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COMMUNITY ANTENNA TELEVISION OPERATIONS AS A "PERFORMANCE": AN APPLICATION OF THE PRINCIPLE OF SEMANTIC EXTENSION TO THE FEDERAL COPYRIGHT ACT*

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The most significant development in the telecommunications field in recent years has not been the addition of the ultra high frequency band to television stations, the advent of pay television, color television or video-tape replays of the Vietnam War highlights. Rather, the most significant development has been the remarkable growth of community antenna television (CATV). The fact that the CATV systems in operation and the total number of subscribers thereto have almost doubled since 1960 gives some evidence as to the astounding success of CATV.[1] While there were only 550 CATV systems in operation in 1959,[2] it has been estimated that 1600 CATV systems were operating by the summer of 1965.[3] Further estimates indicate that these systems serve over 1,200,000 homes.[4] In addition, the CATV systems billed their customers

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1. J. Keller, Is COMMUNITY ANTENNA TELEVISION A COPYRIGT INFRINGER?, 43 U.DET. L.J. 367 (1966). At least two North Dakota communities have a CATV system, and more are being planned. Devils Lake, with a population of 6,875, has a CATV system with 1,340 subscribers, while in January of 1965, Grafton, with a population of 5,885, started receiving service from a CATV system which now has 325 subscribers. Television Magazine, March 1967, p. CATV-3, 46.

2. In the Matter of Inquiry into the Impact of Community Antenna Systems, TV translators, TV "Satellite" Stations, and TV "Repeaters" on the Orderly Development of Television Broadcasting, 26 F.C.C. 403, 408 at para. 11 (1959).

3. *CATV Growth Paced by Problems*, Broadcasting, July 26, 1965, p. 31. See Notice of Inquiry and Proposed Rulemaking Re All CATV Systems, 1 F.C.C. 2d 453 (1965). Although not proportional, generally as television has grown over the years in the number of broadcasting stations and in the number of home receivers, CATV has also grown. There are approximately 566 television stations in the United States covering some 266 markets. 52 million households in the United States, which represent 92 per cent of all the households, now have television receivers. Television Magazine, April 1965, p. 85.

4. R. Huntley & C. Phillips, *Community Antenna Television: A Regulatory Dilemma*, 18 ALA. L. REV. 64, 67 (1965); SELDEN, AN ECONOMIC ANALYSIS OF COMMUNITY ANTENNA TELEVISION SYSTEMS 50 (1964). It has also been estimated that CATV systems currently serve 8,302,956 people, and 2,509,987 homes. *Hearings on S. 1006 Before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary United States*

over $100 million in 1965 for the services rendered.[5] To this figure should be added the revenues received from installation fees which might allow the CATV system to regain a major portion of its investment at the outset.[6]

The profit making capability of the CATV system is furthered extended by liberal Treasury Department depreciation allowances which apparently allow the costs of the entire system to be written off within a five to seven year period, thus characterizing the industry as having "low reportable and low taxable earnings, but high amounts of generated cash."[7]

While the technical aspects of CATV transmission shall be explored in some detail later, CATV may be defined as "a master television receiving antenna system which receives signals transmitted by television broadcast stations and redistributes them, by wire or cable, to subscribing members of the public."[8] The system consists of an elevated antenna, and amplifying equipment which is necessary to distribute the signals received by the antenna over cables to the subscribers' television sets. Signals from distant stations are transferred by microwave to the CATV's antenna. By charging its subscribers a monthly fee in addition to the initial installation, fee, the company produces its revenue. Because the monthly fee is charge regardless of whether the subscriber turns on his receiving set, CATV is distinguishable from "pay-TV" which involves the purchase of programs on a pay-as-you-see basis.

While the greatest demand for CATV is in remote scattered communities, significant developments have taken place recently in areas of high population density in California and Pennsylvania, and even more recently in New York City where the quality of

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Senate, 89th Cong., 2nd Sess. 96 (1966) (Hereinafter cited as *Hearings*). The range of estimates for potential growth is from 8 per cent to 50 per cent penetration of all United States homes, athouth one enthusiastic estimate by Irving Kahn, President of New York's TelePrompTer Corporation, maintains that CATV's may eventually reach 85 per cent of the market. *Hearings* at 126.

