a CATV operator simply cannot be viewed as "selecting," "procuring," or "propagating" broadcast signals as those terms were used in *Fortnightly* . . . . The electronic signals it receives and rechannels have already been "released to the public" even though they may not be normally available to the specific segment of the public served by the CATV system.(note 47)

In short, whatever the size or nature of the cable operator, under the 1909 statute it did not infringe a copyright merely by retransmitting broadcast signals. "Broadcasters perform. Viewers do not perform."(note 48) Neither did cable. Like home viewers, cable systems merely "received."

The Supreme Court's characterization of broadcasters' "releasing their programming" to the public no doubt reflected the lack of importance broadcasters attached to protecting their copyrights in local programs. Just the opposite, the value of broadcast programming was its ability to be received free of charge and without subscription by anyone with a television set. At the time of the *Fortnightly* and *Teleprompter* decisions, local television news had not evolved into the profit center it would later become. Most broadcasters did not envision the viability of all-news radio and the Cable News Network in the fragmented media market that would evolve in the decades to come. Even if they had, television, unlike radio and cable services, played a ratings game in which local news had a growing, but limited, draw.(note 49)

The question of whether distant signal importation reduced the resale value of programming was relegated to a footnote in both the court of appeals and Supreme Court *Teleprompter* opinions. The Supreme Court felt that findings of fact concerning losses to copyright owners would be of "little relevance."(note 50) It presumed that broadcasters whose signals were picked up for cable retransmission in distant markets would be compensated by advertisers for distant viewers and would in turn pay copyright owners more for programs.(note 51) The court of appeals noted that while no evidence of losses to copyright owners had been produced at trial, "common sense would impel one to an opposite conclusion."(note 52) The courts showed no inclination whatsoever to consider the possibility that cable (the question of its impact on program resale to broadcasters aside) might represent an additional source of revenue to broadcast program copyright holders.

In light of the Supreme Court's characterization of broadcasters "releasing" programming, the notion that broadcasters would suffer economic loss as a result of cable's infringement of a "property right" in local programming would have seemed absurd. If broadcast stations took an interest in the copyright issue, it was because they saw the prospect of bringing about the death of distant signal importation by forcing cable systems to negotiate with syndicators for the right to import distant signals. In so doing, they would nip the threat of audience fragmentation in the bud.

B. The Battle over Audience

Meanwhile, the FCC was proving a far more receptive forum for broadcasters trying to stave off audience fragmentation due to cable competition. Over the years, the protectionist FCC was to assume "a veritable Kama Sutra of regulatory positions"(note 53) concerning cable--all of them aimed at preventing broadcasters from losing audiences to distant signal importation.

In the early days, when CATV merely enhanced local reception, the FCC refused to take jurisdiction over cable.(note 54) Later, the Commission decided to regulate cable systems that imported distant signals by microwave feed.(note 55) In 1966 the FCC took ancillary jurisdiction over all cable systems, claiming that cable's "unregulated explosive growth"(note 56) could degrade local broadcast service.(note 57)

In the interest of protecting local service, the FCC "slapped a virtual freeze on cable"(note 58) by prohibiting systems in major markets from carrying distant signals unless they could show that such service "would be consistent with the public interest, and specifically the establishment and healthy maintenance of television broadcast service in the area."(note 59)

C. Retransmission Consent Proposed, 1968

In 1968 the Commission proposed an alternative: cable systems would not have to make such a public interest showing if they could obtain retransmission consent from the stations whose signals would be imported into distant markets by cable systems.(note 60) The Commission claimed that requiring retransmission consent would prevent "unfair competition" between cable and local broadcasters, especially the emerging UHF stations in major markets.(note 61) Such consent requirements probably would have prevented any competition at all from cable systems. In the anti-cable climate then prevailing, it is doubtful any broadcast station would have consented to retransmission of its signal.(note 62)

The aim of the FCC's proposal did not seem to be to allow broadcasters to bargain over the value of their programming, but to give broadcasters a tool to prevent distant signal importation.

