

Reconsidering Retransmission Consent: An Examination of the Retransmission Consent Provision (47 U.S.C. § 325(b)) of the 1992 Cable Act

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Introduction

The Information Age is upon us. Over the past forty years, the methods and infrastructure for delivering information have greatly expanded. Advances in computers and telecommunication have led the way. Cable television has been an important part of this revolution, greatly expanding the number of information sources available to households throughout the United States.⁽²⁾ Far from its origins as a service with the primary purpose of extending local broadcast signals to households whose access to the signal was blocked by mountains or buildings, cable television is now available to almost all households in the United States.⁽³⁾ Over 65 percent of the nation's television households now receive video programming via cable television systems.⁽⁴⁾ Cable television operators presently have been experimenting with providing all sorts of advanced services, including voice communications⁽⁵⁾ and access to the Internet.⁽⁶⁾

This Article focuses on the most basic of cable television services: retransmission of over-the-air broadcast signals. This service was in fact the first cable service; the legal status of over-the-air broadcast signals and the programming they contain has been an issue since the late 1950s. At one time, cable operators had no obligation to pay or negotiate with anyone for the right to retransmit broadcast signals. Today, cable operators must pay a formula-based fee to the Library of Congress Copyright Office for the value of some rebroadcasted programming and may negotiate with broadcasters for retransmission consent--the right to rebroadcast the broadcaster's signal.

This Article critically examines retransmission consent requirements which were established by the Cable Television Consumer Protection and Competition Act (1992 Cable Act or the Act).⁽⁷⁾ The Act made a distinction between broadcast signals and the programming contained on these signals, a distinction some commentators have stated was absurd or unnecessary.⁽⁸⁾ While *rebroadcast of programs* is governed by section 111 of the 1976 Copyright Act,⁽⁹⁾ *retransmission of signals* is governed by the new section 325(b) of the 1934 Communications Act.⁽¹⁰⁾ Under the new provision, local broadcasters have two options for signal carriage: (1) they can negotiate with cable operators and give *retransmission consent* to rebroadcast their signals, or (2) they can elect to be covered under *must-carry* provisions also contained in the 1992 Cable Act.⁽¹¹⁾ Under Federal Communication Commission (FCC or Commission) regulations implementing the 1992 Cable Act,⁽¹²⁾ local broadcasters were required to choose one of these two options by October 6, 1993, and to have subsequent "elections" at three year intervals. Because the first three year election period ended in October 1996, it is appropriate to undertake an examination of the statutory scheme and experience under this scheme.

This Article examines the must-carry/retransmission consent choice granted to cable operators in the 1992 Cable Act, focusing primarily on the retransmission consent provisions.⁽¹³⁾ The Article first surveys the history of cable television and cable regulation. Next, it examines the history and initial implementation of the 1992 Cable Act to assess Congress's intent in passing retransmission consent. The Article then examines, apart from the legislative history, what theoretical justifications underlie a retransmission consent provision, and lays out arguments for and against requiring retransmission consent. This is followed by a description of the actual experience with the retransmission consent provisions--in the cable and broadcasting industries and in the courts--over the past three years. Next, the Article briefly discusses the controversial must-carry provisions which are paired with retransmission consent in the 1992 Cable Act. In view of three years of experience with retransmission consent, the policy implications for the arguments previously raised are assessed. In essence, the Article considers what retransmission consent was meant to do and how accurately retransmission consent has done what was intended.

I. Historical Background of Cable Television and Retransmission Regulation

Issues concerning cable regulation in general and present issues concerning the retransmission consent and must-carry provisions contained in the 1992 Cable Act are best understood in the context of the history of cable television and cable regulation in the United States. Cable television, as it is today, is a different product from what was introduced in the late 1940s. It is reasonable to question whether the regulation which has accompanied the service effectively deals with today's economics.⁽¹⁴⁾ Regulation of cable television has grown out of regulation of broadcast television and other transmission technologies.

A. Origins of Cable Television and Cable Television Regulation

Cable television (CATV)⁽¹⁵⁾ essentially began as a retransmission service. Broadcast systems transmit signals over the airwaves where they can be received by anyone with the proper receiver. A cable operator traditionally took this signal from the airwaves using a normal receiver and "retransmitted" the signal, most frequently over a cable, to subscriber households.⁽¹⁶⁾ This retransmission was economically feasible because some areas are not conducive to receiving over-the-air broadcasts. For example, in local areas where skyscrapers or mountains partially or fully block signals, cable television greatly improves reception relative to the over-the-air signal.⁽¹⁷⁾ Cable television initially posed no serious threat to broadcasters, since it largely expanded the range of their programming and advertising.⁽¹⁸⁾ Initial regulatory attempts reflected this view. In 1958, the FCC, the agency charged under the 1934 Communications Act with regulating the broadcast industry,⁽¹⁹⁾ declined to exercise jurisdiction over cable television, stating that CATV was not a common carrier or a broadcaster covered under the 1934 Communications Act.⁽²⁰⁾ The FCC adhered to this interpretation in a later rulemaking proceeding.⁽²¹⁾ The FCC viewed cable's mandate as a "functional technology" for dissemination of broadcast signals, not a new medium for regulation.⁽²²⁾ In fact, the FCC explicitly stated that they did not want to premise regulation of cable upon assertedly adverse general consequences for broadcasting.⁽²³⁾

As "distant" television signals⁽²⁴⁾ were more frequently added to cable systems, cable evolved even more clearly into a distinct product valuable to consumers and cable television operators. Local broadcasters began to fear cable as a viable alternative, and regulators saw potential for monopoly and disturbance of its broadcast regulation.⁽²⁵⁾ The FCC changed its position and decided to regulate cable television, first by placing restrictions on the microwave facilities serving cable operators.⁽²⁶⁾ In 1965, the FCC announced its intention to regulate all CATV systems, regardless of whether they used microwaves,⁽²⁷⁾ and announced rules to govern microwave regulation explicitly based upon the possibility of adverse impact upon potential and existing local broadcast stations.⁽²⁸⁾ In 1966, the FCC determined that all forms of CATV (including those not served by microwave), could be regulated.⁽²⁹⁾

In *United States v. Southwestern Cable*,⁽³⁰⁾ a broadcaster protected by new FCC regulations had asked the FCC to limit carriage of their signals by the cable operator Southwestern.⁽³¹⁾ Southwestern Cable responded that the FCC did not have authority to regulate cable television and the Ninth Circuit agreed.⁽³²⁾ The Supreme Court, in upholding the FCC's authority and reversing the Ninth Circuit, addressed only the challenge to the FCC's authority to regulate cable and not the underlying rules.⁽³³⁾ Part of the Court's basis for this decision was the fact that cable retransmission may "seriously degrade the service offered by a television broadcaster" and thus ultimately deprive the public of the various benefits of a system of local broadcasting stations."⁽³⁴⁾ In fact, the court restricted FCC regulation to "that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."⁽³⁵⁾

Most of the ensuing regulatory debate concerning cable television in the 1960s and 1970s presumed that cable television, like telephone or electric power provision, was a natural monopoly. Cable rates were regulated "to protect subscribers against monopoly pricing and to ensure adequate access by program providers to cable channels."⁽³⁶⁾ Although the FCC did participate in some regulatory efforts to protect broadcasters, the primary regulating bodies were county and municipal governments, who often granted exclusive franchises to cable companies in exchange for various

concessions such as hookups for public institutions and community programming.⁽³⁷⁾ The cable industry was not enamored by the franchising process, since it created a "cumbersome and time-consuming process of government approval for rate increases, which discouraged network expansion and development of new programming."⁽³⁸⁾

The Cable Communications Policy Act (1984 Cable Act)⁽³⁹⁾ was the federal government's first attempt at national cable television policy. This law explicitly deregulated cable rates in areas where there was "effective competition."⁽⁴⁰⁾ However, because "effective competition" was broadly defined to include any franchise area where three or more unduplicated broadcasting signals were available within a cable operator's service area, almost all cable systems qualified for rate deregulation.⁽⁴¹⁾ Cable prices generally rose throughout the 1980s as a result.⁽⁴²⁾ Price increases led cable consumers and policymakers to call for reregulation of the industry. Consumer dissatisfaction led first to a stricter FCC standard for competition and later to the 1992 Cable Act,⁽⁴³⁾ enacted by Congress over President Bush's veto.⁽⁴⁴⁾

B. The Two Sides of Retransmission Regulation

As discussed above, issues of retransmission have been a persistent feature of broadcast regulation. The FCC has dealt with the question of retransmission since it began to regulate cable television in the early 1960s. Two different interests are present in regard to retransmission: (1) the right of the broadcasters in the broadcast signal, and (2) the copyright of the creator of works contained in the signal. This part surveys the history of the two different retransmission interests and their regulatory schemes leading up to the 1992 Cable Act.

1. Regulation to Protect Broadcasters

The first interest the FCC recognized in terms of retransmission regulation--reflecting its historical perspective--is that of the broadcasters. The basic theory behind this regulation was that broadcasters, having been granted an exclusive right by the FCC to broadcast over the limited broadcast spectrum, might be threatened if others could easily duplicate these broadcasts.⁽⁴⁵⁾ Broadcasters claimed that since cable operators did not have to pay for any of the costs of producing the broadcast signal, cable operators had a competitive advantage which would eventually lead to the destruction of the broadcast television industry.⁽⁴⁶⁾

Concern for broadcasters' signals was clearly stated in the Communications Act of 1934 vis-a-vis other broadcasters. Section 325 of the original act states, in relevant part, that "No person within the jurisdiction of the United States shall knowingly utter or transmit . . . any false or fraudulent signal of distress . . . nor shall any broadcasting station rebroadcast the program or any part thereof of another broadcasting station without the express authority of the originating station."⁽⁴⁷⁾ Broadcasters may not retransmit another broadcaster's signal without obtaining prior consent. This ensures that one broadcaster does not infringe upon another broadcaster's FCC granted right to transmit its broadcast signal.⁽⁴⁸⁾ Section 325 could equally have applied to retransmission by nonbroadcasters, such as cable operators,⁽⁴⁹⁾ but the FCC explicitly declined to follow this view.⁽⁵⁰⁾

At least one case examined broadcast rights in the absence of FCC regulation. In *Cable Vision v. KUTV*,⁽⁵¹⁾ a federal district court in Idaho was faced with a situation where a cable operator was clearly competing with the only local television station, KLIX, which had secured exclusive rights from the networks under section 325(a) to rebroadcast signals from Salt Lake City. However, only one signal was rebroadcast at any one time. Cable Vision set up a system which could retransmit all of the Salt Lake City channels at once. Cable Vision sued KLIX on antitrust grounds, and KLIX countersued claiming tortious interference with contract. The court granted KLIX an injunction on the tortious interference grounds although stating that any specific property right by KLIX was derived solely from contract.⁽⁵²⁾ The court did not recognize any other property right.

Partly because of its initial understanding of cable television's role and its own jurisdiction,⁽⁵³⁾ the FCC initially declined to regulate retransmission of broadcast signals by cable operators.⁽⁵⁴⁾ In its 1959 proceedings, the FCC recommended that Congress pass legislation (1) requiring cable systems to obtain the consent of broadcasters to

retransmit (retransmission consent) and (2) requiring cable systems to "carry the signal of the local station . . . if the local station so requests"⁽⁵⁵⁾ (must-carry). Congress did not act in response to the request. Once the FCC did decide to regulate cable television, partly because of the perceived threat to broadcast television, the FCC relied upon a series of rules regarding when and how cable operators could retransmit broadcast signals. These rules were called must distant signal rules, and syndicated program exclusivity rules. The FCC did not create a property right for local television broadcasters' signals similar to the rights that broadcasters generally had regarding other broadcasters' signals.

The first regulations were promulgated in the mid-1960s. These stated that (1) CATV systems were required to transmit to their subscribers the signals of any station into whose service area they have brought competing signals (must-carry)⁽⁵⁶⁾ and (2) importation of distant signals into the 100 largest television markets was prohibited without FCC approval of its necessity.⁽⁵⁷⁾ The FCC also promulgated nonduplication rules and again asked Congress to pass a cable analog to section 325(a) and to prohibit cable-originated programming. Again Congress did not act. The regulations were challenged and upheld in *Southwestern Cable*.⁽⁵⁸⁾ "The practical effect of the rules was to freeze most cable retransmission of distant signals."⁽⁵⁹⁾ These rules were revised and reissued in 1972, adding rules regarding syndicated program exclusivity, which gave local television stations that had purchased exclusive exhibition rights and copyright holders, the ability to demand that local cable systems delete a program from retransmitted distant signals.⁽⁶⁰⁾ Cable operators persistently fought these regulations.

2. The Second Interest: Copyright

A second interest was recognized as being at stake in the retransmission process. Owners of the copyright in programs shown on television felt that while broadcasters had paid for the privilege of showing their works, cable companies had not. Retransmission of broadcasts raised the issue of property rights in the programming carried on the broadcast signal. The 1909 Copyright Act did not explicitly address the issue of retransmission of copyrighted works.⁽⁶¹⁾ Court cases, in fact, established that under the terms of the 1909 Copyright Act, retransmission was not a performance and thus no liability was incurred.

In *Fortnightly Corp. v. United Artists Television Inc.*,⁽⁶²⁾ the Supreme Court took its initial view of the copyright liability surrounding retransmission of broadcast television by cable operators. In *Fortnightly*, a motion picture copyright holder brought suit against a cable operator alleging copyright violations. The copyright holder noted that although the television stations had licenses, the cable operator did not. The Court found that retransmission of the local broadcast signal was not "performance" and thus no violation.⁽⁶³⁾ The Court noted that "both broadcaster and viewer play crucial roles in the total television process;" and viewers of performances do not perform.⁽⁶⁴⁾ The Court's point was that a cable system was like the homeowner who put a large antenna outside his house and then connected his neighbors as well. The Court said in dicta that "[t]he function of CATV systems has little in common with the function of broadcasters. CATV systems do not in fact broadcast or rebroadcast. Broadcasters select the programs to be viewed; CATV systems simply carry, without editing, whatever programs they receive."⁽⁶⁵⁾

The Court revisited the copyright question in *Teleprompter Corp. v. Columbia Broadcasting Systems, Inc.*⁽⁶⁶⁾ In this case, the appeals court had made a distinction between signals already in the community and those that were distant, and allowed copyright liability for the latter.⁽⁶⁷⁾ The Supreme Court rejected this view and reaffirmed the holding in *Fortnightly*.⁽⁶⁸⁾ Justices Blackmun, Douglas, and Burger dissented.

This outcome was by no means certain. In *Buck v. Jewell* analogous question in regard to radio broadcasts and found copyright liability. In that case, the Court found that a hotel which rebroadcast radio signals to its guests was involved in a "public performance."

In 1976, Congress revised the Copyright Act and expressly addressed cable retransmission. Section 111 established a compulsory licensing scheme. Under this scheme cable operators are allowed to simultaneously retransmit programming but are required to compensate copyright owners for the programming based on a complex formula

including gross receipts paid by subscribers to the cable system for the retransmission service and, for larger systems, "distant signal equivalents," which is described as "nonnetwork television programming carried . . . beyond the local service area of the primary transmitter of such programming."⁽⁷⁰⁾ Passage of this legislation was contentious. The legislation did not require any payment for retransmission of local over-the-air signals or retransmission of distant network programming, based on the presumption that neither of these harmed copyright owners.⁽⁷¹⁾ Payments under the 1976 Act are made only to copyright owners and not to broadcasters (except to the extent that they own copyrights).

The 1976 Copyright Act's treatment of cable television was widely criticized. Some claimed that the legislation should have contained "full copyright liability" and that the Act precluded the use of the market to set appropriate prices for the copyrighted materials.⁽⁷²⁾

3. Post 1976 Regulation

Partly in response to the 1976 Copyright Act, the FCC began to change its cable regulations. In November 1976, the FCC began looking into abolishing the syndicated exclusivity rules,⁽⁷³⁾ which were repealed in 1981 despite a court challenge.⁽⁷⁴⁾ The Copyright Royalty Tribunal,⁽⁷⁵⁾ which administered the rates, made adjustments to reflect the regulatory changes. The Copyright Royalty Tribunal eliminated the adjustments when the FCC reinstated syndicated exclusivity rules in 1990.

In *Malrite TV v. FCC*, petitioners tried to keep the FCC from repealing certain regulations protecting broadcasters by claiming that the 1976 Copyright Act forbade these changes.⁽⁷⁶⁾ However, petitioners also tried to claim that retransmission consent, which had been suggested to the FCC by the National Telecommunications and Information Administration (NTIA)⁽⁷⁷⁾ as an effective replacement for the regulations, would not violate the 1976 Act.⁽⁷⁸⁾ Although the court refused to keep the FCC from changing the rules,⁽⁷⁹⁾ the court seemed to say that FCC-imposed retransmission consent *would* be the same as full copyright liability, which Congress had expressly rejected.⁽⁸⁰⁾ However, the court refused to decide conclusively whether retransmission consent would be permissible under the Communications Act.⁽⁸¹⁾

Further developments in cable regulation occurred during the 1980s. In 1985, the D.C. Circuit invalidated the must-carry regulations as a violation of cable operators' First Amendment rights.⁽⁸²⁾ The FCC responded with reformulated rules, but these were also found to violate the First Amendment.⁽⁸³⁾ Retransmission consent was proposed in addition to or instead of the compulsory licensing scheme a number of times.⁽⁸⁴⁾

C. Summary

The history of cable retransmission regulation had two components leading up to the 1992 Cable Act. One had its origin in the protection of broadcasters. This has been exemplified by FCC regulations including the must-carry regulations and other protective regulations imposed by the FCC since the 1960s. However, in 1985, the must-carry regulations were struck down by the courts as a First Amendment violation. The other issue was copyright, which was based on trying to protect the owners of copyrighted works. This was resolved (somewhat) by the compulsory licensing contained in section 111 of the 1976 Copyright Act. The 1992 Cable Act would only further complicate things.

II. The 1992 Cable Act

The 1992 Cable Act, passed by Congress on October 5, 1992, as the only law passed over President Bush's veto,⁽⁸⁵⁾ once again changed the delicate balance of rules regarding cable retransmission and, in fact, changed the entire regulatory scheme regarding cable television. The main impact of the law regarding retransmission was to reimpose, by law, the must-carry regulations and to finally impose retransmission consent. However, these new provisions did not replace the compulsory licensing scheme, as some commentators had advocated. Instead, these provisions were laid on top of the old scheme and the legislation clearly stated that the new provisions were not to affect rights under the old

provisions.

The purpose of this Part is to examine the history behind the portion of the 1992 Cable Act which implemented the retransmission consent and must-carry provisions. This Part introduces the arguments and rhetoric which existed during the formation and initial implementation of the 1992 Act without critically examining the arguments or assertions made. Part III provides a more critical examination of many of these arguments.