5. *Community Antennas Enter the Big TV Picture*, Fortune, August, 1965, p. 146, 242. Annual revenues are currently estimated at over $150 million. H.R. Rep. No. 83, 90th Cong., 1st Sess. 49 (1967).

6. For example, in one case, the CATV system charged $100.00 for the initial hookup. Intermountain Broadcasting & Television Corp. v. Idaho Microwave, Inc., 196 F. Supp. 315, 318 (D. Ida. 1961). It is also estimated that profits for CATV operations may be as high as 35 to 40 per cent. *Hearings* at 195.

7. Fortune, *supra* note 5, at 242. Once the system's capital investment is written off, however, the operator generally sells the system and the investment-depreciation cycle starts anew. While the sales price at an earlier date ranged from $120 to $200 per subscriber, selling prices have risen recently to between $200 and $350 per subscriber because of the interest shown in CATV by some of the giants in industry. Business week, December 12, 1964 p. 34.

8. Note, 52 GEO. L.J. 136 (1963). The beginnings of CATV can be traced back almost to the beginnings of commercial television. The first systems were started in 1950, only nine years after the first commercial television license was granted in 1941. These first systems were constructed by the Jerrold Electronics Company following extensive research beginning as early as 1948. See United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E.D. Pa. 1960).

reception is often destroyed because of the numerous skyscrapers.[9] For the subscriber, CATV is quite advantageous as reception is unaffected by bad weather, airplanes, or topographical obstacles or electrical and magnetic interference, which make cablel transmission especially effective with color programs. Although the reception by cable in 1959 was limited to 3 channels, now most systems offer 12 signals and 20 channel systems are being planned.[10]

While the television viewer appreciates the clearer reception and wider program selection available through CATV, its rapid growth and popularity is viewed with considerable apprehension by local television station owners. These local owners claim their stations are made less attractive to both local and national advertisers because the CATV system offers all of the popular shows to its viewers and can do so without resorting to a delayed basis broadcasting of the network shows which the local station often must do because of scheduling difficulties brought about by time differences. Moreover, when the subscriber's set is connected to the cable, his antenna for receiving the local station is disconnected, and unless the cable connection contains a special switching device, the local station cannot be received without adding another connection for the local antenna. There is also a further complaint by the station owners that CATV systems often enter and service the same communities in which UHF expansion was envisioned under the Federal Communication Commission's national allocation plan.[11]

Although the Federal Communications Commission initially refused to take jurisdiction over CATV systems in 1959,[12] it has reconsidered this ruling and in April, 1965, the FCC ruled that it would take jurisdiction over all CATV systems in order to rpomote the orderly development of this phase of the broadcasting industry.[13] The reasons for the change are (1) the systems pose a threat to stations licensed in areas outside the range of big city stations whose signals are carried on CATV systems. This competition with

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9. 1 F.C.C.2d, *supra* note 3, at 455.

10. Rules Re Microwave-Served CATV, Dockets Nos. 14895 and 15233, FIRST REPORT AND ORDER, 38 F.C.C. 683, 709 at para. 65 (adopted April 22, 1965).

11. *Id.* at 711-12. The consternation of the broadcasters is not unfounded. A recent study completed by the National Association of Broadcasters, reached the conclusion that for every 1,000 homes wired into a CATV system, the local television station loses $9,000 annually. See Business Week, December 12, 1964, p. 35. A further study by that watchdog of the broadcasting industry, the FCC, indicated that towns with a substantial percentage of CATV penetration produced disproportionately lower revenue to the local television station than towns of comparable size but with little or no CATV penetration. FIRST REPORT AND ORDER, 38 F.C.C. 683 (April 1965).

12. In the Matter of Inquiry Into the Impact of Community Antenna Systems, TV Translators, TV "Satellite" Stations, and TV "Repeaters" on the Orderly Development of Television Broadcasting, 26 F.C.C. 403 (1959); Frontier Broadcsting Co. v. Collier, 24 F.C.C. 251 (1958).