IV. Compromise and Copyright Revision

Only after cable operators agreed to support copyright law revision did the FCC adopt rules allowing cable to grow.(note 63) According to Article I, Section 8 of the Constitution, the purpose of granting Congress power to make copyright laws is to "promote the Progress of Science and useful Arts."(note 64) Thus, copyright law is intended to strike a balance between creators' rights to profit from their creations and society's right to benefit from access to those creative works. When Congress revised the copyright law in 1976,(note 65) it tipped the scales on the side of access for cable. It created a solution aimed at imposing some copyright liability on cable television while protecting the cable industry and its subscribers against concerted obstruction from broadcasters or the potentially crushing license fees and transaction costs of negotiating for the right to retransmit broadcast signals. However, while copyright holders were for the first time given the right to some compensation for cable retransmission,(note 66) the law gave neither broadcasters nor copyright holders the ability to prevent cable systems from retransmitting broadcast signals or to negotiate a mutually agreeable price for cable's use of copyrighted broadcasts. Instead, the law allowed cable systems to obtain a compulsory license to retransmit television signals in exchange for a license fee collected and distributed by the government.(note 67)

The compulsory license charges cable systems for retransmitting distant, non-network programming.(note 68) For retransmitting these signals, cable systems pay a percentage of their gross receipts(note 69) multiplied by the number of "distant signal equivalents" they carry.(note 70) Distant network and non-commercial educational stations cost only one-fourth as much as distant independents.(note 71)

The copyright law revision presumed that owners of copyrights in local television programs and in network programs did not deserve compensation for retransmission by cable systems. In the case of local programming, the cable system was seen as doing no more than bringing the local signal to those local residents who could receive the signal over the air, or to those local viewers who would otherwise not get the signal because of interference. In other words, cable retransmission was seen as having no effect or creating a positive effect on the local station rather than diminishing the local station's ability to profit from its intellectual property. Because network programming already has been released for national broadcast, it too was treated by the copyright law as undiminished by cable retransmission.

By setting the payment for distant network affiliates at one- fourth the amount paid for distant independents under the compulsory license scheme, the law sought to compensate merely for the portion of the distant affiliate's broadcast schedule that could be presumed to be made up of syndicated programs.(note 72) The compulsory license fee was fashioned to take into account cable systems and cable uses that arguably actually benefited broadcasters by increasing local audiences and did nothing to reduce the resale value of syndicated programming to other markets. Otherwise, it was argued, broadcasters and networks would receive an unwarranted "double payment."(note 73)

In the battle leading to the revision of the copyright law, broadcast stations had fought to protect their interest in maintaining local audiences rather than for copyright protection of locally produced programs. Copyright law had been viewed as a means to *prevent* cable systems from importing distant signals rather than a method for collecting payment for cable's use of broadcast programming. The question of how to protect copyright for local broadcast productions was never seriously at issue. Neither was the idea that cable operators should pay for broadcast signals because of the value the signals represented to end-users. That cable operators received value from broadcasters by extending their programs to paying customers as much as it added value to their broadcasts by amplifying their signals never seems to have been seriously considered by either side.

V. Second Thoughts on Compulsory Licensing

The compulsory license for cable seemed an expedient solution to the complex problems posed by the infant cable industry of the early 1970s. The drafters of the 1976 law were optimistic that the compulsory license was flexible enough to serve through the end of the century.(note 74) Critics of the compulsory license, however, viewed it as an unwarranted subversion of the free market system.(note 75) In fact, the revised copyright law had scarcely taken effect when proposals to force cable to obtain retransmission consent for the use of broadcast programming once again surfaced. By the late 1970s both Congress(note 76) and the executive branch(note 77) had proposed phasing out or eliminating the compulsory license scheme and substituting a retransmission consent requirement.