A. Context of the 1992 Cable Act

Legislation does not evolve in a vacuum. The 1992 Cable Act⁽⁸⁶⁾ was passed largely in response to consumer rage over rising cable rates and poor customer service⁽⁸⁷⁾ which had resulted after the 1984 Cable Act⁽⁸⁸⁾ deregulated rates. As a result, much of the Act reregulated basic tier cable rates, making it much more difficult to escape rate regulation by claiming there was "effective competition."⁽⁸⁹⁾ The Act encouraged competition by reducing the ability of local governments to grant exclusive franchises,⁽⁹⁰⁾ increased consumer protections,⁽⁹¹⁾ as well as instituted the retransmission consent⁽⁹²⁾ and must-carry provisions.⁽⁹³⁾

The retransmission consent and must-carry provisions had legislative precursors. In 1989, CBS--a major broadcast network--proposed an idea called must-carry, must-pay.⁽⁹⁴⁾ In 1990 Senator Daniel Inouye (D-Haw.) introduced a bill including these ideas.⁽⁹⁵⁾ This legislation would have given cable systems the "option" not to carry local commercial signals, however, if they did carry the signals, they were required to pay a retransmission fee to the FCC, which was set by a formula and subsequently distributed to broadcasters, networks, and copyright holders, *and* to follow must-carry regulations.⁽⁹⁶⁾

During consideration of the 1992 Cable Act, *Broadcasting* (later *Broadcasting & Cable*) --a major industry newspaper--noted a survey conducted by the Roper Organization which supported the broadcasters claim that the "cable operators [were] making money on the backs of the network's [sic]."⁽⁹⁷⁾ In this survey, two subscribers said that they would cancel their subscriptions if the three major networks were not carried. Eighty percent said that their subscription rates should at least be cut in half.⁽⁹⁸⁾

B. Legislative History of 1992 Cable Act

Much of the 1992 Cable Act dealt with protecting consumers.⁽⁹⁹⁾ However, the formal and informal legislative history surrounding the Act also addressed issues relating to retransmission consent. The retransmission consent provisions were among "the most controversial parts of the Act."⁽¹⁰⁰⁾ Section 2 of the Act laid out five explicit statements of policy for the Act:

- (1) promote the availability . . . of a diversity of views and information through cable television and other video distribution media;
- (2) rely on the marketplace . . . to achieve that availability;
- (3) ensure cable operators continue to expand, where economically justified, their capacity and the programs offered over their cable systems;
- (4) where cable television systems are not subject to effective competition, ensure that consumer interests are protected . . . ; and
- (5) ensure that cable television operators do not have undue market power vis-a-vis video programmers and consumers.⁽¹⁰¹⁾

Many of these relate to the competition and consumer protection aspects. However, fourteen of the twenty-one findings also listed in section 2 explicitly address retransmission consent and must-carry.⁽¹⁰²⁾ The findings indicate

that Congress had some purpose in preserving local broadcasting,⁽¹⁰³⁾ in preserving "free" television,⁽¹⁰⁴⁾ and in establishing a competitive and economic balance between cable and broadcast operators.⁽¹⁰⁵⁾ While by no means determinative,⁽¹⁰⁶⁾ these statements do give some indication as to the purposes Congress had in passing the retransmission and must-carry provisions.

The remainder of this subpart discusses direct and indirect legislative history related to the 1992 Cable Act.

1. Treatment by the House

Members of Congress knew that retransmission consent would be highly controversial. In fact, although the provision existed in the Senate bill,⁽¹⁰⁷⁾ the provision was explicitly left out of the companion House bill⁽¹⁰⁸⁾ in order to avoid a jurisdictional dispute between the House Energy and Commerce Committee, which had jurisdiction over cable issues, and the House Judiciary Committee, which had jurisdiction over copyright matters. The House Judiciary Committee viewed the provision as related to the cable compulsory copyright provisions in 17 U.S.C. § 111 and was considering legislation to modify the compulsory copyright.⁽¹⁰⁹⁾ Referral to the Judiciary Committee "would have killed the chances of passing cable legislation in the 102d Congress, and certainly would have eliminated the possibility of Retransmission Consent becoming law."⁽¹¹⁰⁾ Nevertheless, seven members of the House Energy and Commerce Committee, while noting the political motives behind not including the retransmission consent provision, filed a three page statement of additional views stating their preference that the provision be included in the final legislation.⁽¹¹¹⁾ The House bill did contain a must-carry provision,⁽¹¹²⁾ which would have applied without choice of retransmission consent.

2. Conference Committee Report

The Conference Committee adopted the Senate language.⁽¹¹³⁾ The conferees additionally mentioned that the compulsory copyright license in 17 U.S.C. § 111 was "undisturbed" by the legislation, and added language in the legislation so stating.⁽¹¹⁴⁾ The retransmission provision states that "no cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, except--(A) with the express authority of the originating station; or (B) pursuant to [the must-carry provisions], in the case of a station [so] electing."⁽¹¹⁵⁾ The provisions also state that retransmission consent does not apply to noncommercial stations or certain satellite broadcasts and superstation broadcasts. Furthermore, they directed an FCC rulemaking implementing the provisions, and noted that election periods for broadcasters to choose between retransmission consent and the must-carry provisions would begin within one year of enactment and thereafter every three years. Finally, the provision states that if a broadcaster elects for retransmission consent, the must-carry provisions do not apply, and that such election does not supersede the rights of any station which has chosen must-carry.⁽¹¹⁶⁾

3. Senate Committee Report

The primary legislative origin of the retransmission consent provision was in the Senate Committee on Commerce, Science, and Transportation. Because the Conference Committee report does not say much about the reasoning behind the retransmission consent provision, the next best formal source is the report of the Senate committee with jurisdiction.⁽¹¹⁷⁾

Senator Daniel Inouye added the retransmission consent provision during the full committee mark-up.⁽¹¹⁸⁾ In discussing section 15 of the Senate bill, the Senate Committee based its reasoning in the actual wording of section 325(a), which states that "nor shall any broadcasting station rebroadcast the program or any part thereof of another broadcasting station without the express authority of the originating stations."⁽¹¹⁹⁾ The Committee noted that the legislative history of the origin of this section--in the Radio Act of 1927--indicated that this applied to "the wired wireless," which the committee understood to mean the radio predecessor of cable television, as well as over-the-air broadcast stations.⁽¹²⁰⁾ Although recognizing that the FCC rejected this reasoning in 1959,⁽¹²¹⁾ the committee noted that since cable systems compete with broadcasters for advertising revenues, this treatment was no longer viable.

Retransmitted broadcast signals are the most popular programming carried on cable systems. Nevertheless, cable operators "use these signals without having to seek the permission of the originating broadcaster or having to compensate the broadcaster for the value its product creates for the cable operator."⁽¹²²⁾ This created a "distortion in the video marketplace which threatens the future of over-the-air broadcasting."⁽¹²³⁾ The present system requires "broadcasters [to] in effect subsidize the establishment of their chief competitors."⁽¹²⁴⁾ The committee also stated that "the intent of S. 12 is to ensure that our system of free broadcasting remain vibrant, and not be replaced by a system which requires consumers to pay for television service."⁽¹²⁵⁾ In supporting the reinstatement of the must-carry provisions, the committee relied on a statement in the Communications Act of 1934 that "television broadcasting plays a vital role in serving the public interest."⁽¹²⁶⁾

4. Congressional Debate

Statements made by members of Congress during the debate over the retransmission consent provisions also yield some insight into the purposes of the retransmission provisions. Upon initial consideration of S. 12, Senator Ford (D-Ky.) stated that cable had become too powerful and specifically supported the must-carry provisions.⁽¹²⁷⁾ This sentiment was echoed by many of the bill supporters, while opposing members stated that passage of the legislation would "cripple the growth of cable programming and service options."⁽¹²⁸⁾

a. Senate Statements

Specifically regarding retransmission consent, Senator Inouye, who had proposed the provision at mark-up, stated that retransmission consent was meant to allow broadcasters "the option of being treated like any other cable programmer" and recognized that cable competes with broadcasters for advertising revenue. Furthermore, the provisions would allow local stations to control the use of their signals.⁽¹²⁹⁾ The expectation was that, in most cases, agreements would be reached under retransmission consent, thus allowing parties to avoid "a complex set of governmental rules to promote the carriage of local broadcast signals."⁽¹³⁰⁾

Opponents argued that while on its face the provision sounded logical, in application, it may cost cable customers more, and possibly deprive them of broadcast signals. Senator Seymour (R-Cal.) urged the Senate to have fuller hearings on what the potential effects of the provision would be on consumers and copyright holders.⁽¹³¹⁾ Senator Timothy Wirth (D-Col.) worried that the combination of retransmission consent and the must-carry provisions may give too much power to the broadcasters.⁽¹³²⁾

Nevertheless, general support for the provision was evident in the Senate. A substitute amendment was offered for the bill by Senators Packwood, Stevens, and Kerry, but contained a retransmission consent/must-carry provision identical to the original.⁽¹³³⁾

b. House of Representatives Statements

Although the House did not have a retransmission consent provision in its version of the 1992 cable legislation, a number of members did speak in support of such a provision.⁽¹³⁴⁾ The members called it a "marketplace mechanism that allows two business interests to try to reach an agreement."⁽¹³⁵⁾ One member, Representative William Hughes (D-N.J.), Chairman of the House Subcommittee on Copyright--which had been explicitly avoided by the proponents of retransmission consent--spoke in opposition to retransmission consent, calling it a "broadcaster's Christmas in July" which overcompensated for an admitted inequity.⁽¹³⁶⁾ Another, Representative Mike Oxley (R-Ohio), noted the probability of the issue reappearing in conference, and regretted the fact that he could not oppose the measure, which he claimed would cost consumers "\$3 per head and some \$20 billion more."⁽¹³⁷⁾

c. Statements Post Conference

Statements in debate by senators and representatives after the Conference Committee report included the provision,

and arguments later overriding Bush's veto, duplicated the arguments given before. Supporters viewed the legislation as promoting competition between cable providers and broadcasters while protecting consumer interests, whereas opponents claimed that consumers would be harmed much more than proponents claimed and that the legislation harmed the compulsory licensing scheme constructed by the 1976 Copyright Act.⁽¹³⁸⁾ Others noted that questions about the effect on the copyright compulsory license had not been answered, partly because of the tactic of keeping the bill out of the House Judiciary Committee.⁽¹³⁹⁾ Still others believed that the combination of must-carry and retransmission consent gave the broadcasters too much of a benefit.⁽¹⁴⁰⁾

5. Hearings

Hearings also shed light regarding legislative intent, although they are inherently limited as fora where interests often push their own views to be sorted out by legislators. Two hearings were held in the 102d Congress which have some bearing on retransmission consent. The Senate Subcommittee on Communications, of the Commerce, Science and Transportation Committee, held two hearings in preparation for consideration of S. 12, and the House Subcommittee on Telecommunications and Finance of the House Energy and Commerce Committee, also held hearings. Since the later Senate hearing before the same subcommittee⁽¹⁴¹⁾ focused mostly on questions related to the must-carry provisions, the discussion is focused on the first Senate hearing.

In the first Senate hearing on March 14, 1991,⁽¹⁴²⁾ the subcommittee heard from both cable operators and broadcasters. The cable representatives uniformly opposed S. 12, although little was mentioned in their prepared statements regarding either must-carry or retransmission consent.⁽¹⁴³⁾ Senator Inouye did ask one of the panelists, James C. Kennedy, the chairman and CEO of Cox Enterprises, what his position was on must-carry and retransmission consent. Interestingly, Kennedy responded that:

[M]ust-carry is really a non-issue for me. As I said, every decent cable company in America tries to provide the programming that their customers want, and their customers want the over-the-air television signals

[S]ome of the broadcasters are saying that [] 70 percent of the viewing . . . on a cable system is of over-the-air television stations. Why could not that cable system pay the broadcaster for the right to distribute that?

Well, if that is to occur, I think that broadcasters have to realize that cable companies should then have a choice. They should not be forced to pay for everything. They should be compelled to pay for the programming that they want.⁽¹⁴⁴⁾

Senator Inouye followed up with a question to Ted Turner, president and board chairman of Turner Broadcasting System, as to whether rates would rise in response to retransmission consent. Turner expressed his general opposition to the idea and noted that the costs would likely be passed on to customers.⁽¹⁴⁵⁾ Senator Packwood continued the questioning of both Kennedy and Turner, noting with Turner that local network affiliates had to pay to retransmit CNN satellite coverage of the Gulf War, although cable operators can take the local transmission signal without pay.⁽¹⁴⁶⁾ Later in the colloquy, James A. Mooney, president of the National Cable TV Association, admitted that:

I think if you were going to invent these industries tomorrow . . . you might say there is a kind of rough justice in the proposition that the cable operator ought to have to pay the local broadcaster for the privilege [of] retransmitting the signal

I think whatever the theoretical free market attractions of that, you really have to question the standing of the broadcasters to show up at this point in history and all of a sudden want to get paid for the cable operators doing what they used to insist the cable operators [do] as a matter of law⁽¹⁴⁷⁾

The broadcasters expressed more clearly developed opinions on both must-carry and retransmission consent. Edward Fritts, the president of the National Association of Broadcasters (NAB) firmly requested the "right to control the retransmission of [their] signal."⁽¹⁴⁸⁾ James Hedlund, president of the Association of Independent TV Stations, while firmly in support of must-carry, stated that retransmission consent would likely favor the older and stronger stations

and could also make a bill too controversial to pass.⁽¹⁴⁹⁾ Upon further questioning, both Fritts and Hedlund stated that broadcasters should receive compensation for the value they provide cable operators. Fritts asked the subcommittee to add retransmission consent to the bill.⁽¹⁵⁰⁾ Inouye noted at the end of the panel that he would be happy to entertain suggestions for a retransmission consent amendment.⁽¹⁵¹⁾

The House Subcommittee on Telecommunications and Finance hearings involved H.R. 1303, the original companion bill to S. 12.⁽¹⁵²⁾ On June 27, 1991, the subcommittee heard from representatives of both the cable and broadcast industry regarding retransmission consent and must-carry. Fritts, Mooney, and Hedlund, who had been involved in the Senate hearings, were present, along with a number of others. Not surprisingly, Fritts, representing the NAB, favored the retransmission consent provisions asserting: (1) that the power of cable television had greatly increased, and retransmission consent was necessary to level the playing fields; (2) that retransmission consent was intended by the predecessor statute (section 325(a) and the Radio Act of 1927); and (3) that the cable industry's arguments that retransmission consent and must-carry would give too much to the broadcasters or affect the compulsory copyright license were wrong.⁽¹⁵³⁾ In regard to the compulsory copyright question, Fritts stated that "[c]ommunications and copyright law have always recognized that there are two interests intertwined in a broadcast signal--the interest in the *signal* which belongs to the broadcaster, and the interest in the *programs* carried on that signal which belongs to various copyright holders."⁽¹⁵⁴⁾

Mooney, representing the cable industry, was much more prepared to oppose retransmission consent at this hearing, calling it the "free TV surcharge" and labeling it as an attempt by CBS and broadcasters to add a 20 percent surcharge to subscriber bills.⁽¹⁵⁵⁾ Mooney noted that broadcaster revenues far outweigh cable revenues and that the broadcast networks were essentially asking to be bailed out of "poor business judgment." Mooney observed that retransmission consent would conflict with the cable compulsory copyright license, according to past opinions of the FCC, the Copyright Office, and the Department of Justice.⁽¹⁵⁶⁾ James Hedlund, for the Independent TV stations, reiterated his support for must-carry and general support for a retransmission consent option, noting the relative power of cable operators and the benefits of local broadcasters.⁽¹⁵⁷⁾

Amos B. Hostetter, Jr., chairman and CEO of Continental Cablevision, opposed the retransmission consent/must-carry package, stating that CBS, the main proponent of retransmission consent, was the only network which did not participate in cable.⁽¹⁵⁸⁾ He also noted that while the broadcasters do not pay for their signal usage, cable operators must pay franchise fees. Hostetter finished with the statement that "the CBS retransmission consent/must-carry scheme is about putting more money into the pockets of CBS by forcing cable consumers to pay extra for the very same programs that they have already paid for through broadcast advertising This is an incredibly cynical proposal."⁽¹⁵⁹⁾

Laurence A. Tisch, the president and CEO of CBS, responded with a short statement which essentially repeated the NAB's arguments.⁽¹⁶⁰⁾ Upon questioning from Representative Edward Markey (D-Mass.), chairman of the panel, Tisch stated that he did not believe cable rates would rise as a result of retransmission consent, and cable operators would be willing to accept a formula instead of negotiated deals.⁽¹⁶¹⁾ He further stated that the real purpose of retransmission consent was to secure a place for free broadcast television in the future of television.⁽¹⁶²⁾

The panel also included statements by Henry P. Becton, Jr., of WGBH--Boston, who expressed public television's support for must-carry and opposition to retransmission consent's application to public television,⁽¹⁶³⁾ and Brian P. Lamb, of C-SPAN, who worried that must-carry provisions would force cable systems to cease carriage of important cable services such as C-SPAN because they would be crowded out by must-carry stations.⁽¹⁶⁴⁾

C. FCC Regulations Implementing the Retransmission Consent Provisions

The regulations promulgated by an agency implementing legislation often give insight into legislative purposes. The FCC, as directed by the 1992 Cable Act,⁽¹⁶⁵⁾ promptly instituted a rulemaking proceeding to formulate rules for the
⁽¹⁶⁶⁾

implementation of the retransmission consent provisions. Although the rulemaking proceedings for the must-carry regulations were conducted at the same time as the retransmission consent proceedings, the FCC emphasized that this was a matter of convenience; it should not be implied that the two provisions are not severable.⁽¹⁶⁷⁾

In releasing final rules on March 29, 1993, the FCC made a number of significant determinations.⁽¹⁶⁸⁾ First, the FCC decided to apply the retransmission consent provisions not only to television broadcast stations, but also to radio and to Low Power Television Stations (LPTV). This reflected the FCC's acceptance of the legislative history which tied section 325(b) to section 325(a)'s origins in the Radio Act of 1927 and viewed the 1992 Cable Act provisions as a "gap-closing" measure.⁽¹⁶⁹⁾ In regard to construing the exception applicable to some satellite carriers, the FCC noted that the "overriding intent of the 1992 Cable Act was to increase--not reduce--availability of broadcast signals to the public."⁽¹⁷⁰⁾ Further, in unique circumstances where failure to reach a retransmission consent agreement would leave an area without network service (such as in Puerto Rico, where there are no local network affiliates), network affiliates could not unreasonably withhold retransmission consent.⁽¹⁷¹⁾ The FCC also held that retransmission consent applies to both distant and local signals, although only local broadcasters have the option of choosing must-carry coverage.⁽¹⁷²⁾ The FCC decided that failure to choose either must-carry or retransmission consent by the applicable deadline would result in must-carry status for applicable broadcasters.⁽¹⁷³⁾ This again reflects the general belief that having more channels is better.

In regard to the compulsory copyright, the FCC stated that "[t]he legislative history of the 1992 Act suggests that Congress created a new communications right in the broadcaster's signal, completely separate from the programming contained in the signal."⁽¹⁷⁴⁾ The FCC, however, stated that broadcasters must bargain over only the signal right, and not for rights in the individual programming, in regard to securing retransmission consent. "Any bargaining must be for retransmission consent rights to the entire signal."⁽¹⁷⁵⁾

Finally, although some had advocated direct regulation of the effect of retransmission consent agreements on consumers' basic service rates, the FCC declined to regulate this directly, stating that basic service rates are properly regulated under section 623(b)(1).⁽¹⁷⁶⁾ The FCC also prohibited exclusive retransmission consent agreements between television broadcast stations and cable operators.⁽¹⁷⁷⁾

III. Theoretical Justifications for Retransmission Consent

Parts I and II raise a number of arguments which have been used to either encourage or discourage the application of retransmission consent to cable system retransmissions of broadcast signals. This Part assesses many of these arguments. Some of the arguments which have been raised have little foundation, while others raise valid concerns. Those arguments which do cause concern are discussed more fully in Parts IV and VI regarding the actual implementation of the 1992 Cable Act retransmission provisions. However, before discussing these arguments directly, it is important to provide some economic background to the cable and broadcast industries.