13. Notice of Inquiry and Proposed Rulemaking Re All CATV systems, 1 F.C.C.2d 453 (1965).

the stations in remote areas creates the danger of infringement of FCC rules for the effective distribution of broadcast service and the commission is empowered to deal with such infringement by "any person."[14] (2) The FCC has been charged in section 307(b) of the Communications Act[15] with the allocation of broadcasting services. In this connection, it has "expansive powers" and a "comprehensive mandate" and thus the FCC decided that section 307(b) authorizes its jurisdiction over CATV systems.[16]

The FCC has adopted three fundamental rules to govern the operation of all CATV systems. These rules or policies have been summarized as follows:

> (1) That all CATV systems carry without material degradation the signals of all local stations;
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> (2) That all CATV systems not bring in the same program on a distant station on the same day that program is broadcast by the local station; and
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> (3) That CATV systems not bring distant signals into the 100 largest television markets, except upon a showing in a hearing that the operation will be consistent with the public interest and particularly, the establishment and healthy maintenance of television broadcasting service in the area.[17]

It is readily apparent that these rules will not only have some bearing on the determination of the extent of the CATV sysems' liability for copyright infringement, for example, rule (1) in effect forces the CATV system into a copyright violation of the broadcast of the local station, but the resolution of the copyright problem will also have a significant effect upon the CATV regulatory program adopted by the FCC.

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14. *Id.* at 479-80.

15. 47 U.S.C. § 307(b) (1964). "In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

16. 1 F.C.C.2d *supra* note 13 at 479-80.

17. *Hearings* at 77. See, Second Report and Order of the FCC, Fed. Reg. Mar. 17, 1966 at p. 4540, 2 F.C.C.2d 725 (adopted March 4, 1966). To date, the FCC has not prohibited common ownership of broadcaster-CATV interests. It has recognized that abuses could result from such common ownership such as "a use of the CATV systems to discriminate in favor of one broadcaster in a community and against another or of an effort to exploit the CATV system at the expense of the co-owned television station by failure to broadcast an optimum technical signal in order to secure greater revenue from the CATV system." The Commission found no such abuses, however, and felt that its rules were "adequate" to prevent the discriminatory use of a CATV system by a local broadcaster. In the Matter of Acquisition of Community Antenna Television Systems by Television Broadcast Licensees, 1 F.C.C.2d 387, 388 (1965). This is clearly a tentative view by the Commission, and in view of its reversal within a six year period of its jurisdiction over the CATV industry, it would not be surprising to see a similar reversal here preventing common ownership.

This paper will primarily concern itself with whether or not the operations of the community antenna systems subject the system owners to liability for copyright infringement under the federal copyright statute.[18] In an attempt to approach this subject chronologically, a summary of the suits brought under state law, in either state or federal courts is presented. Since these attempts at restraining the CATV systems were unsuccessful, the copyright holders must now turn to the federal courts for protection under the federal copyright statute. Only one such case has proceeded to a final judgment at this time.[19] As that judgment did result in a finding of copyright infringement, however, it is probable that a flood of similar cases will soon appear in the federal courts. This recent case will be given particular emphasis; however, some of the older cases concerning radio broadcasts which presented the same conceptual problem of what constitutes a "performance" will also be presented and discussed. Moreover, we shall give some consideration to the possibility that a license implied in law covers the CATV operations as a result of the authorized telecast by the originating station.

The conceptual problem involved is concerned with the proper interpretation of the phrase "to perform" as used in the Copyright Act. This problem is in some respects one of statutory interpretation and a determination of Congressional intent. It is apparent, however, that because of the recent development of CATV systems, it is impossible to attribute any specific intent on the part of Congress with regard to this problem. This factor by itself, however, should not hinder the court because the necessity of modernizing statutory terminology to keep it abreast of technological advances is one of the developments of our modern judicial system.[20] This process of "semantic extension" has certainly become a reality in statutory interpretation.[21]

The primary concern of statutory interpretation by judicial application of the semantic extension principle is with a thorough realization and analysis of the lingual, economic, legal, and technical realities of the factual situation demanding a decision. To the extent that the technical aspects of television broadcasting and CATV transmission will have an effect on the proper interpretation of the word

18. 17 U.S.C. § 1 *et. seq.* (1964).

