The Copyright Controversy

MAKING CABLE TV PAY?

Henry Geller

FORMER SENATOR WARREN MAGNUSON once observed: "All that each industry seeks is a fair advantage over its rivals." Nothing better illustrates that point—or the politicians' difficulty in withdrawing advantages they have bestowed—than the current controversy over cable TV and its statutory license to carry TV broadcast programs.

Competition is coming strongly and swiftly to television markets long the sole preserve of the VHF broadcaster: UHF broadcasting, including subscription TV, is thriving. New low-power operations are being planned by the thousands. Multipoint distribution systems are carrying pay-TV programs into homes. Cassettes and discs are becoming an alternative means of delivering film fare. The Federal Communications Commission (FCC) has just cleared the way for the possible entry into the television market of direct broadcast satellites by the mid-1980s. Most significant of all, cable television is expanding rapidly in the major markets. Now in about 23 percent of the nation's TV households, it is expected to reach 50 percent by the end of the decade. These new cable systems—which can carry 100 or more channels of TV programming, compared to 12 for traditional cable—represent a true television of abundance.

But all these technologies are no more than delivery systems. What is important to the viewer—and central to my subject here—is the programming they deliver and the method for compensating the copyright owners who supply that programming.

Henry Geller, director of Duke University's Washington Center for Public Policy Research, formerly headed the National Telecommunications and Information Administration (1978–80).

One would have thought that all television delivery systems would purchase their programming fairly in the marketplace, with the government showing no favor to any of the competitors. That is indeed so, except in one case. The government favor is not for one of the new struggling services, like low-power TV or videodiscs. It is, instead, for the fastest growing service of all, cable—a multi-billion dollar industry that includes corporate giants like Westinghouse-Teleprompter, Time-Life, Warner–American Express, and Times-Mirror. Under the Copyright Act of 1976, cable enjoys a government-provided license to carry any TV broadcast signal it desires (subject to FCC rules) and to do so at government-set rates. This gives cable an important financial advantage and some advantages of other sorts as well. For example, while TV broadcasters—commercial or subscription—can be denied the right to a sporting event because of valid league regulations, cable can bring in the same event from distant stations because of the compulsory license. (Unless—as sometimes happens—broadcasters are refused carriage of an event because the sports entrepreneur does not want cable to pick it up "off the air" for relay to other areas.)

Why is it that government intervenes so massively in the TV programming market in favor of cable? To answer the question, we

must first know some background on the industry and the 1976 act.

The Copyright Act of 1976

Cable systems carry over their wires not merely the programming of local TV broadcast stations, but often the programming of distant stations, taken "off the air" and transmitted across the country by microwave or satellite. Of course local broadcasters do not mind when a cable system carries *their* signals; in fact, they would like it to be compelled to do so (and the FCC has obliged by imposing such a requirement) since that increases their audiences and thus the rates that advertisers are willing to pay. However, signals from stations in another market (so-called distant signals) are a different matter; they fragment audiences and ultimately reduce the advertising revenues the broadcasters' air-time can fetch.

Up to a point, the interests of the copyright owners coincide with those of the broadcasters. One of the benefits that a copyright confers is the ability to grant reasonable *exclusive* performance rights in a particular area. And programs whose exclusivity is guaranteed naturally bring a higher price to the copyright owner, since the purchasing station can promote the program secure in the knowledge that it alone will derive the benefit of its promotion.[1] But of course the copyright owner cannot guarantee exclusivity if a performance of the same program in a distant market can be "piped in" by cable. As far as the copyright law was concerned, that was the situation prior to 1976. The Supreme Court had held in *Fortnightly Corp.* v. *United Artists Television, Inc.* (1968) and *Teleprompter* v. *Columbia Broadcasting System, Inc.* (1974) that the retransmission of broadcast signals taken "off the air" did not constitute a performance under the 1909 Copyright Act, and thus could not be prevented by the copyright holder. This put the rapidly growing cable industry in the happy position of being able to use programming produced and financed by somebody else without having to pay for it.