A. Broadcast and Cable Television Economics

The retransmission consent and must-carry provisions contained in the 1992 Cable Act modified the system of incentives present in the cable and broadcast industries. Instead of being able to simply retransmit broadcast signals without any further requirements, cable operators were forced into a market where they needed to negotiate with broadcasters for the rights to their signal. In order to understand the effect that this had, it is essential first to explain the economics which relate to broadcast television, specifically, the economics of public goods and of optimal product variety.

1. Public Goods

For most private goods, the purchaser of the good is the person who is subsequently entitled to consume the good; no other person can consume the good at the same time (it is rivalrous) and others may be prevented from consuming the good (it is exclusive). An example is an apple. Public goods, by contrast, are nonrivalrous and nonexclusive; public

goods may be consumed by more than one person at once and it is difficult, if not impossible, to exclude others from consumption.⁽¹⁷⁸⁾ Two prominent examples of public goods are national defense and lighthouses. With national defense, everyone is protected, regardless of who pays for the protection. Many are protected at once, and people cannot be excluded from its protection. Similarly, once a lighthouse exists, there is no way to prevent a passing ship from using that lighthouse, nor is it only accessible to one sailor at a time.

The problem with public goods is that because there is no relation between purchasers and consumers, there are strong incentives to "free ride" and not pay for the good. After all, if someone else builds the lighthouse, anyone can still use it. This can lead to market failure where the private market will likely produce an insufficient amount of the public good.⁽¹⁷⁹⁾ Market interventions, such as monopoly production (monopoly government production in the case of national defense) or development of exclusion mechanisms to deter free riders, are often necessary.⁽¹⁸⁰⁾

Broadcast television is often described as a public good.⁽¹⁸¹⁾ Some economics textbooks and articles, in fact, use it as an example.⁽¹⁸²⁾ The reasoning is as follows: once a television program is being broadcast, any number of people in the broadcast area can watch the program simply by turning on their television. There is no additional cost for broadcasting to an additional household (nonrival) and there is no way to exclude households (nonexcludable). One difference between the "pure" public good situation and that of television is the requirement that each consumer own a television. This does not solve the excludability problem, however, since many may watch one television.

Few of the economic examinations note that provision of broadcast television is actually two public goods problems wrapped into one.⁽¹⁸³⁾ The first public good is the television programming. This is a public good in the same sense that all authored works--such as books, movies, and works of art--are public goods. The second is distribution. Both broadcast and cable television distribution systems have an element of public good to them, since the additional cost of another viewer is close to zero.

Traditionally, the problem of programming as a public good is the kind of problem which is addressed through copyright.⁽¹⁸⁴⁾ Copyright is economically rooted in the idea that creating a limited monopoly property right for the creator of a work allows the collection of rents which will encourage further creation.⁽¹⁸⁵⁾ A number of commentators have questioned the extent to which copyright protection actually has these effects, and the extent to which copyright should exist for various kinds of works.⁽¹⁸⁶⁾ It suffices to say that the standard method for addressing the problem of the public good aspects of creative works, including television programming, has been copyright. Producers of programming have a copyright right in the programs which are broadcast and they charge television stations for the privilege of broadcasting the programming.⁽¹⁸⁷⁾

Distribution of television programming--for example, via broadcast, cable or videotape--also has public good elements.⁽¹⁸⁸⁾ The least public method of the three is videotape, since the owner may control who watches.⁽¹⁸⁹⁾ Broadcast is the most public. As described above, anyone with a TV can usually pick up the signal and view it without additional cost. However, even broadcasters are capable of scrambling signals to make reception more difficult. Cable distribution is somewhere in between, but more likely closer to a public good. Provided that a house is already hooked up to the cable network,⁽¹⁹⁰⁾ there is a very low marginal cost to (a) turning that connection on or (b) making sure that the signal gets to that house. The latter, presuming a connection is already established and active, should be pretty close to zero. Cable broadcasting does have the increased ability to exclude. As any cable subscriber knows, it is much easier for cable operators to exclude viewers either from the system entirely (for example, if the bill is not paid) or from particular channels (for example, premium channels). This allows cable operators, unlike broadcasters, to charge viewers directly for their programming.⁽¹⁹¹⁾

2. Optimal Product Variety

Another economic consideration which exists with television is the concept of optimal product variety. Because the supply of programming is constrained by the those who determine what programs will be shown on broadcast stations or what channels will be covered on a cable network, there is a question as to how many different programs, or alternatively, how many broadcast or cable stations, there should be. While the instinctive reaction is that more

channels and entrants into any market is always better, this is not the case from an economic point of view.⁽¹⁹²⁾ Suppose a product has one possible differentiating characteristic--it can either be hot or cold--and preferences for hot and cold products are roughly evenly distributed. If two producers both make warm products, the benefits of competition have been effectively foiled. Assuming some fixed costs of production, society would be better off with one producer of the warm product than two, because the additional fixed costs are wasted.⁽¹⁹³⁾ Similarly, if all programming were alike, it would be wasteful duplication to have a variety of suppliers.⁽¹⁹⁴⁾ The optimal amount of product variety must balance the added surplus (to both producers and consumers) from an additional different product being introduced, against the fixed costs to society which are required to produce that product.⁽¹⁹⁵⁾ The more substitutable products in a given market are, the more likely it is that the entry of a new producer will add more to costs than to social benefits.⁽¹⁹⁶⁾

Owen and Wildman note that mode of television program delivery is related to optimal product variety.⁽¹⁹⁷⁾ Owen and Wildman first survey "program choice" literature which examines the effect of competition on "program diversity." They note that early models showed that a benevolent monopolist producing a diversity of programming would have a "socially more beneficial program pattern" than a competitive television industry.⁽¹⁹⁸⁾ Owen and Wildman then extend these models to examine different modes of program delivery. In their characterization, "pay television" is supported by viewers that pay on a per program basis, while advertiser-supported television exists by using programs to attract audiences which are "sold" to advertisers.⁽¹⁹⁹⁾

Theoretically, in a pay television system there is more incentive for those in control of program distribution (whether a cable operator or an over-the-air broadcaster) to cater to the desires of a group of viewers.⁽²⁰⁰⁾ Thus, they conclude, a system of entirely "pay television is more likely to allocate resources in television production efficiently than is advertiser supported television[.]. . .[because] revenues per viewer under pay television are more likely to reflect viewers' program preferences."⁽²⁰¹⁾

Using more complex demand-estimation models and examining different industry structures, Owen and Wildman find that a competitive pay industry is almost always preferred to a pay monopoly and that pay television is more likely than advertiser-based television to take into account special or minority interests.⁽²⁰²⁾ Focusing on the ability of a pay television industry to focus on special or minority interests, it follows that the less substitutable programs are, the better a competitive pay television industry does relative to advertising-based models.

Owen and Wildman create a theoretical model to assess television industry market structure in terms of maximizing viewer welfare.⁽²⁰³⁾ In comparing four modes of production--competitive and monopoly advertiser-based programming and competitive and monopoly pay television programming--they found that the likely best situation would not be all one mode, but would contain a "mixture of [television programming] services, including pure pay services, services supported by advertising only, and program services supported by advertising and viewer payments."⁽²⁰⁴⁾

B. Arguments Regarding Retransmission Consent

A number of arguments regarding retransmission consent have been made throughout the course of the eventual adoption of a retransmission consent requirement. These arguments have run the gamut from ones which focus on "unrecognized property rights" of broadcasters to those which claim that consumers will be injured or that the delicate statutory compulsory copyright scheme will be upset. The remainder of this Part organizes, presents, and critically examines eight of these arguments, five in favor of retransmission consent and three opposed to retransmission consent. Some of these arguments, upon close examination, have little substance; others raise issues which should be considered as the implementation of retransmission consent continues.

1. Arguments for Retransmission Consent

a. Retransmission Consent Recognizes the Property Right Inherent in Broadcasters' Signal

One of the primary arguments for retransmission consent has been that broadcasters have a property right in their broadcast signal and this right was, before the 1992 Cable Act, infringed by cable operators who, without authorization, could retransmit broadcast signals and effectively sell the broadcast, packaged along with other broadcast and cable channels, to subscribers for profit. This caused an alleged "distortion in the marketplace."⁽²⁰⁵⁾ This argument has been used by broadcasters throughout the history of cable regulation.⁽²⁰⁶⁾ This is also the argument to which broadcasters appeal when they look to section 325(a) of the Communications Act, which forbids other broadcasters from retransmitting signals.⁽²⁰⁷⁾ Finally, rhetoric which discusses the "right to control the retransmission of [their] signal,"⁽²⁰⁸⁾ clearly appeals to the idea of a property right.

There are two major reasons why this argument does not carry much weight. First, the broadcaster has a limited right to broadcast by virtue of a license granted by the government. For broadcasters then to claim that they ought to be compensated when someone else actually extends the quality or range of this signal overreaches significantly. Second, there is a factual question as to whether the retransmission actually has any effect at all on the marketplace, since broadcasters are normally compensated through advertising, not by the recipients of the broadcast.

The broadcaster has a limited claim regarding a property right in the signal because the broadcaster only holds a license to broadcast from the government. The "policy of the [Communications] Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license."⁽²⁰⁹⁾ The broadcast spectrum is regulated to serve the public interest and broadcasters have been granted a license when it is determined to serve the public necessity.⁽²¹⁰⁾ A cable operator, by retransmitting this signal, does not decrease the value of this right. In fact, because the value of the signal is dependent on the number of people who can receive the signal, and because cable can only increase the number of people who receive a signal, it seems more logical that cable retransmission would *increase* the value of the original broadcast rather than decrease the value. The cable argument that they have largely paid for their distribution network (that is, the cable system and franchise fees to construct it) whereas the broadcaster has been granted a right to at least an important portion of their distribution network (that is, a license to use a portion of the broadcast spectrum) has real power.⁽²¹¹⁾

If consumers paid for television signal reception directly, broadcaster complaints that they are unfairly uncompensated might make some sense. For example, if broadcasters generally charged each person who received the signal one dollar (presumably to compensate for fixed costs, etc.), then cable operators, after paying only one dollar, could easily charge a lesser fee to redistribute the programming via cable. This could theoretically make broadcasters unable to recover fixed costs. However, this is not the system of compensation which exists for broadcast television.

Financing of broadcast television is accomplished primarily through advertising; advertisers pay broadcasters to deliver an audience for their advertising. Cable distribution increases the audience or signal quality for an over-the-air program, and should thus increase the value of placed advertisements, assuming that the cable operator is not allowed to remove the advertisements. Advertisers would thus pay the broadcaster more to compensate for the increased reach of the signal relative to the unenhanced signal.⁽²¹²⁾ There is no need for cable operators to compensate broadcasters for the increased reach of their signal; broadcasters are already compensated by advertisers. In fact, one could imagine situations where broadcasters would want to pay cable operators to retransmit their signal in order to increase advertising revenues.⁽²¹³⁾

b. Retransmission Consent Addresses the Public Good Problem Posed by Distribution

As discussed above in Part III.A.1., broadcast television has many elements of a public good. One possible argument related to the argument that broadcasters are not being adequately compensated for the use of their signal, is that some sort of property rights allocation is necessary in order to make sure that broadcasters receive appropriate compensation for the production of this public good. This is not unlike the reasons which are often given for copyright protection, which is the standard way of solving the public goods problem for creative works.⁽²¹⁴⁾

There are at least two problems with this justification for a retransmission consent provision. By making the analogy to copyright, retransmission consent subjects itself to the same criticisms that have been made about copyright protection.

These criticisms make clear that property-like protection is probably not necessary. A related argument is that the main worry with public goods is the danger of underproduction. However, there is no evidence that television is in fact being underproduced.

As Stephen Breyer states in his article examining copyright, "a large difference between the cost of producing a work initially and the cost of copying is not alone sufficient to show that copyright protection is desirable."⁽²¹⁵⁾ In the world of retransmission consent, this translates to the statement that the fact of a large difference between the cost of initial transmission via broadcast and the cost of retransmission via cable does not necessarily justify a property right on the part of the broadcaster. Breyer asks a number of challenging questions regarding copyright protection, such as whether allowing publishers to simultaneously produce an individual book title would actually result in (a) a cost advantage to the copier and (b) a reduction in the number of books produced.⁽²¹⁶⁾ Breyer notes that while a cost advantage may exist for the book copier, there are countervailing forces, such as lead time and fear of retaliation, which could prevent a real cost advantage.⁽²¹⁷⁾ While these countervailing forces may not exist in the world of broadcast retransmission, the economics of broadcasting similarly indicates that retransmission does not necessarily harm broadcasters. For example, the cost of broadcast television to viewers is zero. The fact that retransmitters may have lower costs nevertheless makes it unlikely that retransmitters will undercut the broadcasters' price to viewers. In fact, as described above, the fact that the broadcasters receive payment from advertisers for advertisement placement seems to indicate that retransmission could in fact enhance advertiser payments to broadcasters by creating a larger receiving audience.

It is further not clear that a lack of property-like protection for broadcast television would necessarily lead to a significant reduction in the amount of television produced. Even if there was serious concern that before retransmission consent there was not enough broadcast television, it is likely that substitute products, such as cable-oriented television production, would more than adequately compensate for the lack of broadcast television in most markets.

c. Retransmission Consent Provides a Preference to Free Local Broadcasting

One clearly stated concern in passing the 1992 Cable Act was the desire to perpetuate free local broadcast television.⁽²¹⁸⁾ The Act gives local broadcasters a choice between choosing must-carry status, which forces cable operators to retransmit their signal, or the option to enter into a retransmission consent agreement. The FCC has consistently maintained that there is an interest in preserving local broadcast television.⁽²¹⁹⁾ David Simon provides two arguments in favor of encouraging local broadcast service.⁽²²⁰⁾ Simon first notes that many people may be left without television service if local broadcast ceases, either because they are not attached to a cable system or because they cannot afford cable's subscription fee. He argues "it would be illogical for the government to pay . . . the fees for all who cannot afford them, when the alternative of free over-the-air broadcasting is available."⁽²²¹⁾ Second, Simon argues that local news and public interest programming in general would be harmed by proliferation of imported signals.⁽²²²⁾ He notes the failure of a local origination cable programming requirement in 1969.⁽²²³⁾

Both of Simon's arguments are persuasive, although less so than they were when written in 1978. First, a much higher percentage of households are presently able to obtain cable services.⁽²²⁴⁾ It is not necessarily true that the demise of broadcast television would mean the end of television for many households; many would simply switch to cable. Simon is correct in noting that if television were viewed as a necessity and no broadcast existed, there would be a need to subsidize those who could not afford the cable subscription charge. However, this might not be the most efficient way to provide television service if the services are available in other ways. If the main good provided by cable service is television service, then the cost to consumers is certainly lower if provided free over-the-air rather than via subscriber cable service, even if subsidized.⁽²²⁵⁾

Simon's second argument, that broadcast television encourages the "local character" of television, is also of ambiguous value. Although there was not much local programming on cable systems in the late 1960s and 1970s, it is not true today. Cable systems in general have a much greater capacity today than they did in 1978 and are more capable of complying with local access requirements. Many franchise agreements, in fact, do require local programming.⁽²²⁶⁾ It is thus not completely clear that localism is best served by local *broadcast* television. However, given that locally-oriented broadcast stations presently exist, it may make sense to continue this system rather than to construct new local

cable channel providers.

More importantly, it is unclear whether the retransmission consent provision will really have the effect of maintaining free local broadcasting. While the must-carry provisions are expected to be utilized by the small independent stations who will not likely be carried on a cable system, retransmission consent is expected to be the choice of the larger and more established broadcasters.⁽²²⁷⁾ The status of large well established broadcasters providing local programming is not realistically threatened by the absence of retransmission consent.⁽²²⁸⁾ These stations are also likely to be local affiliates of national networks, which have only a small amount of "local" character. Thus, although promoting free local broadcasts might be somewhat important, it is unclear that retransmission consent effectively accomplishes that goal.

d. Retransmission Consent Promotes Increased Diversity of Information Sources

The 1992 Cable Act states that one of the aims of the Act is to promote the increased diversity of information sources.⁽²²⁹⁾ In implementing the Act, the FCC also stated that the "overriding intent of the 1992 Cable Act was to increase--not reduce--availability of broadcast signals to the public."⁽²³⁰⁾ However, there is no reason to think *a fortiori* that the imposition of retransmission consent should lead to increased diversity of television offerings. The broadcasters to whom retransmission consent applies are already producing a product; it is unclear why retransmission consent should create more diversity.⁽²³¹⁾ The must-carry provisions, on the other hand, might very well encourage diversity on cable channels, since this basically allows any broadcaster to opt for mandatory coverage on the cable system.

Even so, the analysis of whether an additional channel promotes diversity on a cable system depends on whether there is excess channel capacity on a system. If there is excess channel capacity, then an additional channel would seem to add, rather than subtract, from diversity. However, if there is limited channel space, whether there is a net benefit to diversity depends on whether the new channel is "more diverse" than the channel it replaced. Because there are many reasons why a cable operator might take on a certain channel,⁽²³²⁾ there is no reason to assume that the cable operator will necessarily choose to take on the more diverse channel.

Thus there is no *a fortiori* reason to believe that retransmission consent will lead to greater program diversity. Even if retransmission consent leads to the introduction of new channels, this only necessarily increases diversity on those cable systems with excess channel capacity. On systems without excess capacity, the net gain to program diversity is unclear.

e. Retransmission Consent Promotes Optimal Product Variety

Although this argument was not raised explicitly in consideration of the 1992 Cable Act, a reasonable argument can be made that retransmission consent, by providing support to advertiser-supported broadcast television, does promote a more optimal product variety in television programming. As stated above in Part III.A.2., the configuration of modes of distribution more likely to lead to optimal product variety includes broadcast advertising-supported stations. Owen and Wildman clearly state that a mixture of advertising and viewer payment-supported television is more likely to lead to an optimal variety of programming than either of the other modes exclusively.⁽²³³⁾ To the extent that broadcast television's very existence is threatened by cable television and support for advertising supported television is the same as support for broadcast television, retransmission consent should lead to more optimal product variety. While the argument above regarding free local broadcast television is susceptible to the assertion that local cable channels can be just as local as local broadcast channels, the argument for supporting broadcast television to promote optimal product variety remains, since most broadcast television is exclusively advertising-supported.