In the 1980s as the cable industry flourished (and broadcast stations and networks faced audience erosion), the call to force cable to pay for broadcast programming--local and network-- became louder. Broadcasters looked at cable's healthy end-user revenues, which were due in large part to subscribers' viewing of broadcast signals, and demanded that these revenues be shared. For the first time broadcasters seemed seriously to consider that they contributed to cable's ability to attract subscribers because of the value of broadcast programs. Also, for the first time commercial broadcasters looked at their programming as a product to be sold to end-users, rather than as a vehicle to be used to attract audiences for advertisers.

A. The Cable Industry, 1992

In the years after the compulsory license scheme became law, the cable industry was transformed by technological advances--most importantly the satellite transmission of programming--and by deregulation.

In 1976 cable reached fewer than eleven million subscribers.(note 78) There were only about six hundred thousand pay cable households,(note 79) and total cable revenues were less than $1 billion.(note 80) By 1990 more than fifty-one million households subscribed to cable,(note 81) and 29.5 million households had pay cable.(note 82) Cable advertising revenue and end-user payments were over $15 billion.(note 83) By 1995 total spending by subscribers and advertisers is predicted to be $22.4 billion per year.(note 84) "Cable has evolved into a mature, established industry."(note 85)

When the compulsory license scheme was fashioned, there were no such things as superstations and satellite-delivered basic cable networks. By 1990 basic cable and premium cable services had a combined share of almost 24 percent of television viewing;(note 86) by 1995 their combined share is predicted to reach more than 29 percent.(note 87) Over the years, many FCC restrictions disappeared,(note 88) and cable rates were deregulated.(note 89)

B. The Cable Act of 1992

Consumer outrage over rising cable rates and poor customer service focused congressional attention once again on the cable industry and its relationship with its customers and competitors. Congress passed the Cable Television Consumer Protection and Competition Act(note 90) over a presidential veto shortly before the election in 1992(note 91)--a testament to the political popularity of cable regulation.

Under the new law, broadcasters may opt for either must-carry or retransmission consent.(note 92) Stations may demand the safety of assured carriage on local cable systems or take the risky, but potentially profitable, course of negotiating with the cable operator for payment in return for the right to retransmit the station's signal.(note 93) While the Cable Act of 1992 does not repeal the compulsory license for importation of distant signals, for the first time it gives broadcasters the right to decide whether to allow local cable systems to retransmit their signals and the right to negotiate a price for the value the signals bring to cable.(note 94)

Much of the talk of broadcasters getting paid for the retransmission of their signals has proven to be wishful thinking. There is truth to the argument that cable retransmission of broadcast signals enhances the value of local and network programs by improving reception. In that sense, broadcasters have already been paid in the only way they could traditionally expect payment-- by becoming more attractive to audiences and advertisers. Stations that create little of their own programming have little to sell to cable systems. For broadcasters relying heavily on network or syndicated fare, the value of being carried on the cable system may sufficiently compensate the broadcaster for any marginal value that its own programming contributes to the cable system's ability to draw subscribers. Particularly in small markets, must-carry appears to be the route many stations have taken in the first round of negotiations.(note 95)

But under the Cable Act of 1992 and the FCC's regulations, each station will have the opportunity to reconsider its option every three years.(note 96) A broadcaster offering something more than syndicated or network programming stands a good chance of tapping cable's end-user revenue stream. Thus, retransmission consent--and its potential for creating a dual revenue stream for broadcasters--could be a commercial incentive to produce substantially more local programming. In television, "local" translates into news, sports, and information; entertainment has traditionally been more economically produced for national distribution.

VI. Copyright as an Incentive to Make Local News Programming

Cable subscribers, like other television viewers, want access to local television news. A relatively small group of subscribers look to cable as a way of obtaining, at a price, specialized programming including news and community information. A television station positioned as a local news station has "must-have" leverage with the cable system regardless of the must-carry regulations. It brings to the bargaining table a commodity that cannot be replaced, at any price, with distant signals or national cable networks.