The inequity of this arrangement was apparent, and Congress responded in 1976 by amending the copyright law. The amendment did three things: First, it declared retransmission to be a performance and thus, if unlicensed, a violation of the copyright. But then it granted cable systems an automatic "compulsory license" with respect to all locally broadcast signals and with respect to those distant signals that the cable systems were permitted to carry by the FCC. Finally, it established that the fees payable to copyright owners for this license would be based on a percentage of each cable system's gross revenues from TV distant signal carriage and would be adjusted periodically by the Copyright Royalty Tribunal (CRT), an agency created by the 1976 law. (Not surprisingly, the CRT process—which involves not only determining the periodic adjustment, but also dividing up the total "pot" among the various copyright claimants—has been most difficult, enriching squabbling lawyers but often not their clients.) The fee specified in the act was, of course, less a reflection of "real value" (if that term has any content apart from a free market) than of the political strength and negotiating position of the interests involved. As to political strength, the broadcasters and copyright owners were a fairly even match for cable. However, by reason of the Supreme Court's holdings that no copyright protection currently existed, their negotiating position was disastrous—since there would not be any royalties unless legislation was passed. It being easier to stop legislation than to pass it, the cable interests had the whip hand. In short, the fee was laughably low.[2]

Copyright owners did, however, have some protection in that the compulsory license was granted only for programming that the FCC permitted cable to carry. And at the time, the FCC's rules contained two significant restrictions: the first limited the number of distant signals that a cable system could import, and the second guaranteed "syndicated exclusivity" —meaning that if a local TV broadcaster had paid a copyright owner for the exclusive right to show a program in the area, the cable system had to "black out" that program when it ap-

[1] The programs referred to here are not the ABC, CBS, or NBC programs (for such fare is distributed for simultaneous nationwide viewing), but are, rather, the non-network films and series, often called syndicated programming.

[2] In 1979, for carriage of non-network distant signal programming, copyright owners received $15 million from cable via the CRT—about 1 percent of the industry's basic revenues—compared to $1,343 billion from TV broadcasters—equal to 30 percent of gross broadcast revenues (excluding network sales).

peared on any distant signal the system was carrying.

The rationale for all this was that it would be "impractical and unduly burdensome" to require every cable system to negotiate with every copyright owner whose work it was going to retransmit. Perhaps so. But the approach taken in the Copyright Act was badly mistaken. If Congress felt compelled to establish a compulsory license, it should at least have limited the damage by distinguishing between the traditional and the new cable systems. Traditional twelve-channel cable had been operating in relatively small markets for years, relying heavily on distant signals for its success. To have subjected these firms to full copyright liability would have disrupted long-established program schedules and viewer habits in towns and small cities across the nation. Further, the copyright owners would have gained little, for they receive less than 10 percent of their revenues from smaller markets (the 100th largest on down to the smallest). It therefore made good political sense for Congress not to alter traditional cable's right to distant signals.

But the new cable systems were a different creature, and should have been required to fend for themselves in the programming market. Even in 1976, they were not "Mom and Pop" operations; rather, they were large corporate enterprises offering thirty or so channels to viewers in major markets and capable of spending the $80 to $100 million it takes to "cable" a big city. More important, they were beginning to penetrate these major markets (where there already is a great deal of over-the-air TV programming) by relying not on distant TV signals, but on original programming distributed via satellite.

From Bad to Worse

Since 1976, cable has become a major industry. The capacity of the new systems has grown to 50, 100, or even more channels. The industry includes seven pay-TV networks with satellite distribution reaching close to nine million subscribers, and more are planned. Moreover, the success of pay-TV had led to the development of advertiser-supported cable networks, which

© 1980 Cincinnati Enquirer—Jim Borgman.
Permission granted by King Features Syndicate, Inc.

now include two sports networks and five networks offering more general programming, with several more in the offing. All of these provide signals to the cable systems via satellite, without charge (and one of them even pays cable to carry its programs). The industry also includes "hybrid" networks which supplement advertising revenues by charging cable systems a monthly subscriber fee. And finally, there are free information networks, free religious networks, and special children's services. In short, the industry has grown enormously in diversity, sophistication, and financial power.

Thus the Copyright Act, seriously flawed policy even at its inception, is wholly bankrupt today. Yet until 1980, at least the FCC's rules on distant signals and syndicated exclusivity somewhat alleviated the inequity to copyright owners. But in a 4–3 decision last September, the FCC eliminated those protections and proclaimed, with a burst of deregulatory enthusiasm, that it was freeing cable to operate in the marketplace.

That assertion calls to mind George Orwell's admonition on looking behind the shibboleths for the substance. What the FCC has done is deregulatory only in the limited and parochial sense that the agency has lifted its own major rules governing cable. In doing so, however, it has not thrown the industry into the free market but placed it more fully than before in the hands of another regulatory system, the copyright tribunal.

If the FCC's decision is sustained, there will no longer be any effective way for a broadcaster to purchase a temporary exclusive right to desirable programs. Thus it will not be possible for copyright owners to earn larger revenues on programs in high demand—new films, for example—by offering full exclusivity in a number of different markets. Instead, their first sale of a new film to a broadcaster can be, in effect, a nationwide sale (because of satellite carriage to the cable universe), and the fees due from cable will be determined administratively at the CRT. In short, all programming on the air—not just some of it, as in the past—will be subject to cable's compulsory license. And presumably, in an effort to maintain control of their product, sports entrepreneurs in particular will increasingly tend to sell only to cable. Finally, the CRT's fee-setting operation will be larger and more complex than before.