Thus, to the extent that the granting of a retransmission consent/must-carry choice represents a distributive allocation to support broadcast television, rather than the interests of either programmers or cable operators, retransmission consent may encourage the continuation of advertiser-supported broadcast television. This may move product variety closer to the optimum by encouraging a mix of program distribution modes.⁽²³⁴⁾

2. Arguments Against Retransmission Consent

a. Retransmission Consent Interferes With or Undermines the Compulsory Cable Copyright

One of the main arguments launched against retransmission consent is that establishing a retransmission consent requirement will destroy the cable compulsory license which is meant to provide compensation to programming producers to resolve the standard public goods problem dealing with the makers of creative works.⁽²³⁵⁾ William Patry, in his treatise on copyright, states that "retransmission consent eviscerates the cable compulsory license. . . . Retransmission consent further offends copyright principles by permitting broadcasters to negotiate for and sell the copyrighted works of others--the program copyright owners--at free market rates, while the programmers are relegated to a below-market compulsory license fee."⁽²³⁶⁾ The conference committee which reported the bill added subsection 6 to section 325(b), explicitly stating that the compulsory copyright provisions were undisturbed.⁽²³⁷⁾

The conclusion that the addition of a property scheme (that is, retransmission consent) on top of the cable compulsory licensing scheme destroys the latter is unfounded. The amounts paid under the compulsory licensing scheme are unchanged.⁽²³⁸⁾ If they were too low before, they remain too low. The addition of retransmission consent may not help the situation, but it seems odd to say that it destroys the former system. In fact, commentators have shown that two schemes, one which assigns property rights (such as full copyright liability or retransmission consent) and another which assigns liability (such as the compulsory copyright system), are theoretically equivalent.⁽²³⁹⁾ The addition of a property scheme to a liability scheme (compulsory licensing) does not change this theoretical conclusion.

b. Retransmission Consent Needlessly Increases Transaction Costs

A valid complaint does follow from the discussion of the difference between property and liability rules, however. The equivalence between a property and a liability scheme does not completely hold true when there are significant transaction costs associated with one scheme.⁽²⁴⁰⁾ The cost imposed by requiring broadcasters and cable operators to negotiate every three years over retransmission consent could be quite significant. Although this argument was not explicitly raised during consideration of the 1992 Cable Act, this is a significant concern.

c. Retransmission Consent Increases the Price of Cable Television to Consumers

One argument which was constantly raised by opponents of retransmission consent during consideration of the 1992 Cable Act was that imposing a system of retransmission consent where cable operators would have to pay broadcasters for the right to retransmit their signals would basically result in a pass-through of the cost to cable customers. Regulation that was meant to benefit broadcasters at the expense of cable operators would really result in an additional cost for consumers.⁽²⁴¹⁾ Some broadcasters disputed these claims, stating that cable operators could pay for the increased costs out of reduced profits, and that any expense was worthwhile to secure free broadcast television's place in the future of television.⁽²⁴²⁾

The concerns regarding further impositions on cable consumers are reasonable. Although basic cable rates were to be regulated under the 1992 Cable Act, it seems quite likely that operators would claim that the cost of paying any retransmission consent fees was a cost of doing business that ought to be reflected in their basic rates. Although it is possible that cable operators had sufficient profits to pay a retransmission consent fee, there is no reason to expect the cable operators not to try to pass this cost through.

C. Summary

Many of the arguments made during the debates leading to the adoption and imposition of the retransmission consent provisions in the 1992 Cable Act, upon closer scrutiny in conjunction with the economics surrounding broadcast and cable television, appear to be specious. In fact, little support can be found for the main argument given in favor of the provision, that there is an imbalance in the market because cable operators are allowed to retransmit broadcast signals without compensating broadcasters. Neither the argument in its simple form of claiming that there is an imbalance, nor in its slightly more complicated form related to the public good of television distribution, carries much weight. In the

end, however, some arguments for retransmission consent, although not highlighted in the legislative history, do sustain a critical analysis. One is the argument that broadcast television should be encouraged so that the variety of programs produced will be closer to the optimal level. The argument that retransmission consent will promote free local broadcast television may also apply, though it seems to apply with more clarity to the must-carry provisions than retransmission consent provisions. The argument that retransmission consent will lead to greater diversity of information sources seems *a fortiori* unclear.

On the other hand, of the three arguments against retransmission consent, two raise serious concerns. Although the argument that retransmission consent would conflict with the cable compulsory licensing scheme does not have much validity, the arguments that retransmission will cost consumers--either by making them bear the transaction costs associated with the consent negotiation, or by making them pay higher costs to pay for the actual costs of retransmission consent--are quite ominous. These concerns should be kept in mind as Part IV examines what has happened over the past three years under the retransmission consent provisions.

IV. Retransmission Consent in Practice

Most earlier analyses of the retransmission consent provisions contained in the 1992 Cable Act were, by necessity, preliminary.⁽²⁴³⁾ The FCC regulations implementing the retransmission consent provisions are just over three years old. The first elections between the retransmission consent and must-carry provisions occurred just over three years ago in October 1993. However, since another election period is occurring,⁽²⁴⁴⁾ it is highly appropriate to review the results of the retransmission consent process since 1992. This Part is divided into three sections. The first section provides a chronological history of the effect of retransmission consent on cable and broadcasting industries. Second, legal issues regarding the implementation of retransmission consent are examined. Finally, legislative responses to retransmission consent are briefly examined. Because there have not yet been comprehensive studies of the effect of retransmission consent on the industry, this Part relies largely on industry news accounts.⁽²⁴⁵⁾

A. Industry Effects

Retransmission consent, after the first election period, did not provide one thing that the broadcasters, and CBS in particular, had desperately wanted: it did not create a direct second stream of income. Those broadcasters that chose retransmission consent--and most did, especially among stations affiliated with major networks--received noncash compensation, such as access on the cable system for another station, if they received any at all.⁽²⁴⁶⁾ Three of the four major networks used their affiliates to leverage new cable stations onto the airwaves.

1. Initial Reactions

Even before the 1992 Cable Act finally passed through Congress, the broadcasters, and in particular the networks, began to react to the prospect of retransmission consent. In September 1992, Fox changed language in its network-affiliate contracts to allow Fox "input" as to whether the local broadcast station chooses must-carry or retransmission consent in its negotiations with local cable systems. Fox also indicated that it thought money received as a result of retransmission consent should be divided among the network, the affiliate, and copyright holders.⁽²⁴⁷⁾

Other parties, including cable operators and copyright holders, were quick to react. On October 12, 1992, Bob Thomson, senior vice president of Tele-Communications Inc. (TCI), stated that the cable operator had "no intention of entering into any agreements" with broadcasters at all.⁽²⁴⁸⁾ Copyright holders complained that they were left out of the process. For example, Barry Meyer, executive vice president of Warner Bros., stated on October 26 that copyright holders "are the orphans of retransmission consent. . . . It is not the signal itself that is valuable--it's what the signal carries. . . ." ⁽²⁴⁹⁾

2. Build-up to Negotiations

As broadcasters and cable operators began positioning in the spring, the rhetoric changed somewhat. Cable operators declared that retransmission consent would place upward pressure on cable rates.⁽²⁵⁰⁾ The FCC decided that complete

pass-through of retransmission consent costs would not be allowed, making cash payments by cable operators less likely. ⁽²⁵¹⁾ At the same time, cable operators maintained that they did not want to voluntarily drop stations currently carried. The cable operators stated they were open to "imaginative solutions" from the broadcast industry ⁽²⁵²⁾ while reaffirming their insistence of not paying any fees. ⁽²⁵³⁾

Broadcasters indicated that the majority of local stations, especially those affiliated with networks, would choose retransmission consent rather than must-carry status. ⁽²⁵⁴⁾ This partly reflected a desire to try to obtain payments and partly a fear that the must-carry provisions would eventually be overturned, even though the District Court panel found them constitutional on April 12, 1993. ⁽²⁵⁵⁾ The exceptions were smaller independent stations who opted for must-carry status. ⁽²⁵⁶⁾

3. Creative Solutions

In May 1993, Fox first floated a creative solution that eventually took greater hold. Instead of cash, Fox would accept access for a new basic cable channel on the local cable system in exchange for the right to continue retransmission of their local broadcast stations. Fox claimed that this would help both cable operators and network broadcasters. ⁽²⁵⁷⁾ This offer was made possible partly because of the unique agreement the network had negotiated with its local affiliates. ⁽²⁵⁸⁾ TCI quickly accepted the offer, making an agreement whereby Fox gave consent to carriage of its local affiliates and TCI would pay Fox twenty-five cents per subscriber for the new channel, of which either 7.5 cents or five cents plus 25 percent of the new channel's profits would go to local affiliates. ⁽²⁵⁹⁾ Fox eventually dictated that its affiliates choose the retransmission consent deal, unless the cable system had fewer than 1000 subscribers, in which case the network required must-carry. ⁽²⁶⁰⁾

NBC soon followed Fox's lead, although CBS was still focused on obtaining cash flow. ⁽²⁶¹⁾ One by one, deals duplicated the Fox model. ⁽²⁶²⁾ Even Turner Broadcasting, a major cable operator, sought a retransmission consent deal for its TBS broadcast channel, in which it would receive startup service for The Cartoon Network. ⁽²⁶³⁾ A few smaller stations negotiated cash deals, ⁽²⁶⁴⁾ and many independent stations opted for must-carry. ⁽²⁶⁵⁾ Eventually, CBS, after trying late in the process to piece together a proposal for an all-news network, caved in and granted one year's retransmission consent unconditionally for the stations it owns. ⁽²⁶⁶⁾

4. The Dust Settles on the First Round

When the dust had finally settled, 80 percent of all commercial TV stations chose retransmission consent over must-carry. Ninety percent of network TV affiliates chose retransmission consent, although only 20 percent of independent stations chose this route. ⁽²⁶⁷⁾ Instead of a second cash flow, new services exist on cable, most of them extracted from multiple station owners and networks. Fox leveraged the introduction of fX; ABC leveraged ESPN2; NBC leveraged America's Talking and renewals for CNBC; and some local stations leveraged a new channel, a regional news station, local news updates on cable news stations, or other specialty stations. ⁽²⁶⁸⁾ Few cable systems dropped significant broadcast stations for a significant amount of time. ⁽²⁶⁹⁾ Most of the networks, with the exception of CBS, got something, although not necessarily the cash they had wanted. Some cable networks insisted that they had been seriously injured. Brian Lamb, CEO of C-SPAN, claimed that seven million homes lost C-SPAN or C-SPAN2 as a result of must-carry and retransmission consent. ⁽²⁷⁰⁾

5. Indications for Future Negotiations

In late 1995 and 1996, broadcasters began preparing for the next round of retransmission negotiations. In December, Capital Cities/ABC announced plans to launch a new cable news network to challenge CNN. ⁽²⁷¹⁾ NBC announced the new MSNBC network and successfully managed to trade in its retransmission consent deals for America's Talking in order to launch it. ⁽²⁷²⁾ CBS announced Eye on People, in a belated effort to leverage a channel ⁽²⁷³⁾ but did not meet with much success. ⁽²⁷⁴⁾ Local multiple station owners have also prepared, sometimes making deals even before the

networks acted.⁽²⁷⁵⁾ Some local broadcasters may have applied for larger Areas of Dominant Influence so that they have more leverage vis-a-vis must-carry provisions.⁽²⁷⁶⁾ The NAB recommended choosing long retransmission consent deals in case the must-carry provisions are struck down by the Supreme Court.⁽²⁷⁷⁾

The cable operators, for their part, noted that they had previously "got[ten] stuck" with poor-quality cable networks and were not necessarily going to let it happen again.⁽²⁷⁸⁾ The cable operators felt that they had too few slots available to accommodate the burgeoning number of channels.⁽²⁷⁹⁾

The FCC also made a few statements regarding retransmission. In November 1995, FCC Chairman Reed Hundt noted that the FCC should make sure that broadcasters do not use retransmission consent to leverage Advanced Television Signals.⁽²⁸⁰⁾ In June 1996, the FCC announced that retransmission consent, as well as other rules, would apply to the new Open Video Systems under the 1996 Telecommunications Act.⁽²⁸¹⁾

6. What Effect?

One reasonable question is what effect the retransmission consent negotiations actually had.⁽²⁸²⁾ One article assessed this question in terms of consumer benefit and concluded that consumers received a greater variety of channels without higher rates.⁽²⁸³⁾ Another commentator surmised in 1994 that the negotiations resulted in greater production of local television news.⁽²⁸⁴⁾

In some cases, broadcasters have benefited from the new channel agreements. For example, some local weather channels started by LIN Broadcasting have been profitable, as have some local news channels.⁽²⁸⁵⁾ On the other hand, some promised channels have yet to be launched.⁽²⁸⁶⁾ Small rural cable subscribers were likely the biggest losers. Because rural areas have such a small audience, their advertising appeal is limited, and this makes it difficult for a broadcaster to convince a cable station that they should give something up in exchange for the right to rebroadcast the signal.⁽²⁸⁷⁾

A few other trends are also evident. Over the past two years, two new networks have been established, the Warner Bros. television network (WB) and the United/Paramount Network (UPN). These networks have organized many of the independent stations who were unable to take advantage of retransmission consent during the first round of negotiations. In some cases, the new networks have targeted for affiliation the second cable channels that were gained by broadcasters in the retransmission consent negotiations.⁽²⁸⁸⁾ The new networks are both owned by programming producers (Warner Bros. and Paramount) and likely see appeal in both the channel's broadcast signal and the opportunity to quickly be on cable systems, either through must-carry or retransmission consent.

B. Legal Effects

There have been two major areas of legal effect regarding the retransmission consent provisions. The first includes constitutional challenges to the retransmission consent provisions. The best known of these is *Turner Broadcasting v. FCC*,⁽²⁸⁹⁾ which deals primarily with the must-carry provisions.⁽²⁹⁰⁾ An independent constitutional challenge to retransmission consent was raised and dismissed in *Daniels Cablevision v. United States*,⁽²⁹¹⁾ discussed below. A second area includes legal issues regarding implementation of the retransmission consent provisions. Although there have not been many, a few issues are emerging and worth mentioning.

1. Constitutional Challenges

As expected, the cable operators wasted no time in challenging the constitutionality of the 1992 Cable Act.⁽²⁹²⁾ Five lawsuits challenging various sections were filed within days of the Act's passage.⁽²⁹³⁾ Although both Turner Broadcasting and Daniels Cablevision challenged retransmission consent, the three judge court severed the cases and took jurisdiction only over the must-carry provisions.⁽²⁹⁴⁾

In *Daniels Cablevision*, the court considered challenges to a number of 1992 Cable Act sections. With regard to section 6 (retransmission consent), Daniels Cablevision had alleged that retransmission consent was effectively a prior restraint on speech because it "places a condition on [cable operators'] carriage of material that the broadcaster itself has placed in the public domain."⁽²⁹⁵⁾ Judge Jackson rejected this argument, referring to the fact that Congress has authority to provide artists, including broadcasters, with copyright protection for their work. "Congress clearly could have amended the copyright law to provide infringement remedies for cable retransmission of broadcast material. But it is not constitutionally significant that Congress has done in the Cable Act what it otherwise could have done in the Copyright Act."⁽²⁹⁶⁾ Thus Judge Jackson gave a copyright rationale for Congress's ability to create retransmission consent.⁽²⁹⁷⁾

2. Implementation Issues

A few legal implementation issues have arisen which could at some point result in administrative or court action.

a. Antitrust

The specter of antitrust has been raised a number of times during the retransmission negotiation process as broadcasters charge the cable operators with collusion and vice versa. In August of 1993, before the October 6 deadline, Senator Inouye asked the Federal Trade Commission and the Justice Department to look into whether the cable operators had colluded in arriving at a no cash payment position.⁽²⁹⁸⁾ The cable operators suggested that the broadcasters were in collusion, noting that the NAB convention had a session on how to conduct retransmission consent negotiations.⁽²⁹⁹⁾

In fact, the only reported action has been against broadcasters. In early 1996, the Justice Department signed a consent decree with the three Corpus Christi, Texas stations that had actually been removed from cable systems after the first round of negotiations.⁽³⁰⁰⁾ The Justice Department claimed that the stations "promised each other that they wouldn't formally sign retransmission consent deals with local cable operators until others signed deals" and that the stations promised not to sign agreements that gave them an edge over the others. Although maintaining that they thought they had done no wrong, the stations agreed to the consent decree, which promised not to band together in future negotiations. The consent decree was meant to be a "warning to broadcast stations . . . as they begin this year's retransmission negotiations."⁽³⁰¹⁾ The boundaries of a acceptable discussions are still not clear.⁽³⁰²⁾

b. The Case of WOOD

Another interesting situation occurred in the case of WOOD-TV in Grand Rapids, Michigan. WOOD-TV (a LIN TV-owned NBC affiliate) had a two-year retransmission agreement with Cablevision and on expiration said it would renew only if Cablevision included its new 24-hour weather channel. The cable operator refused. WOOD-TV responded by withdrawing their retransmission consent.⁽³⁰³⁾ The cable operator responded by stating that since WOOD-TV elected must-carry status for Western Michigan University's cable system within Cablevision's franchise area, Cablevision must carry WOOD-TV to comply with federal law.⁽³⁰⁴⁾ The claim was that since WOOD-TV selected must-carry status within the local area, and since "the absence of an effective retransmission-consent election renders the station a must-carry signal," Cablevision must carry the signal.⁽³⁰⁵⁾ It is unclear how this dispute was eventually resolved.

C. Legislative Effects

1. Introduced Legislation Regarding Retransmission Consent

Although a number of bills have been introduced to amend or repeal the retransmission consent and must-carry provisions, none has yet made it out of committee. Two bills were introduced in early 1993 to modify the provisions. One would have required that program producers get a share of retransmission deals by creating a copyright infringement for authorizing retransmission without the copyright owner's consent.⁽³⁰⁶⁾ Another would have repealed retransmission consent outright.⁽³⁰⁷⁾ In 1995, a measure was introduced which would have repealed the must-carry

regulations, although leaving retransmission consent intact. [\(308\)](#)

2. The Telecommunications Act of 1996

The Telecommunications Act of 1996, [\(309\)](#) signed on February 8, 1996, does not directly affect retransmission consent or the must-carry regulations, although it clearly may affect the cable and communications industries. The Telecommunications Act, among other things, encourages competition in the cable industry by repealing the telephone company-cable cross-ownership ban. This means that telephone companies and cable operators can now legally enter each others' markets. The cable industry will greatly change if increased competition exists. The Act does state that the cable regulations, such as retransmission consent, will apply to telephone companies providing cable-like Open Video Services. [\(310\)](#)

V. The Must-Carry Provisions

In order to be complete, an analysis of the retransmission consent provisions contained in the 1992 Cable Act must include some discussion of the must-carry provisions. [\(311\)](#) The must-carry provisions are closely related to the retransmission consent provisions: section 6 makes explicit that local broadcasters each have a choice to make between the two sections. [\(312\)](#) In essence this gives the broadcaster a property right, and the broadcaster will either choose to charge the operator for the value of the broadcast signal under retransmission consent (or equivalent compensation) or force the operator to carry the signal. The broadcaster should only choose must-carry when unable to otherwise receive equivalent value through retransmission consent. As might be expected from this description, the great majority (80 percent) of stations chose retransmission consent. Ninety percent of network affiliates chose retransmission consent over must-carry. However, 80 percent of independent stations chose must-carry. For these stations--the less powerful, more locally-oriented stations--must-carry was the best option. [\(313\)](#) This Part briefly examines the must-carry provisions and describes how they relate to the retransmission consent. It also includes a brief description of *Turner Broadcasting v. FCC*, [\(314\)](#) the ongoing case challenging the constitutionality of the must-carry provisions. However, this Part does not purport to be a comprehensive explanation of must-carry; that is best left for another article.

A. Justification

The justifications for the must-carry provisions primarily duplicate those described in Part III.B. However, the must-carry provisions, more than retransmission consent, do provide a clear preference to free local broadcasting. By allowing any broadcast station--no matter how small and unpopular--the capability to leverage themselves onto a cable system, thus

expanding their coverage, [\(315\)](#) must-carry clearly gives a great degree of power to a broadcast station. This power clearly favors the *local* aspect of the station; the station is allowed to claim must-carry status on any cable operator in its Area of Dominant Influence. The power also favors the *broadcast* aspects of the station; local groups who want cable channel access may not use the must-carry provisions.

The arguments for why a local broadcast preference should exist are discussed in the Part regarding retransmission consent. [\(316\)](#) As mentioned before, the actual benefit of free local broadcast is, of course, debatable. It is possible that access to television service by subsidizing cable actually would be more useful to consumers, although it may cost more to implement. It is also possible that enhancing the local character of television could be better accomplished via cable television systems. In fact, by giving local broadcast preference on cable systems, it is possible that channels that would otherwise belong to locally-oriented cable programmers are displaced. Nevertheless, to the extent that free local broadcast television is a priority, the must-carry provisions do appear to accomplish that goal.