Not surprisingly, many of the 1993 negotiations over retransmission consent have involved space for new cable channels devoted to local news and information.(note 97) One deal, for example, gives Cox Enterprises's Pittsburgh station, WPXI (TV), the ability to program a local news and information channel that General Manager John Howell says he has hoped for five years to begin.(note 98) The Pittsburgh venture will be a partnership from which both cable operator and television station hope to profit.(note 99)

Broadcasters trading retransmission consent for cable channel space are most likely to profit if they already produce substantial local news programs and can, in the short term, rely on time shifting.(note 100) In the long term, broadcasters and cable systems may find new and profitable partnerships in which broadcasters provide the content and cable operators provide the delivery systems for innovative, "niche" news programs that do not rely on ratings as the key to profitability.(note 101) The chronic characterization of broadcast news as a headline service of the sensational and the trivial may change as well, as stations focus on in-depth reporting that can feed and re-feed a second all-news channel.

Moreover, strong local news will give television stations greater ability to protect any cable compensation they receive from program syndicators and networks. Syndicators and networks certainly will demand a chunk of any retransmission compensation local stations get from cable--if not directly, then indirectly as future license fees and affiliation agreements are negotiated. But to the extent that local stations create more of their own programming, they will keep more of the benefits that local news programs, not network or syndicated programs, rightly earn from cable retransmission compensation.

In 1992 WSVN, Channel 7, Miami, Florida, became the first independent station to beat its network-owned and affiliated competition in both early and late news ratings.(note 102) WSVN, a former NBC affiliate, became an independent in January 1989, after NBC and CBS purchased stations in Miami and WSVN was left without a network affiliation. The station opted to become "South Florida's News Station" and survived the switch.(note 103) While Fox affiliation certainly helps WSVN, the station positions itself foremost as a local news station. Featuring a style different from traditional news programs, WSVN employs a controversial approach skewed to young viewers that gives the station an edge with advertisers seeking to target that attractive demographic group.(note 104) Thus, WSVN wields bargaining power vis--vis not only cable systems, but also Fox, whose affiliation agreements with generally news-poor independents have given Fox the power to use retransmission consent negotiations on behalf of its affiliates to bargain for a new cable channel for itself.(note 105)

Conclusion

The balance has shifted, and cable is no longer as needy as it seemed in 1976--nor are broadcasters as secure. As broadcasters and cable battle over the terms of their new relationship, the survival of local stations will once again be an issue. To the extent that lawmakers allow market forces to dictate the respective property rights in programming, they may better serve the public interest in local news and information programming than has any previous attempt to achieve those same goals through direct regulation.

With retransmission consent now part of the law, it seems appropriate to revisit the question of copyright liability for cable. If cable systems are now required to negotiate with every local television station they carry, there is little justification to support different treatment for cable's carriage of distant signals. The compulsory license system was aimed at giving cable breathing room and preventing cable from being strangled at birth by cumbersome negotiations with hostile broadcast stations.

Cable demonstrated its bargaining strength in the initial retransmission consent negotiations. If it is at all possible for cable systems to bargain with the many local stations they carry, then it is certainly possible for them to bargain with a few distant stations. There seems little reason to give cable systems a break on the fees they pay for distant signals. Retaining a lopsided system that regulates the fees cable systems pay for distant signals, while letting the marketplace dictate fees or other arrangements for retransmitting local signals, simply does not make sense anymore--even if it did when Congress revised the copyright law in 1976.

Moreover, by giving cable systems a bargain on distant signals, the compulsory license laws may impose artificial barriers for local stations negotiating for payment for their signals. If broadcasters are to compete in selling their programs to cable systems, they need to compete on a level playing field. The government need not dictate license fees for distant signals any more than it need dictate retransmission consent fees. Cable systems and broadcasters are now capable of negotiating both.