19. United Artists Television, Inc. v. Fortnightly Corp., 255 F. Supp. 177 (S.D.N.Y. 1966).

20. See Generally, M. COHEN, LAW AND THE SOCIAL ORDER 132-4 (1933); 2 J. SUTHERLAND, STATUTORY CONSTRUCTION § 5102 (3rd ed. 1943).

21. COHEN, *op. cit. supra* note 20, at 133-4; J. FRANK, COURTS ON TRIAL 293-4 (1949). For a discussion of the principle of semantic extension see M. BLOOMFIELD AND L. NEWMARK, A LINGUISTIC INTRODUCTION TO THE HISTORY OF ENGLISH 352-7 (1963).

"performance," we shall first present a basic description of these operations and their distinguishing characteristics.

RELEVANT TELECASTING TECHNOLOGY

In order to fully appreciate the legal issues involved in this paper, a certain basic understanding of the process of telecasting and transmission is essential. Furthermore, in order to understand the relationship of the CATV system, some basic understanding of its operations must be achieved. This short discussion in no way represents itself as a complete definition and description of the relevant technology, but is merely an effort to convey the appropriate information to the lay-reader in, hopefully, readily understandable terms.

The basic instrument involved at the first stage of telecasting is the television camera itself or an instrument of similar properties such as that used in the telecasting of motion picture film. The desired visual information or scene is optically focused on a surface containing photosensitive elements. The light intensity striking these elements causes their electrical properties to vary at any instant in relation to such light intensity. Because of this variance in electrical properties, a pattern of electrical current varying in proportion to the brightness of the light striking the photosensitive surface may be obtained by passing an electron beam over a small portion of this surface in regular sequence. The current television picture tube utilizes a beam which scans over the photosensitive surface in horizontal lines which the national standard being 525 lines per picture frame.[22] The combined voltage resulting from this scanning is known as the "video signal," and this transformation of a visual image into an electrical impulse or varying electrical current is known as "transduction."[23]

The frequency and wave length of the video signal thus produced do not permit this electrical energy to be transmitted from the station's antenna. An oscillator producing carrier waves of higher frequency and shorter wave length must be used to transmit the intelligence contained in the video signal. These carrier waves must also be combined with the video signal and this is accomplished through the process of "modulation." Modulation is accomplished by transferring the video signal into an amplitude modulator. This process produces an "amplitude modulated carrier wave" (AM carrier wave) which may be transmitted by radiation from the station antenna. The intelligence, represented as a variance in voltage of the original video signal, is now represented by variations

22. 26 ENCYCLOPEDIA AMERICANA 399d (1963).
23. *Id.* at 399a-g.

in the amplitude of the carrier wave. This electromagnetic wave is, of course intensified — "amplified" — before transmission through the air.[24]

The microphone is the primary instrument used to pick-up the audio portion of the program. The microphone works in a similar manner as the familiar telephone in that the difference in air pressure represented by the sound waves causes the microphone head to vibrate in such a manner as to vary the resistance — and hence, the electrical energy — flowing through it, in proportion to the intensity of the sound striking the microphone. The varying voltage, called the audio signal, produced by this transduction, must be combined with carrier waves producing a frequency modulated carrier wave (FM carrier wave), which when amplified is capable of being transferred through the air as electromagnetic waves.

With the invention of the "diplexer" the modulated video and audio signals may be combined so that these electromagnetic waves may be radiated toward the horizon from a single antenna.[25]

The transduction of motion picture film is accomplished in a manner similar to that used by a television camera in reproducing a live performance by running the motion picture film through a smaller camera tube and projecting the image onto that tube's photosensitive surface.[26]

The CATV system utilizes specially designed and oriented antennas for optimum reception of each channel carried. The electromagnetic waves received on the antennas, as the result of the transduction, modulation, amplification and transmittal of the television station, are distributed or transmitted over lines known as coaxial cables. The coaxial cable consists of outer and inner metal conductors and an insulating or non-conducting substance separating these two conductors known as a dialectric. The propogation of the waves through this cable causes them to lose intensity and thus amplifiers must be connected to the cable at regular intervals to assure delivery of a satisfactory signal to each subscriber.