B. The Constitutional Challenge

As mentioned above, must-carry regulations, when promulgated by the FCC, were twice found unconstitutional in the 1980s. [\(317\)](#) Therefore, it was no surprise when cable operators quickly challenged the provisions again in court when

[\(318\)](#)

[\(319\)](#)

included in the 1992 Cable Act. In *Turner Broadcasting*, the cable operators challenged the must-carry provisions directly, and the retransmission consent provisions indirectly as inextricably tied to must-carry.

The three-judge district panel first ruled on April 8, 1993, by a vote of 2-1. They stated, ruling on summary judgment motions, that the must-carry provisions (sections 4 and 5) did not violate the First Amendment⁽³²⁰⁾ and explicitly did not reach the severability question as related to retransmission consent (section 6).⁽³²¹⁾ In finding that must-carry was constitutional, the court used the *O'Brien* test,⁽³²²⁾ which states that regulations will be upheld when shown to promote a significant government interest and not to burden substantially more speech than necessary.⁽³²³⁾ The court found that the substantial interest test was satisfied by Congress's finding that "concentration of economic power in the cable industry was preventing non-cable programmers from effectively competing for the attention of a television audience [and that] free local broadcast television [was] in serious jeopardy."⁽³²⁴⁾ The court noted that the 1992 Cable Act provisions were "economic regulation designed to create competitive balance in the video industry as a whole and to redress the effects of cable operators' anti-competitive practices,"⁽³²⁵⁾ and rejected cable operators arguments that the government's asserted interest was a content-based effort to "promote widespread dissemination of information from diverse sources," especially including local broadcasts.⁽³²⁶⁾ The court stated that local subject matter was not a discrete content-based category.⁽³²⁷⁾ Plaintiffs further complained that the factual premise that local broadcasting is in peril was incorrect. The court disagreed.⁽³²⁸⁾ Finally, the court found that the statutory provisions were narrowly tailored to serve the purpose in sustaining local broadcasting.⁽³²⁹⁾

The Supreme Court, in a fractured opinion, vacated the lower court judgment and remanded for further proceedings.⁽³³⁰⁾ The Court agreed with the lower court majority that the must-carry restrictions were not content-based,⁽³³¹⁾ rejecting arguments that preference for broadcast was automatically a content-based restriction,⁽³³²⁾ and affirmed that *O'Brien* provides the appropriate standard of scrutiny.⁽³³³⁾ The Court found that the governmental interests at issue were (1) the preservation of free, over-the-air local broadcast television, (2) promoting diversity of information sources, and (3) promoting fair competition in the market for television programming.⁽³³⁴⁾ The Court noted that "in the abstract, we have no difficulty concluding that each of them is an important governmental interest."⁽³³⁵⁾

At this point, the opinion dissolved into plurality. A four justice plurality (continued by Kennedy's opinion) stated that "[the fact] that the Government's asserted interests are important in the abstract does not mean, however, that the must-carry rules will in fact advance those interests. . . . [The Government] must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."⁽³³⁶⁾ The plurality found that these requirements had not been satisfied,⁽³³⁷⁾ finding insufficiencies both in showing that broadcast is in jeopardy and in showing that must-carry will force cable operators to make programming changes.⁽³³⁸⁾ Justice Blackmun concurred separately that a remand was necessary, although he would accord greater deference to congressional findings.⁽³³⁹⁾ Stevens, although stating he would normally vote to affirm the judgment of the District Court relying on the Congressional findings, concurred with the judgment vacating and remanding, in order to create a majority.⁽³⁴⁰⁾

Four Justices signed on to two parts of Justice O'Connor's opinion, stating that "the Court is mistaken in concluding that the interest in diversity . . . is content neutral"⁽³⁴¹⁾ and finding, as a result, that must-carry is unconstitutional unless narrowly tailored to a compelling state interest. The interest in localism or diversity is insufficient.⁽³⁴²⁾

On remand, the District Court panel once more found, again on cross-motions for summary judgment, that the must-carry regulations passed the intermediate scrutiny test.⁽³⁴³⁾ However, this was only because of Judge Jackson's decision to side with Judge Sporkin to avoid stalemate.⁽³⁴⁴⁾ The court found that there was "'substantial evidence' . . . from which [Congress] drew a 'reasonable inference' that the must-carry provisions are necessary to protect the local broadcast industry and do not burden 'substantially more speech than necessary.'" This was enough to sustain summary judgment for the Government,⁽³⁴⁵⁾ given that "intermediate scrutiny does not require a perfect fit."⁽³⁴⁶⁾

Judge Williams filed a lengthy dissent favoring the plaintiff motion to dismiss, stating that "it is clear that must-carry is not narrowly tailored to address any government interests that are actually at stake."⁽³⁴⁷⁾ Williams noted that (1) there is no threat to the continued viability of broadcast television, (2) it makes no sense to rely on the fact that must-carry will help those it intends to help, (3) broadcasters clearly have other access to consumers, and (4) leased access regulations could much less restrictively allow all access to provision via cable.⁽³⁴⁸⁾ Among other arguments, Williams noted that the stations that have selected must-carry [over retransmission consent] are "marginal."⁽³⁴⁹⁾ Williams also noted that must-carry is more likely elected in an environment of scarce channel availability. As he puts it, "Defendants implicitly claim that the First Amendment harm to a programmer *denied carriage* in the first instance because of a cable system's full capacity (partially thanks to must-carry) is somehow more remote than the harm experienced by a carried programmer that is *dropped* in order to make room for forced carriage of a broadcast station."⁽³⁵⁰⁾ Williams did not make any judgment as to the effect that declaring must-carry unconstitutional would have on retransmission consent.

On October 7, 1996, the Supreme Court heard argument again in *Turner Broadcasting*. In support of the must-carry regulations, Solicitor General Walter Dellinger argued that the regulations were necessary to maintain "a robust array of programming."⁽³⁵¹⁾ It was unclear from the Justices' questioning which way the decision would likely go. The composition of the Court has changed since the last appearance of the case before the Court.

C. Reflection Given Actual Experience

1. Justifications for Must-Carry

The analysis and experience discussed above in relation to retransmission consent is related to the issues discussed by the courts in regard to must-carry. All three of the justifications recognized by the Supreme Court as being governmental interests in regard to must-carry--(1) preservation of free, over-the-air local broadcast television, (2) promoting diversity of information sources, and (3) promoting fair competition in the market for television programming⁽³⁵²⁾--are also justifications raised in relation to retransmission consent. Without making any judgment as to whether the restrictions must-carry imposes are or are not content-based restrictions (and thus whether the justifications must be narrowly tailored to address a compelling state interest or merely substantially related to an important state interest), these issues should be addressed.

First, regarding the preservation of free over-the-air local broadcasting, it is apparent that local broadcast stations, at the very least, have more clearly benefited from the must-carry provisions than the retransmission consent provisions. While it seems the true beneficiary of retransmission consent provisions have been the networks or larger groups of stations which are able to leverage power to create new cable channels and networks, the beneficiaries of the must-carry provisions have been local independent stations. Must-carry status provided these local stations with access to cable systems that retransmission consent alone would not have accomplished. Indeed, without the must-carry provisions, the new channels promised under retransmission consent agreements would likely have eliminated any chance of carriage for these local stations. Judge Williams, in his dissent to the District Court's opinion on remand, noted that the stations electing must-carry are mostly "marginal."⁽³⁵³⁾ The marginal local broadcasters may be exactly the stations that the must-carry provisions were meant to help.

The analysis of whether must-carry has promoted increased diversity of information sources, like the question of whether retransmission consent promotes increased diversity of information sources, relies on whether there is excess channel space, and if there is not excess channel space, whether the must-carry channels provide "greater diversity" than the channels that they replace. If there is excess channel space, there would appear at least to be no loss to diversity as a result of carriage of an additional channel. However, if there is limited channel space and a broadcaster opting for must-carry takes the place of another channel, it is difficult to say whether there is a net benefit. As mentioned above, C-SPAN, a cable channel, claims that seven million homes lost access to at least some of its services as a result of the must-carry and retransmission consent provisions.⁽³⁵⁴⁾ It is unclear whether retransmission of C-SPAN or a local broadcast channel choosing must-carry status would necessarily "create greater diversity." Also, because of the way in which retransmission consent has been implemented, with broadcast networks leveraging

additional channels onto cable systems, it is unclear whether the must-carry provisions or the retransmission consent provisions should be held to blame for the loss of diversity that results when a station is removed from a cable system (and the gain from the addition of another "less diverse" channel).⁽³⁵⁵⁾

In regard to the third aim recognized by the Supreme Court--promoting fair competition in the market for television programming--it is unclear whether either the must-carry or retransmission consent provisions address this issue. As described above regarding retransmission consent,⁽³⁵⁶⁾ it is unclear what exactly the imperfection is in the market.

2. Severability of Must-Carry and Retransmission Consent

One issue that remains in *Turner Broadcasting* regarding the retransmission consent provisions, although the more recent opinions have not mentioned the issue, is the constitutionality of the retransmission consent provisions as unseverable from the must-carry provisions, should the must-carry provisions be found unconstitutional.⁽³⁵⁷⁾

From a textual perspective, the two issues do seem clearly severable. The 1992 Cable Act provides must-carry regulations in sections 4 and 5, while retransmission consent, and the choice between must-carry and retransmission consent, is introduced in section 6. The language of section 6 states, in relevant part, that "no cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, except (A) with the express authority of the originating station; or (B) pursuant to section 614, in the case of a station electing, in accordance with this subsection, to assert the right to carriage under such section."⁽³⁵⁸⁾ Textually it is easy enough to simply excise subsection (B) and leave the retransmission consent provision.

In terms of the practical application of the provisions, the provisions are similarly severable. Eighty percent of commercial broadcast stations chose retransmission consent;⁽³⁵⁹⁾ to hold 80 percent of the commercial broadcast stations hostage to the unconstitutionality of the must-carry provisions which apply to 20 percent seems unnecessary.

Although this is not an argument for severing the provisions, but an argument for preservation of must-carry, loss of the must-carry provisions would seem to diminish the intended impact of the 1992 Cable Act in promoting free local broadcast television. Retransmission consent may help broadcasters relative to cable operators, but the must-carry provisions more directly assist local and over-the-air broadcasters. Retransmission consent has primarily functioned to help the broadcast networks and multiple station owners leverage new offerings onto cable systems.

VI.Reassessing Retransmission Consent

As the end of the first three-year election period between retransmission consent and must-carry comes to a close, the results have not been quite what was expected. As outlined in Part IV, few broadcasters received cash payments for their signals, although this was their primary intent. Although 80 percent of broadcast stations chose retransmission consent, no second revenue stream resulted. Instead, agreements concerning retransmission tended to provide access for additional cable programming provided by broadcasters. Furthermore, although the retransmission consent provisions provide a property right for the *local* broadcast stations which emit the signals, the main beneficiaries of the retransmission consent agreements seemed to be not local broadcast stations, but large broadcast networks and multiple station owners, who found new avenues to expand their programming. In some sense, retransmission consent actually provided the networks with a major break into cable programming, rather than propping up local broadcast.

This Part of the Article reexamines many of the arguments discussed in Part III and examines how implementation did or did not address these arguments. Although there were a number of serious concerns regarding implementation of the retransmission consent provisions--particularly regarding the potential for cable operators to simply pass through the cost of retransmission consent agreements to consumers--these concerns were largely addressed by the FCC. As a result, the agreements reached by broadcast stations took an unexpected form--the leveraged creation of new cable products by the broadcast networks and multiple station owners. While it is unclear whether these creations further any of the goals of the 1992 Cable Act, it is possible that the retransmission consent provisions have solidified the role of broadcast television in the future of television and thus supported the continuance of advertiser-based television programming which is movement toward optimal product variety. Retransmission consent may also have increased the diversity of information sources, although this conclusion is most clear only where cable systems had excess capacity.

There have been a number of unexpected consequences as a result of the retransmission consent provisions, and these may require further study.

A. Addressing the Arguments Against Retransmission Consent

Although the overall results are not clear and may require further study, at least one of the major compelling arguments against retransmission consent--that this cost would be passed through to consumers--was averted by FCC action.⁽³⁶⁰⁾ By announcing that cable operators would not be allowed to incorporate retransmission consent costs into their basic rates, the FCC explicitly avoided consumers bearing the burden for the new provisions.⁽³⁶¹⁾ Combined with the reluctance of cable operators to pay any premiums to broadcasters, this action resulted in the creative deals for additional channel access which characterized the first round of negotiations.⁽³⁶²⁾

The argument that retransmission would unnecessarily increase transaction costs is less clearly evaluable. Because these costs likely become absorbed in the overhead costs of both the cable company and the broadcasters, it would take additional study to determine both the magnitude of the additional transaction costs resulting from retransmission consent and the effect this has had on consumers. Since transaction costs could be quite extensive, this issue should be examined further.

B. The Arguments in Favor of Retransmission Consent

In terms of the compelling arguments for retransmission,⁽³⁶³⁾ retransmission consent appears to have had a marginally positive effect, although, again, further study is warranted. Quite unexpectedly, in terms of promoting a diversity of views and information, the creative solutions developed by cable companies and broadcasters which leverage new cable channel options have increased the diversity of programming offerings, at least where there was previously excess channel capacity. In addition, retransmission consent may have promoted advertiser-supported broadcast television over primarily viewer-payment-supported cable television, which may have moved the mixture of television products closer to an optimal variety. However, whether the local character of television has been sustained is ambiguous.

New programming options have been created as a result of retransmission consent. A number of new cable television offerings have been introduced as a result of the leverage available to broadcast television networks and multiple station owners as a result of retransmission consent.⁽³⁶⁴⁾ As described above,⁽³⁶⁵⁾ if there is excess channel capacity then this clearly creates an additional diversity of programming sources available to consumers. If there is not additional channel capacity then the net gain to diversity depends on whether the leveraged channel is "more diverse" than what it replaces. The extent to which leveraged channels displaced other channels, and the question of whether this displacement caused a net gain or loss to diversity is beyond the scope of this Article. However, because it is likely that most cable operators did have excess capacity, it is likely that there was some gain from these additional channels. Any future analysis of the effect of retransmission consent on diversity of programming should include examination of the results of the must-carry provisions as well.

In terms of absolute support for free over-the-air local broadcast television, the results of retransmission consent are ambiguous. Although the provisions do, in name, provide a right to local broadcasters, the entities most able to take advantage of retransmission consent have been the large broadcast networks and multiple station owners, not local owners. These networks and multiple station owners have used retransmission consent not to foster over-the-air local broadcasts, but instead to create new channel options that are distinctly nonlocal and oriented toward cable. At the same time, because this increased leverage possessed by large broadcast networks and multiple station owners has its source in the right provided to local broadcasters, retransmission consent does at least forestall elimination of over-the-air local broadcasting.

To the extent that one justification for retransmission consent is that it will help broadcasters so that advertiser-supported (but not necessarily local) television would remain viable, thus creating a more optimal variety of television products produced, retransmission consent may have accomplished its aims. Local advertising-based broadcasters, in the short term, are more essential as a result of retransmission consent, if for no other reason than because they provide

needed leverage for networks to increase cable programming. The long term effects, however, are certainly not clear.

C. Unexpected Consequences

The main unexpected consequence of retransmission consent has been the domination of local interests by the interests of the networks and multiple station owners. It is interesting to speculate how the recent proliferation of new networks owned by program producers may have been influenced by the obvious programming power gained by having a network of local stations which can serve as leverage in retransmission consent negotiations.⁽³⁶⁶⁾ It is unclear to what extent the networks have reaped all of the benefit from retransmission consent. It is conceivable that if, in the long run, the foothold into cable programming created by retransmission consent results in greater network emphasis on cable programming to the detriment of their broadcast affiliates, then even the apparent gains in terms of greater support for advertiser-supported broadcast television could be undermined.

Conclusion

This Article has examined the retransmission consent provisions of the 1992 Cable Act. These provisions, like the must-carry provisions with which they were paired in the legislation, have a long history in cable regulation and were the subject of enormous controversy when they were considered and passed. These provisions have a number of announced justifications, some of which do not survive close scrutiny. However, although there were a number of good arguments against a retransmission consent provision, in that it would unnecessarily increase transaction costs and could simply result in greater costs to consumers, there were also some arguments in favor of a retransmission consent provision. In particular, retransmission consent showed promise in increasing program diversity, in preserving advertiser-supported broadcast television (and thus making program variety closer to an optimal level), and to a lesser extent, in promoting local over-the-air broadcast television in combination with the must-carry provision.

The experience with retransmission consent over the past three years provides mild optimism concerning the retransmission consent provisions, although further study is needed in a number of areas. The FCC refused, in its regulation of cable rates, to allow cable operators to pass through additional costs as a result of retransmission consent to the consumers. To the extent that retransmission consent has resulted in additional program offerings that were not previously available, it seems likely that program diversity has been enhanced. To the extent that supporting broadcast as an advertiser-supported medium moves program variety toward the optimum, retransmission consent may have also accomplished this aim.

However, other effects are not as certain. Although no comprehensive study has been done of the magnitude, it is likely that transaction costs are significant as a result of retransmission consent. It is unclear who bears these burdens. Also, although must-carry provisions appear to directly support the aim of local over-the-air broadcast television, it is unclear whether retransmission consent significantly contributes to this aim. In fact, in the sense that retransmission consent has helped networks further dominate local affiliates and leverage themselves into cable programming, it is possible that retransmission consent has in fact harmed local over-the-air broadcast television. Particularly if the Supreme Court strikes down the related must-carry provisions, this should be an area for further study.

As we enter into the second major election period for choice between retransmission consent and the must-carry provisions, the FCC and other policymakers should be aware of trying to make sure that retransmission consent continues to support the justifications behind the provision. The FCC should continue to forbid cable operators from passing retransmission consent costs through to consumers. In addition, to the extent that the preservation of local over-the-air broadcasting is a serious priority (particularly if the must-carry provisions are declared unconstitutional), policymakers may want to consider changes to retransmission consent or other policies in order to foster this aim, rather than allowing the primary beneficiaries of retransmission consent to be larger networks and multiple station owners. At the same time, it does appear that retransmission consent has increased program diversity and perhaps even improved the variety of programming by helping advertiser-supported television.