It is not surprising that the FCC's action has aroused a storm. In essence, the agency has eliminated what many had understood to be an essential part of the government-prescribed payment formula. As former Register of Copyrights Barbara Ringer told the Senate Judiciary Committee on April 29, it was assumed when the Copyright Act was passed "that the FCC might tinker with its rules but that it would not completely abandon the protection it offered copyright owners." With that assumption now gone, the cable copyright matter is before Congress once again.

The Congressional Debate

Simply put, there are essentially three alternatives for Congress to consider—(1) leave the situation where it stands, (2) reestablish by law the rules eliminated by the FCC, or (3) build on the FCC's action by dismantling the remaining (and most offensive) part of the regulatory structure governing cable copyright. In each case, the cable TV industry is pitted against the copyright owners, the sports leagues, and the other commercial delivery system—broadcast TV.

Accept the Status Quo. This alternative is of course the one the cable systems prefer. They, along with former FCC Chairman Charles Ferris, insist that copyright owners will be justly compensated under the new system. In defending this position, they rely on an FCC economic analysis "proving" that the rescission of syndicated exclusivity will not adversely affect the revenues the copyright owners receive from sales to television broadcasters—while adding that, in the unlikely event it should do so, this could always be offset by an increase in the CRT's royalty fees.

The argument is protectionist, brazenly bureaucratic, and utterly beside the point. To begin with, such a fee increase would be a ham-handed approach to compensating copyright owners. By what intricate formula could the CRT hope to divide the pot fairly? But the main point is that there is a long-established market in copyrighted program sales, that this market functions well, and that cable TV, like all other TV distribution systems, should have to operate in that market. Can anyone doubt how Congress would react if the National Tele-

communications and Information Administration recommended, based on a study, that RCA and other disc entrepreneurs be granted a compulsory license to use films as they saw fit? Economic studies, however valuable they are in other contexts, are wholly irrelevant here. If cable carriage of non-network programs from distant stations does not have an adverse effect on copyright owners, the market will reflect that over time, and a superstation (whose operation is designed for nationwide cable distribution via satellite) will be able to obtain the programs they require at no extra charge. If on the other hand, as I suspect, it does have an adverse effect (particularly as cable penetrates more deeply into the major markets), the market will reflect that also. Either way, pricing decisions on copyrighted material are not the government's business.

Cable also asserts that, as the broadcast stations receive higher advertising rates because of the increased viewership they gain through cable, the copyright owners will be able to demand higher fees. This might not happen in the case of "unwilling superstations" (for example, WGN or WOR) since they use local advertising in substantial part, and the merchants in New York obviously will not pay for ads shown in Ohio. But a "willing superstation" (for example, WTBS-Atlanta) could avoid local advertising and therefore probably might adjust its advertising rates (and copyright payments) to reflect its increased viewership. But, here again, this simply establishes that the market will work and that there is no need for the government to intervene.

Not surprisingly, the Copyright Royalty Tribunal also likes the new arrangement. On April 29 the CRT—but not its then chairman—told the Senate Judiciary Committee that it was not "aware of any changes in copyright clearance procedures that provide justification for altering the judgment of the Congress that a cable compulsory license is necessary." CRT is making the old argument that if a cable system in Ohio wants to carry a distant signal like WGN-Chicago or WOR-New York, there is still no practical way for it to do so under full copyright liability: how can the Ohio system bargain for the right to carry every one of the hundreds of programs on WGN or WOR? The CRT's argument is entirely correct and entirely irrelevant. With a plethora of programming available to cable via the many satellite services, why should Congress make WGN's or WOR's programming available to cable by compulsory license, with government-prescribed fees? Why should it skew the market process?

Reverse the FCC. On May 13, Rep. Robert Kastenmeier (Democrat, Wisconsin), chairman of the House Copyright Subcommittee, introduced a bill (H.R. 3560) to limit cable's compulsory license to signals allowed to be transmitted under the FCC's former distant signal and syndicated exclusivity rules (with systems having fewer than 5,000 subscribers exempted from copyright liability). Essentially, the bill aims to quiet the controversy by reestablishing in law the protections originally underlying the 1976 act. The difficulty with this approach is twofold: as the cable industry grows, so does the impropriety of the privilege government has bestowed upon it; and the longer the privilege exists, the more difficult it is to withdraw.