The intensity of the electromagnetic wave received at the CATV antenna is insufficient to force the signal through the coaxial cable and still produce an acceptable signal at the receiving set. The CATV system therefore utilizes elaborate electronic equipment to reproduce the signals on locally supplied energy at a higher intensity. This reporduction may be accomplished through vacuum tubes or transistors. In either case, the action of the tubes or transistor

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24. *Id.*
25. *Id.*
26. For a more complete description of the television process see H. CHINN, TELEVISION BROADCASTING (1953); RADIO CORPORATION OF AMERICA, TELEVISION EQHIPMENT, THEORY AND OPERATION (7th ed. 1953).

controls the flow of locally supplied electrical energy and recreates an exact duplication of the input signal on new carrier waves. The energy represented by the amplitude and frequency variations of the input signal creates the exactly same variation in the vacuum tube. This combination in the vacuum tube dissipates the input signal as heat and reproduces, at greater intensity, an output signal from the vacuum tube. Thus newly supplied energy is supplied to the original transmitted signal to produce a new signal even though that signal is an exact duplicate of the original signal produced by the transduction operation at the station, but at a greater intensity than when received. This process is the same as that amplification applied to the AM and FM carrier waves at the originating station.

The basic function of the CATV system may be simply described as the changing of electromagnetic waves into a variable electronic current and in this sense, this basic operation may be thought of as a "reproduction" or more significantly, a "performance." Whether a wave or a current, however, the form still represents the same reality — energy.

> Transmitting signals through the air and transmitting signals through a coaxial cable are equivalent in electronic terms. The same kind of electromagnetic field is transmitted and both types of transmission are manifestations of the working of precisely the same set of physical laws (Maxwell's equations). In the case of a transmission over the air, an electromagnetic field is radiated from the transmitter antenna. In the case of a transmission by coaxial cable, an electromagnetic field is formed within the space in the cable between the metal conducting elements of the cable and is propagated along the cable in that interior space. Only the boundary conditions are different in the two cases.[27]

It should also be pointed out, however, that most CATV systems now also have demodulators and modulators to create new AM carrier waves in a process electronically equivalent to the modulation done by the broadcasting station.[28] In addition, some CATV systems use converters to change the channel to a different number than that on which the original signal was telecast. Thus a signal received by the CATV system on channel 11 could be retransmitted on channel 4, since lower channel numbers are easier to transmit.[29]

It is apparent, therefore, that in these two additional ways, the

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27. United Artists Television, Inc. v. Fortnightly Corp., 255 F. Supp. 177, 196 (S.D.N.Y. 1966). For a more complete discussion of CATV operations, see United States v. Jerrold Electronics Corp., 187 F. Supp. 545, 549-52 (E.D. Pa. 1960).
28. United Artists Television, Inc. v. Fortnightly Corp., *supra* note 27, at 196.
29. *Supra* note 22, at 399g.

CATV system may actually be applying a process called a "performance." There is one significant process that the CATV system does not do in relation to the input signal, however, and that is the process of transduction. The CATV system neither varies nor distorts the original video signal, and the production of this video signal quite obviously is the most significant step in the telecasting process as only through transduction is light energy changed into electromagnetic energy in the television process.

COPYRIGHT PROTECTION—FEDERAL AND COMMON LAW

It is relatively clear that not all television programs fit within the protection of the federal copyright statute. In order to establish copyright protection, "notice" must be given to the affect that a copyright is being claimed at the time the work is published.[30] Moreover, the work must be "deposited" with the Copyright Office, and this is difficult if not impossible to do with "live" broadcasts.[31] Thus such television programs as news and weather forecasts are probably not within the protection of the federal statute.

The coverage of the Federal Copyright Act is also quite incomplete. Congress is granted power under the Constitution "To promote the Progress of Sciences and useful Arts, by securing for limited times to Authors . . . the exclusive Right to their respective Writings. . . ."[32] The category of "authors" and "writings" limits this protection to a considerable extent in television, and thus even though a performer such as Johnny Carson might be able to qualify his act as a "writing,"[33] it is apparent that he will not be considered an "author."[34]

Many television programs, however, are clearly within the federal statute. While it is true that some materials must be published before the copyright protection attaches,[35] works such as television scripts, musical compositions, or plays may be copyrighted without publication.[36] Motion pictures and taped television plays are obvious examples of television programs clearly within the protection of the federal copyright statute.[37]

In contrast to the traditional approach of a monopoly patent given by the federal copyright statute, the common law does extend