"I believe that most of television's problems stem from lack of competition," said FCC Chairman Newton Minow in 1961.(note 106) The forum was the annual convention of the National Association of Broadcasters; Minow's speech would live in history (or infamy) for its characterization of television programming as a "vast wasteland."(note 107) It was an exhortation to community service that did not play well to the broadcasters listening more than thirty years ago. And it might not play any better today to a broadcast industry beset by competition for audience and advertisers. Yet broadcasters may come to see that Minow was right after all. The competition of which Minow only dreamed--he spoke of the "experiments" then ongoing with "the infant pay TV" and UHF(note 108)--may deliver the industry and its audience out of the wasteland and into a new abundance of local programming.

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Notes

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An earlier version of this Article was presented to the Radio- Television Journalism Division, Association for Education in Journalism and Mass Communication.

1. Joe Flint, *Stations Stay for No Pay*, Broadcasting & Cable, Oct. 11, 1993, at 6, 6. Return to text

2. *Id.* Return to text

3. *Id*. Return to text

4. 47 U.S.C. sec. 309(a) (1988). Return to text

5. *In re* Primer on Ascertainment of Community Problems by Brdcst. Applicants, *First Report and Order*, 57 F.C.C.2d 418, app. B at 442 (1975). Return to text

6. Roger G. Noll et al., Economic Aspects of Television Regulation 112 (1973). Return to text

7. *Id.* at 50. Return to text

8. *Id.* at 10. Return to text

9. Tom Lewis, Empire of the Air: The Man Who Made Radio 116 (1991). Sarnoff's proposal for the Radio Music Box cited sales of radios as the chief source of revenue, accompanied by sales of subscriptions to programming guides. *Id.* While Sarnoff's legend was built, in part, on his having "foreseen" as early as 1915 the potential to use wireless for home entertainment, there is evidence that the Radio Music Box memo may not have been written until 1920, "when broadcasting was literally around the corner." Louise M. Benjamin, *In Search of the Sarnoff "Radio Music Box" Memo*, 37 J. Broadcasting & Elec. Media 325, 326 (1993). Return to text

10. Copyrights Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. secs. 101-1010 (1988)). Return to text

11. 17 U.S.C. sec. 111(d) (1988). Return to text

12. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified in scattered sections of 47 U.S.C.A secs. 521-611 (West. Supp. 1994)). Return to text

13. 47 U.S.C.A. sec. 325 (b)(1) (West Supp. 1994). Return to text

14. The Veronis, Suhler & Associates Communications Industry Forecast 22 (5th ed. 1991) [hereinafter Veronis, Suhler]. Return to text

15. *Id.* at 13. Return to text

16. *Id.* Return to text

17. *Id.* Return to text

18. *Id.* at 20. Return to text

19. *Id.* Return to text

20. *Id.* at 12. Return to text

21. *Id.* at 22-23. Return to text

22. Mary Alice Mayer Phillips, CATV: A History of Community Antenna Television 7 (1972). Return to text

23. Veronis, Suhler, *supra* note 14, at 88. Return to text

24. Phillips, *supra* note 22, at 50. Return to text

25. Staff of House Subcomm. on Communications of Comm. on Interstate and Foreign Commerce, 94th Cong., 2d Sess., Cable Television: Promise Versus Regulatory Performance 12 (Subcomm. Print 1976). Return to text

26. *In re* Amendment of Subpart L, Pt. 11, to Adopt Rules and Regs. to Govern the Grant of Authorizations in the Business Radio Serv. for Microwave Stations to Relay TV Signals to Community Antenna Systems, *First Report and Order*, 38 F.C.C. 683, para. 65 (1965). Return to text

27. Les Brown, Television: The Business Behind the Box 161 (1971). Return to text

28. Harvey Jassem, *The Selling of the Cable TV Compromise*, 17 J. Broadcasting 427, 428 (1973). Return to text

29. *See, e.g.*, Cable Vision, Inc. v. KUTV, Inc., 335 F.2d 348 (9th Cir. 1964), *cert. denied sub nom.* KLIX Corp. v. Cable Vision, Inc., 379 U.S. 989 (1965). Return to text