The Sensible Solution. Clearly, the Copyright Act was and is bad policy. There is no need for the distant signal rule or the syndicated exclusivity rule or the compulsory license or the CRT. There is need for only one provision—full copyright liability for all cable systems operating in the major markets. At the outset of the congressional debate, few seemed prepared to go that far. By now, however, full copyright liability has strong support—from the Department of Commerce, Register of Copyrights David Ladd, and former CRT Chairman Clarence James, among others. And on May 12, Rep. Barney Frank (Democrat, Massachusetts) introduced a bill (H.R. 3528) that would establish such liability effective January 1, 1983, with an exemption for systems serving fewer than 2,500 subscribers. A slightly different way of achieving the same objective would be to require that new systems or new signals in the large markets—say, the 100 largest—come under full copyright liability immediately and that existing systems in those markets do so after one year, while providing an exemption for all systems in the remaining smaller markets.[3] Either

(Continues on page 58)

[3] This approach differs from Rep. Frank's in one small respect: I suggest a market-size cutoff in preference to a subscriber cutoff, so as to avoid the difficulty of a cable system's coming within full copyright liability just because it has added one more subscriber.

est industry waste are potential heat sources; livestock thrive on wastes from distillery, cheese, and citrus processing operations, and even on wastepaper. Cement, fertilizer, and building materials are other common recovery products. One British firm uses its china clay wastes to make prefabricated houses.

Often waste recovery is institutionalized by operating the waste-producing and waste-consuming processes at the same site. This "systems approach" is particularly suited to thermal effluents, which are used for everything from local space heating to the cultivation of eels ($6 million worth at one Scottish distillery). Royston lists twenty-five examples of such integrated systems.

Royston cites Minnesota Mining and Manufacturing (3M), the diversified American company, to demonstrate how one firm can profit by "viewing pollution as an indicator of waste and an opportunity for profit rather than as a costly threat." In a four-year span in which 3M's production increased significantly, the company cut its liquid effluents from 47 tons to 2.6 tons, gaseous effluents from 3,000 tons to 2,400 tons, and solid waste from 6,000 tons to 1,800 tons. The result: a saving of $2.4 million a year. Perhaps most significant is that 3M achieved its gains not by installing new pollution control equipment but by rethinking the production process itself: "reformulating products, redesigning equipment, modifying processes, or recovering materials for reuse." Royston sums up this approach as "good housekeeping." "The key to 3M's success," he adds, "has been giving corporate-wide recognition to the importance of technological innovation in making the company efficient and profitable, delegating responsibility and initiative to the shop floor, and rewarding all company personnel who get involved" in the program.

But even 3M would be hard put to match DSM, the Dutch state coal and chemical enterprise. DSM stages internal simulations of public environmental-impact hearings, with company employees playing the roles of ecology activists. Such precautions can help avert court challenges to planned projects, Royston says, adding: "The ultimate objective of the corporation is survival, and reaching that depends very much on the adaptation of the corporation to its environment."

Making Cable TV Pay?
(Continued from page 39)

approach would eliminate the cumbersome and impractical CRT process, leaving the pricing of copyrighted programs to the marketplace.

Admittedly, this solution is imperfect. However, in light of the entrenched position of the traditional cable system and the claims of their viewers, some compromise with free market principles is probably unavoidable. The compromise outlined here is the fairest possible, for both cable and for the copyright owners. The latter would have full copyright protection in those markets (the 100 largest) from which they draw 90 percent of their revenues. And the great majority of the 4,200-odd cable systems would be better off because, as systems in the smaller markets, they would have no copyright payments. The larger cable systems in the top 100 markets can well afford to pay for the programming they use and, in any event, will depend for their success on pay-TV and the new services. For them to seek to retain the relatively small advantage of a compulsory copyright for distant signal carriage is piggishness—an assault on the rules of fair play.

It is difficult to sympathize with the broadcast industry. Indeed, there is something almost deliciously ironic in the problems it now confronts because of cable. For it was VHF broadcaster pressures that led to the present inadequate spectrum allocations system that, in turn, fostered the growth of cable (see Stanley M. Besen and Thomas G. Krattenmaker, page 27). And it was the broadcasters that held back the development of over-the-air pay-TV for decades, so that when enterprising cable systems turned to satellite-distributed pay-TV as a device for penetrating the major markets, the move was not precluded by a long-established subscription TV service. Like Rubashov in *Darkness at Noon*, they are being devoured by a force of their own making (although it should be noted that about one-third of the cable systems are owned by VHF broadcasters).

The copyright owners, however, have done nothing to deserve the inequities of compulsory license. Enough violence has been done to the marketplace in the last two decades. It is time—indeed, long past time—to bring true deregulation to the cable copyright field. ■