30. 17 U.S.C. § 13 (1964); 37 C.F.R. § 202.2 (1949). See generally, S. SPRING, RISKS AND RIGHTS IN PUBLISHING, TELEVISION, RADIO, MOTION PICTURES, ADVERTISING, AND THE THEATER 116 (2d ed. 1956).
31. 17 U.S.C. § 12 (1964).
32. U.S. CONST. art. I § 8.
33. See 17 U.S.C. § 5 (1964).
34. Waring v. WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 A. 631, 633 (1937).
35. 17 U.S.C. §§ 10, 11, 13 (1964) (books, periodicals and newspapers).
36. 17 U.S.C. § 12 (1964).
37. See United Artists Television, Inc. v. Fortnightly Corp., 255 F. Supp. 177, 183 (S.D.N.Y. 1966).

protection to the creator of an idea by granting an absolute property right so long as his idea remains unpublished.[38] While the Federal Copyright Act under section 2 does retain this common law property right,[39] once the work is placed in the public domain, the creator has no right to seek compensation for a performance or reproduction of his work.

The state courts have been liberal in protecting works that would not satisfy the federal limitations on "writings" or "author". A band leader has been given credit as an "author" and his artistry considered a "writing".[40] Similarly, the "style of talking" and distinctive "voice" of a radio broadcaster were defined as an "art expression" of the type protected by common law copyright.[41] These more liberal interpretations of the subjects covered under the common law copyright do not, however, lead to the conclusion that as effective a monopoly is granted under common law as federal law because publication, even though unintentional, will result in a loss of the property right.

The significant issue then, in determining whether the television station is afforded protection under common law copyright is whether the telecast will constitute a "publication". An analysis of the cases shows that the telecast probably does not constitute a "general" publication. A limited publication which does not make copies available to the public, such as a play,[42] a public performance of a song,[43] or a public lecture,[44] does not result in a loss of the common law copyright because it is not circulated to the general public. Even with the much larger audience of a television station, there is dictum in one case to the effect that a television reporter in making a news announcement does not lose his common law copyright.[45] A perusal of radio broadcasting cases shows this dictum to be based on good law, as radio broadcasting has been held not to constitute a general publication.[46] It was reasoned that "the rendering of the performance before the microphone cannot be held to be an abandonment of ownership . . . by the proprietors, or a dedication of it to the public at large."[47] Similarly, the Metropolitan Opera has successfully enjoined the recording and subsequent

38. See Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1934); Note, 41 ST. JOHN'S L. REV. 227 (1966).
39. 17 U.S.C.§ 2 (1964).
40. Waring v. WDAS Broadcasting Station, Inc., *supra* note 34.
41. Columbia Broadcasting Sys., Inc. v. Documentaries Unlimited, Inc., 42 Misc.2d 723, 248 N.Y.S.2d 809 (Sup.Ct. 1964).
42. Ferris v. Frohman, 223 U.S. 424, 435 (1912).
43. Him v. Universal Pictures Co., 154 F.2d 480 (2d Cir. 1946).
44. Nutt v. National Institute, Inc., 31 F.2d 236 (2d Cir. 1929).
45. Columbia Broadcasting Sys., Inc. v. Documentaries Unlimited, Inc., *supra* note 41 at N.Y.S. 812.
46. Uproar Co. v. National Broadcasting Co., 8 F. Supp. 358 (D. Mass. 1934), *modified*, 81 F.2d 373 (1st Cir. 1936), *cert denied*, 298 U.S. 670 (1936).
47. *Id.* at 362.

sale of its radio broadcast.[48] It is also clear that even though the radio performance is of a literary work, the broadcast does not destroy the common law copyright.[49]

Two recent United States Supreme Court cases have reduced the effectiveness of the common law copyright substantially, however, and may account for the fact that there is no reported attempt of a television station to enjoin community antenna system activities by suits under common law copyrights.[50] The indication from these cases is that federal copyright law may have pre-empted a large part of the field from common law copyright as the Court stated that, "because of the federal patent laws a state may not, when the article is unpatented and uncopyrighted, prohibit the copying of the article itself or award damages for such copying."[51] Moreover, in reasoning that the public cannot be denied by state law what the federal patent laws place in the public domain, the Court noted in passing that the federal copyright law also preempts that field from state law.[52] It should be noted, however, that the preemption only works as to television broadcasts within the federal copyright act's protection, such as motion pictures, and probably does not destroy the common law copyright as to works not within the protection of the federal statute such as a live news broadcast.[53]