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2. 1. *See, e.g.*, Michael Armacost, *Foreword* to Robert W. Crandall & Harold Furchtgott-Roth, *Cable TV: Regulation or Competition?* at vii (1996) (Armacost, president of the Brookings Institution, stating that "[t]he cable industry is only one source of video programming for U.S. households, but it is clearly the most important."); *see generally* National Telecomm. and Info. Admin., U.S. Dep't of Commerce, NTIA Special Pub. No. 91-26, *The NTIA Infrastructure Report: Telecommunications in the Age of Information* (1991) [hereinafter NTIA Report].
3. 2. Leland Johnson, *Toward Competition in Cable Television* 150 (1994) (96%, citing a National Cable Television Association report); *see also* Crandall & Furchtgott-Roth, *supra* note 1, at 1.
4. 3. *Year in Review: Broadcasting and Cable 1995*, Brdcast. & Cable Y.B. at xxi (1996) (stating that 65.3% of the nation's TV households are reached by cable systems).
5. 4. NTIA Report, *supra* note 1, at 26465.
6. 5. *Heat Turns Up on Cable Modems*, *Mediaweek*, May 8, 1995, at 3.
7. 6. 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.).
8. 7. *See* 2 William F. Patry, *Copyright Law and Practice* 97071 (1994).
9. 8. The Copyright Act of 1976, 17 U.S.C. § 111 (1994).
10. 9. 47 U.S.C. § 325 (1994).
11. 10. 47 U.S.C. § 534 (1994). Must-carry regulations basically require that local cable operators must carry local broadcast television signals. These regulations often also place restrictions on this carriage, such as channel placement, etc.
12. 11. 47 C.F.R. § 76.64 (1995). *See* discussion *infra* Part II.C.
13. 12. Examining the retransmission consent provisions by necessity requires some examination of the must-carry provisions with which retransmission consent is paired. However, a focus on retransmission consent is sensible for a number of reasons. First, scholars and courts have spent more time scrutinizing the must-carry provisions of the 1992 Act, despite the fact that the retransmission consent was (a) more controversial at the time of passage and (b) presently has been applied to many more broadcast stations. Second, because section 325(b) gives broadcasters the right to choose whether to negotiate carriage under retransmission consent or to force submission to the must-carry provisions, the options together recognize a property right in the broadcasters' signals. A broadcaster should theoretically only choose the must-carry provisions if this result is better for them than any other possible negotiated result under the retransmission consent provisions. Recognition of this property right is explicit in the retransmission consent provisions.
14. 13. *See generally* Stephen Breyer, *Regulation and Its Reform* 19196 (1983) (introducing the concept of mismatch).
15. 14. Because the early cable operators primarily used standard (although large) antennas to receive the signals, the technology was called Community Antenna Television (CATV). Many of the early cases and texts discuss CATV. The terms are essentially equivalent.
16. 15. Crandall & Furchtgott-Roth, *supra* note 1, at 1; *Brief History of Broadcasting and Cable*, Brdcast. & Cable Y.B. at xvii (1996).
17. 16. *See* Willis Emmons, *Note on Cable Television Regulation*, Harvard Business School Case No. 9-391-022, March 30, 1993 revision, at 12.
18. 17. Crandall & Furchtgott-Roth, *supra* note 1, at 2 (cable "seemed to pose no threat of competition to broadcast

television.").

19. 18. Communications Act of 1934, ch. 652, § 1, 48 Stat. 1064, 1064 (codified at 47 U.S.C. § 151 (1994)).

20. 19. Frontier Brdcast. Co. v. J.E. Collier & Carl O. Krummel, *Memorandum Opinion and Order*, 24 F.C.C. 251, para. 7, 16 Rad. Reg. (P & F) 1005 (1958).

21. 20. *In re Inquiry Into the Impact of Community Antenna Sys., TV Translators, TV "Satellite" Stations, and TV "Repeaters" on the Orderly Dev. of TV Brdcast.*, *Report and Order*, 26 F.C.C. 403, para. 60, 18 Rad. Reg. (P & F) 1573 (1959). [hereinafter *CATV and TV Repeater Services Report and Order*].

22. 21. See Patrick Murphy, *Retransmission Consent: A Mixed Signal for Cable Copyright*, 17 Colum.-VLA J.L. & Arts 237, 23940 (1993).

23. 22. *CATV and TV Repeater Services Report and Order*, 26 F.C.C. 403, para. 69, 18 Rad. Reg. (P & F) 1573.

24. 23. Distant signals are signals carried by cable systems which cannot be received over the air in the area covered by the cable system. Signals could be transmitted to a cable system headend by cable, microwave, or, more recently, satellite.

25. 24. Crandall & Furchtgott-Roth, *supra* note 1, at 2.

26. 25. *In Re Carter Mountain Transmission Corp.*, 32 F.C.C. 459, para. 17, 22 Rad. Reg. (P & F) 193 (1962), *aff'd*, *Carter Mountain Transmission Corp. v. FCC*, 321 F.2d 359 (D.C. Cir. 1963). The FCC also stated that they could act to protect broadcast stations, reversing their prior stance. *Id.*

27. 26. *In re Amendment of Subpart L, Part 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 Sys.; Amendment of Subpart I, Part 21, To Adopt Rules and Regs. To Govern the Grant of Authorizations in the Domestic Point-to-Point Microwave Radio Serv. for Microwave Stations Used To Relay TV Brdcast. Signals to Community Antenna TV Sys.*, *First Report and Order*, 38 F.C.C. 683, para. 4, 4 Rad. Reg. 2d (P & F) 1725 (1965) [hereinafter *Microwave Relays First Report and Order*].

28. 27. *Id.* para. 77.

29. 28. *In re Amendment of Subpart L, Part 91, 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.; Amendment of Subpart I, Part 21, To Adopt Rules and Regs. To Govern the Grant of Authorizations in the Domestic Point-to-Point Microwave Radio Serv. for Microwave Stations Used To Relay TV Brdcast. Signals to Community Antenna TV Sys.; Amendment of Parts 21, 74, and 91 To Adopt Rules and Regs. Relating to the Distribution of TV Brdcast. Signals by Community Antenna TV Sys., and Related Matters*, *Second Report and Order*, 2 F.C.C.2d 725, para. 19, 6 Rad. Reg. 2d (P & F) 1717 (1966) [hereinafter *CATV Regulation Second Report and Order*].

30. 29. *Southwestern Cable*, 392 U.S. 157 (1968).

31. 30. *Id.* at 160.

32. 31. *Southwestern Cable v. United States*, 378 F.2d 118 (9th Cir. 1967), *rev'd*, 392 U.S. 157 (1968).

33. 32. *Southwestern Cable*, 392 U.S. at 161.

34. 33. *Id.* at 175 (citing *Microwave Relays First Report and Order*, 38 F.C.C. 683, para. 48, 4 Rad. Reg. 2d (P & F) 1725).

35. 34. *Southwestern Cable*, 392 U.S. at 178.

36. 35. Johnson, *supra* note 2, at 2.

37. 36. *Id.* at 3. For more information on the economics of franchising, see Mark A. Zupan, *The Efficacy of Franchising Bidding Schemes in the Case of Cable Television: Some Systematic Evidence*, 32 J.L. & Econ. 401 (1989).

38. 37. Johnson, *supra* note 2, at 3.

39. 38. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (codified as amended in scattered sections of 47 U.S.C.).

40. 39. 47 U.S.C. § 543(a)(2) (1994).

41. 40. Johnson, *supra* note 2, at 4.

42. 41. *Id.*

43. 42. 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.).

44. 43. See *infra* Part II for more discussion of the legislative history of the 1992 Cable Act.

45. 44. Murphy, *supra* note 21, at 239.

46. 45. The merits of this claim are not clear and are critically addressed in Part III.B.

47. 46. 47 U.S.C. § 325(a) (1994).

48. 47. Murphy, *supra* note 21, at 238.

49. 48. See 68 Cong. Rec. 2880 (1926) (statement of Senator Clarence C. Dill (D the 1927 Radio Act, later codified as 47 U.S.C. § 325).

50. 49. *CATV and TV Repeater Services Report and Order*, 26 F.C.C. 403, para. 65, 18 Rad. Reg. (P & F) 1573 (1959). The FCC based its reasoning partly on a reference to radio in Senator Dill's comments. In the rulemaking proceeding, broadcasters had been specifically asking for a property right in their signals.

51. 50. *Cable Vision*, 211 F. Supp. 47 (D. Idaho 1962), *vacated for failure of joinder*, 335 F.2d 348 (9th Cir. 1964).

52. 51. *Id.* at 54.

53. 52. See *supra* notes 1822 and accompanying text.

54. 53. *CATV and TV Repeater Services Report and Order*, 26 F.C.C. 403, para. 67, 18 Rad. Reg. (P & F) 1573.

55. 54. *Id.* para. 94.

56. 55. *Microwave Relays First Report and Order*, 38 F.C.C. 683, paras. 85-92, 4 Rad. Reg. 2d (P & F) 1725 (1965). These were expanded to all cable systems in 1966. *CATV Regulation Second Report and Order*, 2 F.C.C.2d 725, para. 48, 6 Rad. Reg. 2d (P & F) 1717 (1966). For a more detailed examination of the history of must-carry regulations, see Marc Peritz, *Turner Broadcasting v. FCC: A First Amendment Challenge to Cable Television Must-Carry Rules*, 3 Wm. & Mary Bill of Rts. J. 715 (1994).

57. 56. *CATV Regulation Second Report and Order*, 2 F.C.C.2d 725, para. 141, 6 Rad. Reg. 2d (P & F) 1717. Some have called these regulations retransmission consent regulations, because the consent of the FCC is required for retransmission. Here the term "retransmission consent" is used solely in the manner used in the 1992 Cable Act--to mean consent between broadcaster and cable operator regarding retransmission--to avoid confusion.

58. 57. *See supra* notes 29-34 and accompanying text.

59. 58. Patry, *supra* note 7, at 930. The FCC did propose retransmission consent between broadcast stations and cable operators as an alternative to the must-carry regulations in 1968. *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, 14 Rad. Reg. 2d (P & F) 765 (1968). However, commentators have noted that this proposal was not an effort "to allow broadcasters to bargain over the value of their programming, but to give broadcasters a tool to prevent distant signal importation." Lorna Veraldi, *Newscasts as Property: Will Retransmission Consent Stimulate Production of More Local Television News?*, 46 Fed. Comm. L.J. 469, 481 (1994).

60. 59. *In re* Amendment of Pt. 74, Subpart K, of the Commission's Rules and Regs. Relative to Community Antenna TV Sys., *Report and Order*, 36 F.C.C.2d 143, para. 60, 24 Rad. Reg. 2d (P & F) 1501 (1972).

61. 60. This is not surprising, given the fact that radio became popular in the 1920s and that television was not invented until 1929 and only became popular in the 1950s.

62. 61. *Fortnightly*, 392 U.S. 390 (1968).

63. 62. *Id.* at 399.

64. 63. *Id.* at 398-99.

65. 64. *Id.* at 400.

66. 65. *Teleprompter*, 415 U.S. 394 (1974).

67. 66. *Id.* at 401.

68. 67. *Id.* at 414.

69. 68. *Jewell-LaSalle*, 283 U.S. 191 (1931).

70. 69. 17 U.S.C. § 111(f) (1994).

71. 70. H.R. Rep. No. 94-1476, at 86 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5700; *see also* Patry, *supra* note 7, at 93738.

72. 71. *See, e.g.*, Stanley M. Besen et al., *Copyright Liability for Cable Television: Compulsory Licensing and the Coase Theorem*, 21 J.L. & Econ. 67 (1978); Gillis L. Heller, Comment, *Regulatory Versus Property Rights Solutions for the Cable Television Problem*, 69 Cal. L. Rev. 527 (1981); Susan C. Greene, *The Cable Television Provisions of the Revised Copyright Act*, 27 Cath. U. L. Rev. 263 (1978); Leslie A. Swackhammer, *Cable of Consensus*, 6 Hastings Comm. & Ent. L.J. 283, 31718 (1984). *See also infra* Part III.B.2.a.

73. 72. *In re* Cable Television Syndicated Program Exclusivity Rules, *Notice of Inquiry*, 61 F.C.C.2d 746 (1976) [hereinafter *Syndex Report and Order*], *modified in Report and Order*, 79 F.C.C.2d 663 (1980).

74. 73. *Malrite TV v. FCC*, 652 F.2d 1140 (2d Cir. 1981) (addressing FCC rules issued in *Syndex Report and Order*).

75. 74. The Copyright Royalty Tribunal was abolished in 1993 and its duties were reassigned to the Librarian of Congress. Patry, *supra* note 7, at 963 n.406.

76. 75. *Malrite TV*, 652 F.2d at 1147.

77. 76. Lorna Veraldi, Note, *Cable Television's Compulsory License: An Idea Whose Time Has Passed?*, 25 N.Y.L. Sch. L. Rev. 925, 945 n.137 (1980) (citing a 1979 NTIA Petition for Rulemaking regarding Retransmission Consent

and Two-Tier Structure for Cable Carriage of Non-network Programs).

78. 77. *Maltrite TV*, 652 F.2d at 1146.

79. 78. *Id.* at 1147-48.

80. 79. *Id.* at 1148.

81. 80. *Id.* at 1148 n.11.

82. 81. *Quincy Cable TV v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

83. 82. *Century Communications v. FCC*, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988).

84. 83. *See Veraldi, supra* note 76, at 946-47.

85. 84. The override vote was 74-25 in the Senate and 308
Cable, Brdcast., Oct. 12, 1992, at 3.

86. 85. 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.).

87. 86. *See Veraldi, supra* note 76, at 485.

88. 87. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (codified as amended in scattered
sections of 47 U.S.C.).

89. 88. 1992 Cable Act, § 3, 106 Stat. at 1460 (codified at 47 U.S.C. § 543(a)(2) (1994)).

90. 89. *Id.* §§ 7, 18, 24, 106 Stat. at 1483, 1493, 1500 (codified at 47 U.S.C. §§ 541, 546, 555 (1994) (respectively)).

91. 90. *Id.* §§ 8, 19, 20, 106 Stat. at 1484, 1494, 1497 (codified at 47 U.S.C. §§ 552, 548, 551 (1994) (respectively)).

92. 91. 47 U.S.C. § 325(b).

93. 92. 47 U.S.C. §§ 534, 535 (1994). Section 535 deals with non
covered by the retransmission consent provisions.

94. 93. *Must Carry, Must Pay in the Works: Broadcasters Discussing Copyright Plan*, *Brdcast.*, June 19, 1989, at 29.

95. 94. Cable Subscriber Protection and Broadcast Retransmission Act of 1990, S. 2357, 101st Cong. (1990), *reprinted*
in 136 Cong. Rec. S3400
section analysis, and letter from the National Association of Broadcasters).

96. 95. 136 Cong. Rec. S3404
compulsory copyright.

97. 96. Joe Flint, *ABC, CBS, and NBC Important to Cable Subscribers*, *Brdcast.*, May 6, 1991, at 42 (quoting Network
Television Association president Peter Chrisanthopoulos).

98. 97. *Id.*

99. 98. *See supra* notes 86-90 and accompanying text.

100. 99. Nicholas W. Allard, *The 1992 Cable Act: Just the Beginning*, 15 *Hastings Comm. & Ent. L.J.* 305, 333 (1993).
This article provides an excellent summary of the 1992 Cable Act and is the basis for much of this Part.

101. 100. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(b), 106 Stat. 1460, 1463.

102. 101. *Id.* § 2(a), 106 Stat. at 1460-63 lists the following:

(8) The Federal Government has a substantial interest in making all nonduplicative local public television services available on cable systems. . . .

(9) The Federal Government has a substantial interest in having cable systems carry the signals of local commercial television stations because the carriage of such signals is necessary to serve the goalsof providing a fair, efficient, and equitable distribution of broadcast services.

(10) A primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming. . . .

. . . .

(12) . . . There is a substantial governmental interest in promoting the continued availability of such free television programming, especially for viewers who are unable to afford other means of receiving programming.

(13) As a result of the growth of cable television, there has been a marked shift in market share from broadcast television to cable television services.

. . . .

(15) A cable television system which carries the signal of a local television broadcaster is assisting the broadcaster to increase its viewership, and thereby attract additional advertising revenues that otherwise might be earned by the cable system operator. . . .

(16) As a resultthe economic viability of free local broadcast televisionwill be seriously jeopardized.

. . . .

(19) At the same time, broadcast programming that is carried remains the most popular programming on cable systems. . . . Cable systems, therefore, obtain great benefits from local broadcast signals which, until now, they have been able to obtain without the consent of the broadcaster or any copyright liability. This has resulted in an effective subsidy of the development of cable by local broadcasters. While at one time, when cable systems did not attempt to compete with local broadcasters for programming, audience, and advertising, this subsidy may have been appropriate, it is so no longer and results in a competitive imbalance between the 2 industries.

103. 102. *Id.* § 2(a)(8)(11), 106 Stat. at 1461. This argument is discussed in greater detail *infra* Part III.B.1.

104. 103. *Id.* § 2(a)(12), 106 Stat. at 1461. This argument is discussed in greater detail *infra* Part III.B.1.

105. 104. *Id.* § 2(a)(13)(19), 106 Stat. at 1462-63. This argument is discussed in greater detail *infra* Part III.B.1.

106. 105. In fact, these statements of policy most likely reflect the fact that Congress knew these provisions were controversial and likely to be challenged and included the statements strictly as an attempt to ward off challenges. Indeed, the must-carry and retransmission consent provisions were challenged in court on the day after the bill was enacted. The validity of these findings was one issue the courts eventually considered in *Turner Broadcasting Sys., Inc. v. FCC*, 819 F. Supp. 32 (1993), *vacated and remanded*, 114 S. Ct. 2445 (1994), regarding must-carry.

There are other indications that Congress was aware that these sections were likely to be challenged. Section 23 of the 1992 Cable Act amended the Communications Act of 1934 so that challenges regarding the must-carry provisions would be heard first by a three-judge panel of district court judges with appeal directly to the Supreme Court. 47

U.S.C. § 555(c) (1994).

107. 106. S. 12, 102d Cong. (1991).

108. 107. H.R. 4850, 102d Cong. (1992).

109. 108. Allard, *supra* note 99, at 337. In fact, hearings were held by the House Subcommittee on Intellectual Property and Judicial Administration to consider modifying the compulsory copyright to include payments to broadcasters for signals retransmitted. *See also* H.R. 4511, 102d Cong. (1992). This is a very different approach from the retransmission consent provision contained in the 1992 Cable Act. The bill was never acted upon by the full Judiciary Committee.

110. 109. Allard, *supra* note 99, at 337. As Allard explains, "without a negative vote in the House in either Committee or on the floor, the House Conferees chosen from the Energy and Commerce Committee would be able to agree to the Senate Amendment to add Retransmission Consent to the legislation." *See also* The 1992 Cable Act: Law & Legislative History 25556 (Robert E. Emeritz et al. eds., Pike & Fisher 1992) [hereinafter 1992 Legislative History].

111. 110. H.R. Rep. No. 102-628, at 169-71, *reprinted in* 1992 Legislative History, *supra* note 109, at 431 (additional views of Reps. Eckart, Lehman, Tauzin, Lent, Fields, McMillan (N.C.), and Holloway).

112. 111. H.R. 4850, 102d Cong. § 5 (1992).

113. 112. H.R. Conf. Rep. No. 102-862, at 76, *reprinted in* 1992 U.S.C.C.A.N. 1231, 1258.

114. 113. 47 U.S.C. § 325(b)(6) (amending the Communications Act of 1934) (amending the Communications Act of 1934) ("Nothing in this section shall be construed as modifying the compulsory copyright license established in Section 111 of title 17, United States Code, or as affecting existing or future video programming licensing agreements between broadcasting stations and video programmers.").

115. 114. 47 U.S.C. 325(b)(1).

116. 115. The full text of section 325(b) is given below:

(b) Consent to retransmission of broadcasting station signals.

(1) Following the date that is one year after the date of enactment of the Cable Television Consumer Protection and Competition Act of 1992, no cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, except--

(A) with the express authority of the originating station; or

(B) pursuant to section 614, in the case of a station electing, in accordance with this subsection, to assert the right to carriage under such section.

(2) The provisions of this subsection shall not apply to--

(A) retransmission of the signal of a noncommercial broadcasting station;

(B) retransmission directly to a home satellite antenna of the signal of a broadcasting station that is not owned or operated by, or affiliated with, a broadcasting network, if such signal was retransmitted by a satellite carrier on May 1, 1991;

(C) retransmission of the signal of a broadcasting station that is owned or operated by, or affiliated with, a broadcasting network directly to a home satellite antenna, if the household receiving the signal is an unserved household; or

(D) retransmission by a cable operator or other multichannel video programming distributor of the signal of a superstation if such signal was obtained from a satellite carrier and the originating station was a superstation on May 1, 1991.