30. United Artists TV, Inc. v. Fortnightly Corp., 255 F. Supp. 177, 181 (S.D.N.Y. 1966), *aff'd*, 377 F.2d 872 (2d Cir. 1967), *rev'd*, 392 U.S. 390 (1968). Return to text

31. *Fortnightly*, 255 F. Supp. 177. Return to text

32. United Artists TV, Inc. v. Fortnightly Corp., 377 F.2d 872 (2d Cir. 1967), *rev'd*, 392 U.S. 390 (1968). Return to text

33. Fortnightly Corp. v. United Artists TV, Inc., 392 U.S. 390 (1968). Return to text

34. *Id.* at 399. Return to text

35. *Id.* at 401. Return to text

36. Copyright Act of 1909, ch. 320, 35 Stat. 1075, *superseded by* Copyrights Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. secs. 101-1010 (1988)). Return to text

37. Alan R. Chase, Comment, *The Copyright Law and Its Relevance to CATV: Can an Old Dog Be Taught New Tricks*, 19 Buff. L. Rev. 65, 79 (1969). Return to text

38. CBS, Inc. v. Teleprompter Corp., 355 F. Supp. 618 (S.D.N.Y. 1972), *rev'd*, 476 F.2d 338 (2d Cir. 1973), *rev'd*, 415 U.S. 394 (1974). Return to text

39. *Id.* Return to text

40. *Id.* at 620. Return to text

41. *Id.* at 619. Return to text

42. *Id.* Return to text

43. *Id.* at 621-24. Return to text

44. *Id.* at 630. Return to text

45. CBS, Inc. v. Teleprompter Corp., 476 F.2d 338, 349 (2d Cir. 1973), *rev'd*, 415 U.S. 394 (1974). Return to text

46. Teleprompter Corp. v. CBS, Inc., 415 U.S. 394, 416 (1974) (Blackmun, J., dissenting). Return to text

47. *Id.* at 410. Return to text

48. *Id.* at 403. Return to text

49. *See* Jeff Greenfield, *Making TV News Pay*, Gannett Center J., Spring 1987, at 21, 29-33. Return to text

50. *Teleprompter*, 415 U.S. at 413 n.15. Return to text

51. *Id.* at 412. Return to text

52. CBS, Inc. v. Teleprompter Corp., 476 F.2d 338, 342 n.2 (2d Cir. 1973), *rev'd*, 415 U.S. 394 (1974). Return to text

53. Michael Botein, *The New Copyright Act and Cable Television--A Signal of Change*, 24 Bull. Copyright Soc'y U.S.A. 1, 3 (1976). Return to text

54. *In re* Inquiry into the Impact of Community Antenna Sys. on the Orderly Development of TV Brdcst., *Report and Order*, 26 F.C.C. 403, paras. 58-71 (1959). Return to text

55. *In re* Grant of Authorizations in the Business Radio Serv. for Microwave Stations to Relay TV Signals to Community Antenna Sys., *First Report and Order*, 38 F.C.C. 683, para. 4 (1965). Return to text

56. United States v. Southwestern Cable Co., 392 U.S. 157, 175 (1968) (quoting H.R. Rep. No. 1635, 89th Cong., 2d Sess. 7 (1966)). Return to text

57. *In re* Amendment of Subpart L, Pt. 21, to Adopt Rules and Regs. to Govern the Grant of Authorizations in the Business Radio Serv. for Microwave Stations to Relay TV Signals to Community Antenna Sys., *Second Report and Order*, 2 F.C.C.2d 725, para. 25 (1966) [hereinafter *CATV Second Report and Order*]. Return to text