There is apparently no decision as to whether or not CATV systems are liable for infringement under common law copyright. It has been held, however, under a state copyright statute, that a CATV system was not liable for its activities because the plaintiff had intentionally made his works public by consenting to a telecast by a network station and simultaneous rebroadcast by local stations.[54] The Court concluded "that the activities of the defendant . . . do not constitute an infringement upon, or a violation of, any rights or privileges of either of the plaintiffs in this action.[55]

OTHER PROTECTIONS—UNFAIR COMPETITION

A suit for either common law or federal law copyright infringement has not been the only remedy attempted by the television stations or copyright owners. Several cases based on unfair competition and unjust enrichment, have been tried in the federal courts but none of them has resulted in liability of the CATV system.

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48. Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp., 199 Misc. 786, 101 N.Y.S.2d 483 (Sup.Ct. 1950), *aff'd.* 269 App. Div. 632, 106 N.Y.S.2d 795 (1st Dep't. 1951).
49. King v. Mister Maestro, Inc., 224 F. Supp. 101 (S.D.N.Y. 1963).
50. Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964); Compco Corp. v. Day-Brite Lighting, Inc., 376U.S.234 (1964).
51. Sears, Roebuck & Co. v. Stiffel Co., *supra* note 50 at 232-33.
52. *Id.* at 231 n.7.
53. Note, 41 ST. JOHN'S L. REV. 225, 231 (1966).
54. Z Bar Net, Inc. v. Helena Television, Inc., 125 U.S.P.Q. 595 (D. Mont. 1960).
55. *Id.* at 596. See discussion of this case in Note, *supra* note 53 at 235.

Intermountain Broadcasting & Television Corp. v. Idaho Microwave, Inc.,[56] is an example of just such an unsuccessful attempt. The plaintiffs in this suit were three television stations. One of the defendants, Cable Vision, Inc. maintained two receiving antennas in the Twin Falls, Idaho area. Its equipment enabled it to select signals to carry to its customers. These signals were then amplified, demodulated and in some instances, the signals were converted to different channels and frequencies than those on which the originating station transmitted.

Furthermore, Cable Vision, Inc. and the second defendant, Idaho Microwave, Inc., had announced plans to construct additional facilities to pick up and convey the signals of the three plaintiffs by microwave to the facilities of Cable Vision, Inc. The defendants engaged in soliciting subscribers to this more advanced service and had announced that the plaintiff's broadcasts would be made available as soon as the microwave transfer system was operating. The defendants furthermore denied any obligation on their part to obtain the consent of, or to account to, the plaintiffs for picking up and distributing the plaintiffs' broadcasts.

Plaintiffs chose not to rely upon any right to protect their programming under statutory or common law copyright. Rather, in their motion for summary judgment they stated that regardless of program content or copyright, their broadcasts could not be picked up without their consent. The plaintiffs claimed that defendants threatened practice constituted an appropriation of the fruits of plaintiff's money, skill and labor, and amounted to unfair competition and unjust enrichment. Noting that the plaintiffs and the defendants operated in different ways and for different purposes and were therefore not in the same kind of business, the court refused the motion for summary judgment.[57] "This Court should not, and the Idaho Courts would not . . . hold that plaintiffs here have any property right, quasi or otherwise in their broadcasts, considered apart from such program content as might be protective under statutory or common law copyright, which is being infringed by the practice of defendants or which is entitled to protection."[58] Since the plaintiffs sold their broadcasting to sponsors for advertising and distributed the signals freely, they were not in competition with one who collected those signals and sold them for profit.[59]

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56. 196 F. Supp. 315 (D. Ida. 1961).
57. *Id.* at 325.
58. *Id.*
59. Id. Refusing to grant relief based on unfair competition because the CATV systems sell to television viewers and the broadcasters sell to advertisers is an extremely shortsighted analysis by the courts. The analysis presumes that the local station can operate without television viewers watching its channel, since it does not depend on viewers for its revenues. This is obviously wrong. The reason it is able to sell advertis-