For purposes of this paragraph, the terms "satellite carrier", "superstation", and "unserved household" have the meanings given those terms, respectively, in section 119(d) of title 17, United States Code, as in effect on the date of enactment of the Cable Television Consumer Protection and Competition Act of 1992.

(3) (A) Within 45 days after the date of enactment of the Cable Television Consumer Protection and Competition Act of 1992, the Commission shall commence a rulemaking proceeding to establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent under this subsection and of the right to signal carriage under section 614, and such other regulations as are necessary to administer the limitations contained in paragraph (2). The Commission shall consider in such proceeding the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier and shall ensure that the regulations prescribed under this subsection do not conflict with the Commission's obligation under section 623(b)(1) to ensure that the rates for the basic service tier are reasonable. Such rulemaking proceeding shall be completed within 180 days after the date of enactment of the Cable Television Consumer Protection and Competition Act of 1992.

(B) The regulations required by subparagraph (A) shall require that television stations, within one year after the date of enactment of the Cable Television Consumer Protection and Competition Act of 1992 and every three years thereafter, make an election between the right to grant retransmission consent under this subsection and the right to signal carriage under section 614. If there is more than one cable system which services the same geographic area, a station's election shall apply to all such cable systems.

(4) If an originating television station elects under paragraph (3)(B) to exercise its right to grant retransmission consent under this subsection with respect to a cable system, the provisions of section 614 shall not apply to the carriage of the signal of such station by such cable system.

(5) The exercise by a television broadcast station of the right to grant retransmission consent under this subsection shall not interfere with or supersede the rights under section 614 or 615 of any station electing to assert the right to signal carriage under that section.

(6) Nothing in this section shall be construed as modifying the compulsory copyright license established in section 111 of title 17, United States Code, or as affecting existing or future video programming licensing agreements between broadcasting stations and video programmers.

47 U.S.C. § 325(b) (1994).

117. 116. S. Rep. No. 102-92 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133 . The additional views expressed by some members of the House Committee supporting retransmission consent basically repeat the language given in the Senate Report. *See supra* note 110.

118. 117. Allard, *supra* note 99, at 334 n.121. In April, 1991, Brdcast. noted the announcement of the Inouye plan at a meeting of the National Association of Broadcasters. Kim McAvoy, *The Inouye Alternative: Must Carry or Retransmission Consent*, Brdcast., April 22, 1991, at 29. A later article stated that S. 12, including the retransmission consent provision, had the strong support of the "National Association of Broadcasters, network affiliate organizations and CBS" and prospects for committee action looked good, despite bitter cable opposition. Kim McAvoy, *Going to the Mat over Tough Cable Bill*, Brdcast., May 13, 1991, at 27.

119. 118. 47 U.S.C. § 325(a) (1994).

120. 119. S. Rep. No. 102-92, at 34-35, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1167-68, *see supra* notes 44-47 and accompanying text.

121. 120. *CATV and TV Repeater Services Report and Order*, 26 F.C.C. 403, paras. 65-68, 18 Rad. Reg. (P & F) 1573

(1959).

122. 121. S. Rep. No. 102-92, at 35, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1168.

123. 122. *Id.*

124. 123. *Id.* *See infra* Part III.B.

125. 124. S. Rep. No. 102-92 at 36, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1169.; *see also* The 1992 Cable Act: Law & Legislative History, *supra* note 109, at 168.

126. 125. S. Rep. No. 102-92, at 41, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1174.

127. 126. 138 Cong. Rec. S40809 (daily ed. Jan. 27, 1992).

128. 127. For the full detail of the congressional debate regarding the 1992 Cable Act, see 138 Cong. Rec. S400 (daily ed. Jan. 27, 1992); 138 Cong. Rec. S561611 (daily ed. Jan. 29, 1992); 138 Cong. Rec. S635 (1992); 138 Cong. Rec. S71170 (daily ed. Jan. 31, 1992); 138 Cong. Rec. H6531 (1992); 138 Cong. Rec. H867187 (daily ed. Sept. 17, 1992); 138 Cong. Rec. S14,22251 (daily ed. Sept. 21, 1992); 138 Cong. Rec. S14,60016 (daily ed. Sept. 22, 1992); and 138 Cong. Rec. S16,65277 and H11,47788 (daily ed. Oct. 5, 1992).

129. 128. 138 Cong. Rec. S56263 (daily ed. Jan. 29, 1992) (statement of Sen. Inouye).

130. 129. 138 Cong. Rec. S643 (daily ed. Jan. 30, 1992) (statement of Sen. Inouye).

131. 130. 138 Cong. Rec. S63940 (daily ed. Jan. 30, 1992) (statement of Sen. Seymour). *See also* 138 Cong. Rec. S64041 (daily ed. Jan. 30, 1992) (statement of Sen. Breaux (D-La.)).

132. 131. 138 Cong. Rec. S65960 (daily ed. Jan. 30, 1992) (statement of Sen. Wirth).

133. 132. 138 Cong. Rec. S694 (daily ed. Jan. 30, 1992).

134. 133. 138 Cong. Rec. H6490

Swift, Dreier, Chandler, Klug, Harris). The context was in the rejection of an amendment to the rule on the bill which would have included the retransmission consent provisions.

135. 134. *Id.* at H649293.

136. 135. *Id.* at H6495 (statement of Rep. Hughes).

137. 136. *Id.* at H6507 (statement of Rep. Oxley).

138. 137. *See generally* 138 Cong. Rec. S14,601

see 138 Cong. Rec. S14,605

Senate Subcommittee on Copyright); 138 Cong. Rec. H11,483 (daily ed. Oct. 4, 1992) (statement of Rep. Berman).

139. 138. 138 Cong. Rec. S14,610 (daily ed. Sept. 22, 1992) (statement of Sen. Seymour).

140. 139. 138 Cong. Rec. S14,24546 (daily ed. Sept. 21, 1992) (statement of Sen. Wirth).

141. 140. *Broadcasters' Public Interest Obligations and S. 217, the Fairness in Broadcasting Act of 1991: Hearing Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation*, 102d Cong. (1991).

142. 141. *Cable TV Consumer Protection Act of 1991: Hearings on S. 12 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation*, 102d Cong. (1991) [hereinafter *Senate Hearings*].

143. 142. Somewhat ironically, one of the respondents, in arguing against mandated access by others to cable programming, stated that "[t]here is no precedent in American business practice or copyright law for forcing owners of intellectual property to sell their product to all comers--especially their competitors." *Senate Hearings, supra* note 141, at 141 (prepared statement of James P. Mooney, president, National Cable TV Association).

The omission of comments on retransmission consent are actually not all that surprising, since Senator Inouye added the provision at the full committee mark-up. *See supra* note 117 and accompanying text.

144. 143. *Senate Hearings, supra* note 141, at 181.

145. 144. *Id.* at 18182.

146. 145. *Id.* at 18789.

147. 146. *Id.* at 195.

148. 147. *Id.* at 199 (statement of Edward O. Fritts).

149. 148. *Id.* at 20005 (statement and prepared statement of James B. Hedlund).

150. 149. *Id.* at 254.

151. 150. *Id.* at 262.

152. 151. *Cable Television Regulation: Hearings on H.R. 1303 and 2546 Before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce*, 102d Cong. (1991) [hereinafter *House Hearings*]. H.R. 1303 was replaced in March, 1992 by H.R. 4850, which more closely followed S. 12, and which had already passed the Senate. Randy Sukow, *The Act's Aftermath: On to the FCC*, Brdcst., Oct. 12, 1992, at 32.

153. 152. *House Hearings, supra* note 151, at 75276 (prepared statement by Edward Fritts).

154. 153. *Id.* at 774.

155. 154. *Id.* at 78182 (statement of James P. Mooney).

156. 155. *Id.* at 80814 (prepared statement of James P. Mooney).

157. 156. *Id.* at 85663.

158. 157. Hostetter noted that ABC was involved with ESPN and the Arts & Entertainment Network (A&E), while NBC was involved with CNBC, A&E, and regional sports channels. *Id.* at 938 (Hostetter, Jr.).

159. 158. *Id.* at 967.

160. 159. *Id.* at 9921001 (statement and prepared statement of Laurence Tisch).

161. 160. *Id.* at 1002.

162. 161. *Id.* at 1007-08.

163. 162. *Id.* at 836.

164. 163. *Id.* at 911-12 (prepared statement of Brian Lamb).

165. 164. Cable Television Consumer Protection Act of 1992, Pub. L. No. 102-385, § 6, 106 Stat. 1460, 1482 (codified

at 47 U.S.C. § 325(b)(3)(A)).

166. 165. *In re* Implementation of the Cable Television Consumer Protection and Competition Act of 1992, *Notice of Proposed Rulemaking*, 7 FCC Rcd. 8055, 72 Rad. Reg. 2d (P & F) 255 (1992).

167. 166. *Id.* para. 2.

168. 167. *In re* Implementation of the Cable Television Consumer Protection and Competition Act of 1992, *Report and Order*, 8 FCC Rcd. 2965, 72 Rad. Reg. 2d (P & F) 204 (1993) (codified at 47 C.F.R. § 76.64 (1994)).

169. 168. *Id.* paras. 13840.

170. 169. *Id.* para. 147.

171. 170. *Id.* paras. 145-46.

172. 171. *Id.* para. 148.

173. 172. *Id.* para. 159.

174. 173. *Id.* para. 173.

175. 174. *Id.*

176. 175. *Id.* para. 176.

177. 176. *Id.* para. 179.

178. 177. *See generally* Harvey Rosen, Public Finance 6488 (1992).

179. 178. *Id.* at 75.

180. 179. *Id.* at 80.

181. 180. Bruce M. Owen & Steven S. Wildman, Video Economics 2324 (1992).

182. 181. *See, e.g.*, Paul A. Samuelson, *Aspects of Public Expenditure Theories*, 40 Rev. Econ. & Stat. 332, 335 (1958).

183. 182. One important exception is Owen & Wildman, *supra* note 180, at 24.

184. 183. *See, e.g.*, Timothy J. Brennan, *Copyright, Property, and the Right to Deny*, 68 Chi.-Kent L. Rev. 675 (1993); Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 Harv. L. Rev. 281 (1970); Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 Stan. L. Rev. 1343 (1989); Alfred C. Yen, *The Legacy of Feist: Consequences of the Weak Connection Between Copyright and the Economics of Public Goods*, 52 Ohio St. L.J. 1343 (1991).

185. 184. The cost of producing a television program is independent of the number of people who eventually see the program. Owen & Wildman, *supra* note 180, at 24. Since there is much potential for free riding on the production of the programming, it is possible that television programming is underproduced, *i.e.*, more television programs would optimally exist than the free market would provide. Besen, *supra* note 71, at 84. *See also* Brennan, *supra* note 183, at 68688; Gordon, *supra* note 183, at 134849 n.21.

186. 185. *See, e.g.*, Breyer, *supra* note 183, at 292. Breyer's analysis, noting that much of the protection which is intended for the author actually goes to the publisher, is particularly relevant to cable television, since the actual

creators of television programs have most likely similarly ceded their copyright protection to the studios. *Id.*

187. 186. Besen, *supra* note 71, at 83. However, in the context of cable television, it is important to note that before the 1976 Copyright Act, the Supreme Court had stated that retransmission of a broadcast by a cable system was not a "performance" for the purposes of the 1909 Copyright Act and thus there was no copyright protection available in that situation. *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968); *see supra* notes 61 accompanying text.

188. 187. Owen & Wildman, *supra* note 180, at 92.

189. 188. A videotape is similar to a book. While a book is not totally excludable--many can read it--there is a much greater private quality to the medium.

190. 189. And 96% presently are. *See Johnson, supra* note 2, at 150.

191. 190. Owen and Wildman note that broadcast television basically operates by attracting audiences which are sold to advertisers. Thus both the cost of the programming and of transmitting the signal are paid for by advertisers. Owen & Wildman, *supra* note 180, at 92. *See also infra* notes 209-10 and accompanying text.

192. 191. Owen & Wildman, *supra* note 180, at 64-150; *see F. M. Scherer, The Welfare Economics of Product Variety: An Application to the Ready-to-Eat Cereals Industry*, 28 J. Indus. Econ. 113 (1979), *reprinted in* F. M. Scherer, *Innovation and Growth: Schumpeterian Perspectives* 142 rooted in the idea of monopolistic competition. *Id.* at 142 (citing Edward H. Chamberlin, *The Theory of Monopolistic Competition* (1933)); Owen & Wildman, *supra* note 180, at 108.

193. 192. This type of analysis has been applied, among other things, to the two-party political system. Owen & Wildman, *supra* note 180, at 65.

194. 193. *Id.* at 68.

195. 194. Scherer, *supra* note 191, at 147.

196. 195. *Id.* at 148.

197. 196. Owen & Wildman, *supra* note 180, at 65, 93100, 10731.

198. 197. *Id.* at 6884.

199. 198. *Id.* at 92. "Pay television" is primarily cable television, where subscribers (viewers) can be charged directly for the programming they receive. In practice, some cable channels are pure pay television, such as HBO or Showtime, while other channels may derive revenue from advertising as well as subscriber fees. *Id.* at 125. Broadcast stations are generally viewed as entirely advertising-supported, but could conceivably, through the use of signal scrambling, charge viewers directly like pay television if they so desired.

200. 199. *Id.* at 95.

201. 200. *Id.* at 9899.

202. 201. *Id.* at 124.

203. 202. *Id.* at 11924.

204. 203. *Id.* at 131.

205. 204. *See supra* notes 12122 and accompanying text.

206. 205. *See supra* Part I.B.1.

207. 206. *See supra* notes 4649, 11825, 152, 168 and accompanying text.

208. 207. *See supra* note 147 and accompanying text.

209. 208. *Brandywine-Main Line Radio v. FCC*, 473 F.2d 16, 61 (D.C. Cir. 1972) (quoting *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940)), *cert. denied*, 412 U.S. 922 (1973) (dealing with the suspension of a radio license under 47 U.S.C. § 303 (1994)).

210. 209. 47 U.S.C. § 307 (1994).

211. 210. *See supra* note 158 and accompanying text.

212. 211. To the extent that cable provides a competing advertising medium, compensation to broadcasters could theoretically decrease.

213. 212. *See infra* note 268 for an example of such a situation.

214. 213. *See supra* notes 183
12 (D.D.C. 1993) (finding the retransmission consent provisions of the 1992 Cable Act to be similar to copyright protection and not constitutionally violative of the First Amendment).

215. 214. Breyer, *supra* note 183, at 344.

216. 215. *Id.* at 29499.

217. 216. *Id.* at 30001.

218. 217. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(10), (12), 106 Stat. 1460, 1461 (1992).

219. 218. *See supra* notes 12425 and accompanying text.

220. 219. David F. Simon, *Local Television Versus Cable: A Copyright Theory of Protection*, 31 Fed. Comm. L.J. 51, 6871 (1978).

221. 220. *Id.* at 71.

222. 221. *Id.* at 6265. *See also* Veraldi, *supra* note 58.

223. 222. Simon, *supra* note 219, at 6970.

224. 223. *See* Johnson, *supra* note 2, at 150.

225. 224. Of course, it is debatable whether television service is the kind of necessity for which the government ought to subsidize those unable to pay. Cable television may be qualitatively different from other services which the government has urged to achieve universal access, such as electricity or telephone service. The United States government has encouraged extension of electricity and telephone services to hard to reach areas throughout the last 50 years through the Rural Electrification Administration and other efforts. NTIA Report, *supra* note 1, at 291.

As cable services have begun to provide a greater number of services--such as government information, educational services, world wide web access--it is conceivable that cable service, rather than television service, could be viewed as the true essential service. *See id.* at 285
availability of these services through phone lines and via cable networks.

226. 225. Of course, regulations requiring access for local cable providers could be subject to First Amendment challenges similar to those which have followed the must-carry regulations. At this point, a stated governmental purpose of the must-carry regulations has been the preservation of local *broadcast* television, not simply local needs. *See infra* Part V.B.

227. 226. *Small Cable System Impact*, Television Digest, Oct. 11, 1993, available in Westlaw, 1993 WL 2881871. *See also supra* note 148 and accompanying text.

228. 227. This has been an argument used by broadcasters regarding the must-carry regulations. *See infra* Part V.B.

229. 228. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(b)(1), 106 Stat. 1460, 1463 (1992) (stating that the Act should "promote the availability . . . of a diversity of views and information").

230. 229. *In re* Implementation of the Cable TV Consumer Protection and Competition Act of 1992, *Report and Order*, 8 FCC Rcd. 2965, para. 147, 72 Rad. Reg. 2d (P & F) 204 (1993). *See also supra* note 169 and accompanying text.

231. 230. In practice, retransmission consent has had a different effect. *See infra* Parts IV and VI.

232. 231. Examples include increased revenue, must-carry requirements, local access requirements, or agreements which are incident to a retransmission agreement.

233. 232. Owen & Wildman, *supra* note 180, at 131. *See also supra* note 203 and accompanying text.

234. 233. In their article reviewing the 1992 Cable Act, Donald Boudreaux and Robert Ekelund ignore this possibility and the whole concept of optimal product variety, claiming that "local cable operators--be they monopolists or not--have strong incentives in the absence of government regulation to carry the particular mix of programming that optimizes consumer satisfaction. Thus, Congress need enact no statute, and the FCC need promulgate no regulation, prescribing cable operator programming in the name of consumer welfare." Donald J. Boudreaux & Robert B. Ekelund, Jr., *Cable Reregulation*, 14 *Cato J.* 87, 97 (1994). This assertion appears to be in direct conflict with Owen and Wildman's more extensive analysis.

235. 234. *See supra* notes 18386 and accompanying text.

236. 235. Patry, *supra* note 7, at 970; *see also* Murphy, *supra* note 21, at 266 (recommending that the cable compulsory license be repealed and copyright protection be extended to broadcast signals).

237. 236. *See supra* note 113 and accompanying text.

238. 237. Some commentators did claim that full copyright liability, where cable operators would have to negotiate with copyright holders (as broadcasters must under retransmission consent), would have been preferable to the compulsory licensing scheme where a fixed payment is set by formula. The implication is that full copyright liability would have in fact better addressed the problems of both copyright holders and broadcasters. Besen et al., *supra* note 71, at 85

-seeing no difference between the two--over compulsory copyright). This claim is implied by a simple Coasian analysis stating that retransmission consent and full copyright liability "are merely different approaches to creating property rights in television signals." *Id.*

239. 238. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 *Harv. L. Rev.* 1089, 1106

Rules: An Economic Analysis, 109 *Harv. L. Rev.* 713, 733

different way of assigning rights and, by Coasian analysis, should result in equal efficiency independent of the initial assignment of liability.

240. 239. See Breyer, *supra* note 183, at 316

would likely be higher in a full copyright scheme as opposed to the compulsory licensing scheme. Besen et al., *supra* note 71, at 8687.

241. 240. See *supra* notes 144, 154, 157

Amos Hostetter, respectively, at Senate hearings).

242. 241. See *supra* notes 159

economic answer to this question would depend on the elasticity of demand for cable services. However, since demand for cable service is likely to be relatively inelastic, it seems that, if allowed, cable operators would be able to pass much of the cost through to consumers.

243. 242. See, e.g., Allard, *supra* note 99; Murphy, *supra* note 21; Veraldi, *supra* note 58.

244. 243. The rules promulgated by the FCC state that the second election, to take effect January 1, 1997, must be made by October 1, 1996. 47 C.F.R. § 76.64(f)(2) (1995).