58. Botein, *supra* note 53, at 3. Return to text

59. *CATV Second Report and Order*, *supra* note 57, at 804 [hereinafter *Cable TV Report and Order*] (codified at 47 C.F.R. sec. 74.1107(a), *repealed*, *In re* Amendment of Pt. 74, Subpart K, of the Commission's Rules and Regs. Relative to Community Antenna TV Sys., *Cable TV Report and Order*, 36 F.C.C.2d 143, 212 (1972)). Return to text

60. *In re* Amendment of Pt. 74, Subpart K, of the Commission's Rules and Regs. Relative to Community Antenna TV Sys., *Notice of Proposed Rulemaking and Notice of Inquiry*, 15 F.C.C.2d 417, para. 38 (1968). Return to text

61. *Id.* Return to text

62. Botein, *supra* note 53, at 4. Return to text

63. *See generally Cable TV Report and Order*, *supra* note 59. Return to text

64. U.S. Const. art. I, sec. 8, cl. 8. Return to text

65. Copyrights Act of 1976, Pub. L. No. 94-553, sec. 111, 90 Stat. 2541, 2550 (codified as amended at 17 U.S.C. sec. 111 (1988)). Return to text

66. *See* 17 U.S.C. sec. 111(d)(3)(A) (1988); 2 David Nimmer & Melville B. Nimmer, Nimmer on Copyright sec. 8.18[E][4][d][i] (1993). Return to text

67. *See* 17 U.S.C. sec. 111(d) (1988); 2 Nimmer & Nimmer, *supra* note 66, sec. 8.18[E][4][c]. Return to text

68. *See* 17 U.S.C. sec. 111(d)(3)(A), (f) (1988) (definition of "local service area" and "network station"); National Ass'n of Brdcsts. v. Copyright Royalty Tribunal, 675 F.2d 367, 373 (D.C. Cir. 1982) ("The [Copyrights] Act was not intended to compensate network broadcasters or even local broadcasters whose programs are retransmitted locally by a cable system in the same area."); 2 Nimmer & Nimmer, *supra* note 66, sec. 8.18 [E][4][b][ii]. Return to text

69. For the current percentage rates promulgated by the Copyright Royalty Tribunal, see 37 C.F.R. sec. 308.2 (1993). Return to text

70. 17 U.S.C. sec. 111(d)(1)(B), (f) (1988) (definition of "distant signal equivalent"); 2 Nimmer & Nimmer, *supra* note 66, sec. 8.18[E][4][b][ii] (discussing the computation of a compulsory license charge). Return to text

71. 17 U.S.C. sec. 111(f) (1988); 2 Nimmer & Nimmer, *supra* note 66, sec. 8.18[E][4][b][ii]. Return to text

72. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 90 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5705; 2 Nimmer & Nimmer, *supra* note 66, sec. 8.18[E][4][b][ii]. Return to text

73. 2 Nimmer & Nimmer, *supra* note 66, sec. 8.18[E][4][a]. Return to text

74. Thomas C. Brennan, *Some Observations on the Revision of the Copyright Law from the Legislative Point of View*, 24 Bull. Copyright Soc'y U.S.A. 151, 153 (1976). Return to text

75. Henry Geller, who served on the FCC staff when retransmission consent was proposed in 1968 and headed the National Telecommunications and Information Administration (NTIA) when it proposed replacing the compulsory license with retransmission consent in 1979, noted the unfairness of UHF stations' disrupting the conventional marketing system for broadcast syndicated programs. *Geller and His Retransmission Consent Get Raked over Cable's Coals*, Broadcasting, May 28, 1979, at 38, 42. Some of the complaints came from major market independents themselves, who claimed they were being transformed into superstations against their will and were being pressured for higher syndication license fees as a result. *Metromedia and NAB Hit the FCC Panic Button over Superstations*, Broadcasting, Mar. 26, 1979, at 62, 62. Return to text

76. H.R. 3333, 96th Cong., 1st Sess. sec. 453 (1979). Return to text

77. *In re* Cable TV Syndicated Program Exclusivity Rules, *Notice of Proposed Rule Making*, 71 F.C.C.2d 1004, paras. 5, 67-72, 126 (1979). Return to text

78. *Cable Almost Brought in a Billion in `76*, Broadcasting, June 26, 1978, at 25, 26. Return to text

79. *Cable in 1978: About to Break $1-Billion Barrier*, Broadcasting, May 1, 1978, at 25, 25. Return to text

80. *Id.* Return to text

81. Veronis, Suhler, *supra* note 14, at 89. Return to text

82. *Id.* at 90. Return to text

83. *Id*. at 96. Return to text

84. *Id.* at 104. Return to text

85. *Id.* at 88. Return to text

86. *Id.* at 93. Return to text

87. *Id.* at 101. Return to text

88. Some FCC cable regulations were successfully challenged in court. For example, courts overturned the Commission's attempts to mandate access channels, FCC v. Midwest Video Corp., 440 U.S. 689 (1979), and to regulate pay cable, Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977). The FCC did away with other rules on its own initiative; the requirement that cable systems obtain certificates of compliance from the FCC Cable Bureau before beginning operation is one example. *In re* Amendment of Pt. 76 of the Commission's Rules and Regs. Concerning Cable TV Certificate of Compliance Process, *Report and Order*, 69 F.C.C.2d 697 (1978). Return to text

89. *See generally*, Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (codified in scattered sections of 47 U.S.C.). Return to text

90. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified in scattered sections of 47 U.S.C.A. secs. 521-611 (West Supp. 1994)). Return to text

91. On October 5, 1992, the U.S. Senate voted 74-25 to override the veto. 138 Cong. Rec. S16,676 (daily ed. Oct. 5, 1992). The U.S. House of Representatives voted 308-114 to override the veto. 138 Cong. Rec. H11,487-88 (daily ed. Oct. 5, 1992). Return to text

92. 47 U.S.C.A. sec. 325(b)(1) (West Supp. 1994). Return to text

93. 47 U.S.C.A. sec. 536(a) (West Supp. 1994). Return to text

94. *See* 47 U.S.C.A. sec. 325(b)(3)(A) (West Supp. 1994). Return to text

95. *See* Jim Cooper, *Free Ad Time Enters Retrans Negotiations*, Broadcasting & Cable, June 28, 1993, at 38, 38. Return to text

96. 47 U.S.C.A. sec. 325(b)(3)(B) (West Supp. 1994); *see also In re* Implementation of the Cable TV Consumer Protection and Competition Act of 1992, Brdcst. Signal Carriage Issues, *Report and Order*, 8 FCC Rcd. 2965, para. 2 (1993). Return to text

97. Steve McClellan, *Retrans Plans: Programming the New Channels*, Broadcasting & Cable, Oct. 11, 1993, at 16, 16. Return to text

98. Joe Flint, *A Broadcaster Gets a Cable Channel*, Broadcasting & Cable, June 21, 1993, at 7, 7. Return to text

99. *Id.* Return to text

100. Joe Flint, *Programming That Second Channel*, Broadcasting & Cable, June 28, 1993, at 19, 19-20. Return to text

101. *See* Geoffrey Foisie, *Casting About for News Cost Controls*, Broadcasting & Cable, June 7, 1993, at 85. Return to text

102. Interview with Robert Holtzer, Sales, Marketing, and Research Director, WSVN, Miami, in North Miami, Fla. (Mar. 11, 1993). Return to text

103. *Id.* Return to text

104. *Id.* Return to text

105. *See* Joe Flint, *Affiliates Approve Fox's Cable Network*, Broadcasting & Cable, June 7, 1993, at 16, 16. Return to text

106. Newton Minow, The "Vast Wasteland," Address Before the Nat'l Assoc. of Broadcasters (May 9, 1961), *in* How Vast the Wasteland Now? 31 (Gannett Found. Media Ctr. ed., 1991). Return to text

107. *Id.* at 24. Return to text

108. *Id.* at 30. Return to text