245. 244. One exception exists. Nicole Fradette et al., Project, *Regulatory Reform: A Survey of the Impact of Reregulation and Deregulation on Selected Industries and Sectors*, 47 Admin. L. Rev. 461, 587 [Regulatory Reform]. This article similarly examined effects by surveying news articles. Studying the effects of retransmission is also complicated because many of the agreements reached under retransmission consent are confidential.

246. 245. It is possible that broadcasters did receive indirect compensation through additional advertisements placed on the new channels.

247. 246. Joe Flint, *Fox Eyes Retrans Pie*, Brdcst., Sept. 28, 1992, at 5.

248. 247. Joe Flint, *Many Players Eye Retransmission Pot*, Brdcst., Oct. 12, 1992, at 3.

249. 248. Joe Flint, *Industry Leaders Debate Retrans Consent*, Brdcst., Oct. 26, 1992, at 46. For a discussion of the validity of this argument, see *supra* Part III.B.2.a.

250. 249. Doug Halonen, *FCC Adopts Must-Carry, Retransmission*, Elec. Media, Mar. 15, 1993 (citing James Mooney, president of the National Cable Television Association). See *supra* Part III.B.2.c.

251. 250. Jeannine Aversa & Rachel Thompson, *Cash for Carry Seen Less Likely Now with Rate Regs*, Multichannel News, Apr. 12, 1993, at 32. This was a key decision by the FCC. See discussion *infra* Part VI.A.

252. 251. Joe Flint & Rich Brown, *Time to Talk Turkey on Retrans/Must Carry*, Brdcst. & Cable, Mar. 15, 1993, at 6, 15.

253. 252. Kim McAvoy, *Ten TV Groups Ready to Talk Retrans*, Brdcst. & Cable, May 3, 1993, at 18; Joe Flint, *Viacom Says No to Retrans Payments*, Brdcst. & Cable, May 24, 1993, at 66.

254. 253. Jeannine Aversa, *B'casters Want Hefty Cable Fees*, Multichannel News, Apr. 26, 1993, at 48; *Top 25 Groups Brace for Retrans Showdown*, Brdcst. & Cable, June 7, 1993, at 7882.

255. 254. See *infra* Part VI; see also Kim McAvoy, *Loss of Must Carry Doesn't Worry Broadcasters*, Brdcst. & Cable, May 23, 1994, at 58.

256. 255. See, e.g., Ed Bark, *Biggest Fight on TV Will Be Off Screen*, Dallas Morning News, June 21, 1993, at 1C, available in LEXIS, Tex Library, Dalnws File; McAvoy, *supra* note 252. See *infra* Part V.C for a discussion of the must-carry provisions in practice.

257. 256. Joe Flint & Rich Brown, *Fox's Price for Retrans: A Cable Channel*, Brdcst. & Cable, May 3, 1993, at 10.

258. 257. *Id.* See *supra* note 246 and accompanying text.

259. 258. Joe Estrella, *TCI Expected to Announce Deal with Fox for New Cable TV Channel*, Rocky Mtn. News, May 12, 1993, at 46A, available in Westlaw, 1993 WL 3776914.

260. 259. Joe Flint, *Affiliates Approve Fox's Cable Network*, Brdcast. & Cable, June 7, 1993, at 16.

261. 260. Rachel W. Thompson, *NBC May Follow Fox Model on New Network*, Multichannel News, May 24, 1993, at 64.

262. 261. See, e.g., *Times Mirror Broadcasting and Tele-Communications Inc. Reach Retransmission Consent Agreements*, Bus. Wire, June 17, 1993, available in Westlaw, Allnewsplus (TCI and Times Mirror agreement giving extra channel access); Joe Flint, *TCI Deals With Broadcasters Feature Second Channels, Must Carry, No Money*, Brdcast. & Cable, June 21, 1993, at 6 (TCI and Chris-Craft/United Television, Times Mirror, Cox agreements); Rachel W. Thompson, *More Ops Likely to Follow ESPN2 Deal*, Multichannel News, July 19, 1993, at 1 (Continental and ABC/Capital Cities agreement on new ESPN2); Joe Flint, *Capcities, Hearst Opt for Channel*, Brdcast. & Cable, July 19, 1993, at 6 (Continental and ABC regarding ESPN2); *Viacom Keeps Fox in Cable Line-Up*, PR Newswire, July 30, 1993, available in Westlaw, Allnewsplus (Viacom and Fox); Joe Flint, *Capcities, Hearst Latest Retrans Deals*, Brdcast. & Cable, Aug. 9, 1993, at 12 [hereinafter Flint, *Capcities/Hearst Deals*] (Jones Intercable, Sammons Communications and Multivision Cable and ABC regarding ESPN2); *NBC and Time Warner Cable Reach Retransmission Consent Deal*, U.S. Newswire, Aug. 17, 1993, available in Westlaw, 1993 WL 7131138 (NBC and Time Warner regarding launch of America's Talking); *Retransmission-Consent Update*, Brdcast. & Cable, Aug. 30, 1993, at 10 (Continental agreement with multiple station owner Scripps Howard to launch the Home & Garden Network).

It is true that the idea of trading cable access for retransmission was not entirely unexpected. The idea had been mentioned in both House and Senate hearings regarding retransmission consent. *Senate Hearings*, *supra* note 141, at 181 (statement of James Kennedy, president of Cox Enterprises); *House Hearings*, *supra* note 151, at 763 (statement of Edward Fritts, president of the National Association of Broadcasters). However, it seems unlikely that anyone expected it in the magnitude with which it occurred.

263. 262. John M. Higgins, *WTBS Wants Retransmission Consent*, Multichannel News, June 21, 1993, at 1.

264. 263. See, e.g., Flint, *Capcities/Hearst Deals*, *supra* note 261.

265. 264. In June, a major cable operator claimed that they did not care too much about the new network offerings so much as it disliked must-carry, "which forces cable systems to carry 'fifth rate' broadcast stations at the expense of cable services such as C-SPAN2 and Discovery's The Learning Channel." Harry A. Jessell, *Cable Growth Inevitable, Say Turner, Others*, Brdcast. & Cable, June 14, 1993, at 22 (statement of John Hendricks, chairman of Discovery Communications).

266. 265. *CBS Grants One-Year Retransmission Consent*, PR Newswire, Sept. 27, 1993, available in Westlaw, Allnewsplus (statement of Laurence Tisch, chairman of CBS). CBS eventually extended this consent for another year. Joe Flint, *CBS Extends Retrans Deals*, Daily Variety, Aug. 10, 1994, at 5. In 1995, CBS still had no deal for retransmission consent. James A. McConville, *CBS Still Working on Retrans*, Brdcast. & Cable, June 5, 1995, at 25.

267. 266. *Most Stations Seek Pay for Must-Carry*, S.F. Chron., July 16, 1993, at C4, available in Westlaw, 1993 WL 6416504 [hereinafter *Most Stations*].

268. 267. Joe Flint, *Stations Stay for No Pay*, Brdcast. & Cable, Oct. 11, 1993, at 6. See also Steve McClellan, *Retrans Plans: Programming the New Channels*, Brdcast. & Cable, Oct. 11, 1993, at 16 (listing 25 new local cable channels). One example of a specialty network which made a healthy premiere as a result of retransmission consent is the Television Food Network. Kim Mitchell, *Are Viewers, Operators Hungry for Food Network?*, Multichannel News, Nov. 15, 1993, at 22.

269. 268. One counterexample is Corpus Christi, Texas, where the cable operator was forced to drop all three networks. The cable operator received consent in November, when it agreed to contribute to a scholarship fund. Doug Halonen, *Justice Settles Corpus Christi Carriage Dispute*, Elec. Media, Feb. 12, 1996, at 2.

Another interesting case was that of WCSH-TV in Portland, Maine, where, after holding out for cash for retransmission consent the broadcaster eventually *paid* the cable operator in future advertising commitments to be put back on the cable system. *Retrans Turnabout in Maine*, Brdcast. & Cable, Nov. 8, 1993, at 11. *See supra* note 212 and accompanying text.

270. 269. Thomas W. Hazlett, *Changing Channels*, Reason, March, 1996, at 37 (interview with C-SPAN CEO Brian Lamb).

271. 270. John M. Higgins & Richard Katz, *Retransmission Playing Key Role in News Wars*, Multichannel News, Dec. 11, 1995, at 1. John Dempsey, *All-News Webs Eye Retrans Rule*, Variety, Jan. 1 announcement. Higgins & Katz, *supra* at 66. ABC soon abandoned this effort, Rich Brown, *ABC Cancels News Network*, Brdcast. & Cable, May 27, 1996, at 11, and Fox proved unable to create retransmission deals. *Continental, Comcast to Pick Up Fox News*, Media Daily, Sept. 25, 1996, available in LEXIS, FCC Library, Compub File (reporting that Fox was paying \$10 per subscriber for the cable operators to carry the channel).

272. 271. *NBC Proposed MSNBC Retrans Plan*, Brdcast. & Cable, July 15, 1996, at 16.

273. 272. Michael Burgi, *Advice and Consent: CBS' Late Entry Into the Cable TV Game Will Be a Test to See if Retransmission Consent Has Any Teeth Left*, Mediaweek, Sept. 2, 1996, at 2.

274. 273. *CBS Cable Offering No Help to Affiliates*, Media Daily, Oct. 3, 1996, available in LEXIS, FCC Library, Compub File.

275. 274. *See, e.g.*, Rich Brown, *Spartan Allies With HGTV*, Brdcast. & Cable, July 29, 1996, at 45. (Spartan leveraging its own Home and Garden Channel before CBS had announced its channel).

276. 275. *Cable Strength Cited*, Comm. Daily, Apr. 19, 1996, at 4. By increasing the Area of Dominant Influence, which is the FCC-defined area within which a broadcaster may demand must-carry status, a broadcaster would be able to force carriage on a greater number of cable systems.

277. 276. *Id.* See Part V *infra* for more on the must-carry provisions.

278. 277. Dempsey, *supra* note 270, at 61.

279. 278. Burgi, *supra* note 272.

280. 279. *Hundt Questions Need for FCC-set Minimum for HDTV Broadcasts*, Warren's Cable Reg. Monitor, Nov. 27, 1995, available in Westlaw, 1995 WL 11659038.

281. 280. *FCC Limits Cable Switches to OVS But Requires LECs to Meet Other Cable Rules*, Comm. Daily, June 4, 1996, at 1. [hereinafter *FCC Limits*].

282. 281. *See infra* Part V for an analysis of how these effects did or did not reflect the concerns expressed in the arguments discussed in Part III.B.

283. 282. *Regulatory Reform*, *supra* note 244, at 603.

284. 283. Veraldi, *supra* note 58. *See also* Colman Price, *Regional News on a Roll*, Brdcast. & Cable, Aug. 26, 1996, at 48.

285. 284. Steve McClellan & Rich Brown, *Retrans Channels Prove Broadcaster Boon*, Brdcast. & Cable, March 27, 1995, at 18.

286. 285. *Id.*

287. 286. *Small Cable System Impact*, *supra* note 226.

288. 287. *See Every Day in Every Way*, *Brdcst. & Cable*, Aug. 30, 1993, at 58; Joe Flint, *Warner Eyes Cable For Fifth Net*, *Brdcst. & Cable*, Oct. 25, 1993, at 65.

289. 288. *Turner Broadcasting*, 819 F. Supp. 32 (D.D.C. 1993), *vacated and remanded*, 114 S. Ct. 2445 (1994), *on remand*, 910 F. Supp. 734 (D.C.C. 1995), *prob. juris. noted*, 116 S. Ct. 907 (1996). Oral argument was held Oct. 7, 1996.

290. 289. *See infra* Part V.B. *Turner Broadcasting* involved retransmission consent only because the plaintiffs have claimed that must-carry and retransmission consent are so deeply connected that declaring must-carry unconstitutional would necessarily require a similar declaration regarding retransmission consent.

291. 290. *Daniels Cablevision*, 835 F. Supp. 1 (D.D.C. 1993).

292. 291. In fact, the 1992 Cable Act had provided for expedited challenges to the must-carry provisions. These challenges were to be heard by a three-judge district court panel and were directly appealable to the Supreme Court. 47 U.S.C. § 555 (1994).

293. 292. Nicholas W. Allard, *Must Carry and the Courts: Bleak House, the Sequel*, 13 *Cardozo Arts & Ent. L.J.* 139, 140 n.5 (1994).

294. 293. *Daniels Cablevision*, 835 F. Supp. 1 (D.D.C. 1993); *Turner Broadcasting System, Inc. v. FCC*, 810 F. Supp. 1308, 1315 (D.D.C. 1992). As mentioned before, the court did not sever the argument that retransmission consent (section 6) was unconstitutional as unseverable from the unconstitutional must-carry (sections 4 and 5) provisions. Thus this claim remains as part of *Turner Broadcasting*. *See infra* Part V.

295. 294. *Daniels Cablevision*, 835 F. Supp. 1, 12 (D.D.C. 1993).

296. 295. *Id.*

297. 296. *See supra* Part III.B.1.b, discussing the policy merits of viewing retransmission consent as being analogous to copyright.

298. 297. Kim McAvoy, *Inouye Raises Retrans Antitrust Specter*, *Brdcst. & Cable*, Aug. 16, 1993, at 6.

299. 298. *Id.* at 16.

300. 299. *Justice Dept. Says Stations Cooperated Too Much on Retransmission Consent*, *Comm. Daily*, Feb. 8, 1996, available in Westlaw, 1996 WL 2365332.

301. 300. *Id.* (quoting Anne Bingaman, U.S. Assistant Atty. Gen.).

302. 301. Steve McClellan, *How Do LMAs Affect MustCarry Negotiating?*, *Brdcst. & Cable*, Apr. 22, 1996, at 24.

303. 302. Joe Flint & John Dempsey, *Cable Knocks WOOD, Grabs Signal*, *Daily Variety*, Jan. 29Feb. 4, 1996, at 80.

304. 303. *Must Carry: "I Got Your Cable Act," Cablevision Tells WOOD-TV*, *Cablefax*, Jan. 26, 1996, available in Westlaw, 1996 WL 7056184.

305. 304. John Dempsey, *Weather or Not, Cable Puts WOOD Back on Menu*, *Daily Variety*, Jan. 29, 1996, at 8.

306. 305. H.R. 12, 103d Cong. (1993), reported in Randy Sukow, *Retrans Consent Foes Quick to Act in Congress*,

Brdcst. & Cable, Jan. 11, 1993, at 58.

307. 306. H.R. 190, 103d Cong. (1993).

308. 307. H.R. 525, 104th Cong. (1995).

309. 308. Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (to be codified in scattered sections of 47 U.S.C.).

310. 309. *Id.* sec. 301. § 651(a)(3), sec. 302, § 653, 110 Stat. at 119, 121-24. In fact, the first retransmission consent agreements between telephone companies and broadcasters were recently reported. *See* Joe Flint, *A Dodger Double Play*, *Daily Variety*, April 2, 1996, at 1.

311. 310. 47 U.S.C. §§ 53435 (1994).

312. 311. "[N]o cable system . . . shall retransmit the signal of a broadcasting station, or any part thereof, except--(A) with the express authority of the originating station; or (B) pursuant to section 614 [of the Communications Act of 1934 (must-carry)], in the case of a station electing, in accordance with this subsection, to assert the right to carriage under such section." 47 U.S.C. § 325(b)(1) (1994).

313. 312. *See supra* Part IV.A.4.

314. 313. *Turner Broadcasting*, 819 F. Supp. 32 (D.D.C. 1993), *vacated and remanded*, 114 S. Ct. 2445 (1994), *on remand*, 910 F. Supp. 734 (D.D.C. 1995), *prob. juris. noted*, 116 S. Ct. 907 (1996). Oral argument was held Oct. 7, 1996.

315. 314. At least to those who subscribe to cable and never receive over-the-air broadcasts.

316. 315. *See supra* Part III.B.1.c.

317. 316. *Quincy Cable TV v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986); *Century Comm. v. FCC*, 835 F.2d 292 (D.C. Cir.), *cert. denied*, 486 U.S. 1032 (1987).

318. 317. *See supra* notes 291-93 and accompanying text.

319. 318. *Turner Broadcasting*, 819 F. Supp. 32 (D.D.C. 1993), *vacated and remanded*, 114 S. Ct. 2445 (1994), *on remand*, 910 F. Supp. 734 (D.D.C. 1995), *prob. juris. noted*, 116 S. Ct. 907 (1996). Oral argument was held Oct. 7, 1996.

320. 319. *Id.*, 819 F. Supp. at 36.

321. 320. *Id.* at 38 n.10.

322. 321. *United States v. O'Brien*, 391 U.S. 367 (1968).

323. 322. *Turner Broadcasting*, 819 F. Supp. at 39.

324. 323. *Id.* at 3940.

325. 324. *Id.*

326. 325. *Id.* at 43 (citing the Federal Defendant's Memorandum).

327. 326. *Id.* at 44.

328. 327. *Id.* at 46.

329. 328. *Id.* at 47.

330. 329. *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445, 2451 (1994).

331. 330. *Id.* at 2462.

332. 331. *Id.*

333. 332. *Id.* at 2469.

334. 333. *Id.*

335. 334. *Id.*

336. 335. *Id.* at 2470.

337. 336. *Id.*

338. 337. *Id.* at 2472.

339. 338. *Id.* (Blackmun, J., concurring).

340. 339. *Id.* at 2475 (Stevens, J., concurring).

341. 340. *Id.* at 2477 (O'Connor, concurring in part and dissenting in part).

342. 341. *Id.* at 2478.

343. 342. *Turner Broadcasting v. FCC*, 910 F. Supp. 734, 751 (D.D.C. 1995).

344. 343. Jackson would have brought the matter to trial. *Id.* at 752 (Jackson, J., concurring).

345. 344. *Id.* at 739.

346. 345. *Id.* at 751.

347. 346. *Id.* at 755 (Williams, J., dissenting).

348. 347. *Id.* at 75556.

349. 348. *Id.* at 770.

350. 349. *Id.* at 780 (emphasis in original).

351. 350. Linda Greenhouse, *Supreme Court Roundup: Justices Skeptically Review Law Requiring Cable Systems to Carry Broadcast Stations*, N.Y. Times, Oct. 8, 1996, at 22.

352. 351. *Turner Broadcasting v. FCC*, 114 S. Ct. 2445, 2469 (1994).

353. 352. *Turner Broadcasting*, 910 F. Supp. 734, 770 (D.D.C. 1995) (dissenting opinion of Judge Williams).

354. 353. *See Hazlett, supra* note 269, at 37.

355. 354. *See infra* Part VI.B.

356. 355. *See supra* Part III.B.1.

357. 356. *Turner Broadcasting v. FCC*, 819 F. Supp. 32, 38 n.10 (D.D.C. 1993).

358. 357. 47 U.S.C. § 325(b)(1) (1994).

359. 358. *Most Stations*, *supra* note 266.

360. 359. Because Part III.B.2.a. discusses why the argument that retransmission consent would interfere with the compulsory cable copyright provision does not seem plausible, that argument is not readdressed here.

361. 360. *Aversa & Thompson*, *supra* note 250, at 32. The FCC did seem willing to allow incremental increases in retransmission fees to be included in rates, so the future effects are as yet unclear. *Id.*

362. 361. *See supra* notes 25669 and accompanying text.

363. 362. Because Part III.B.1. discusses why the property right and public good arguments do not seem plausible, those arguments are not readdressed here.

364. 363. *See supra* Part IV.A.4.

365. 364. *See supra* Parts III.B.1.d, V.C.1.

366. 365. *See supra* note 287 and accompanying text.