Cable Vision, Inc. v. KUTV Inc.[60] is similar to the *Intermountain* case in that a television station had counterclaimed against a group of CATV system operators alleging tortious interference with contractual rights and unfair competition under Idaho law. The district court had entered a judgment for the television station maintaining its counterclaim[61] and the CATV system operators appealed. The appelate court reversed and held that unless the television stations could demonstrate a protectible interest by virtue of the copyright laws or bring themselves within contemplation of some other recognized exception to the policy promoting free access to all matter in the public domain, they could not recover against the operators of the CATV systems.

Cable Vision, Inc. v. KUTV, was recently followed by a Florida state court in dismissing a suit for injunction and money judgment brought against a CATV system receiving television broadcasts from stations within 100 miles of a city and transmitting them to its subscribers even though the plaintiff station had the exclusive right to first broadcast some of the programs in the city.[62]

APPLICATION OF FEDERAL COPYRIGHT LAW

"A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."[63] This epigram by Justice Holmes has best summed up the thought that a word never has merely one meaning. The surroundings and context of the usage adds different color and different character to a word. The passage of time creates new ideas or thoughts to convey, but often no new words are developed to convey those thoughts, hence words take on new meaning. The meaning of the word "perform" in the Federal Copyright Act is such an example.[64] The provisions of the Copyright Act which raise the issue are:

> § 1. Exclusive rights as to copyrighted works
>
> Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:
>
> (a) To print, reprint, publish, copy, and vend the copyrighted work;
>
> (c) To deliver, authorize the delivery of, read, or present the copyrighted work in public for profit if it be a

ing time is because it has an audience. Certainly the courts cannot believe that the entrepreneur pays the high cost of television advertising to spread his message over dead air waves.

60. 335 F.2d 348 (9th Cir. 1964). 211 F. Supp. 47 (D. Ida. 1962).
61. 211 F. Supp. 47 (D. Ida. 1962).
62. Herald Publishing Co. v. Florida Antennavision, Inc., 173 So.2d 469 (D. Fla. 1965).
63. Towne v. Eisner, 245 U.S. 418, 425 (1918).
64. 17 U.S.C. § 1 (1964).

> lecture, sermon, address or similar production, or other non-dramatic literary work; to make or procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, delivered, presented, produced, or reproduced; and to play or *perform* [emphasis added] it in public for profit, and to exhibit, represent, produce, or reproduce it in any manner or by any method whatsoever. The damages for the infringement by broadcast of any work referred to in this subsection shall not exceed the sum of $100 where the infringing broadcaster shows that he was not aware that he was infringing and that such infringement could not have been reasonably foreseen; and
>
> (d) To *perform* [emphasis added] or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, *performed*, [emphasis added] represented, produced, or reproduced; and to exhibit, *perform*, [emphasis added] represent, produce, or reproduce it in any manner or by any method whatsoever. . . .

It is clear that Congress could not have had any specific intent regarding whether or not the activities constituted a "performance" within the meaning of the Copyright Act because the development of television, and later, CATV has taken place sometime after the passage of the Federal Copyright Act in 1909. The first commercial license for a television station was granted in 1941.[65] This fact alone, however, does not remove CATV from the scope of the federal law. In *Jerome H. Remick & Co. v. American Auto. Accessories Co.*,[66] the court held that the fact that the radio was not developed before the enactment of the applicable portion of the Copyright Act did not by that fact alone exclude it from the statute. The court stated that, "the statute may be applied to new situations not anticipated by Congress, if, fairly construed, such situations come within its intent and meaning. . . . While statutes should not be stretched to apply to new situations not fairly within their scope, they should not be so narrowly construed as to permit their evasion because of changing habits due to new inventions and discoveries."[67]

This language is especially relevant in view of the modern developments in electronics and telecommunications. These develop-

65. Ettore v. Philco Television Broadcasting Corp., 229 F.2d 481, n.3 (3rd Cir. 1956), *cert. denied*, 351 U.S. 926 (1956).

66. 5 F.2d 411-2 (6th Cir. 1925), *cert. denied*, 269 U.S. 556 (1925). See Metro-Goldwyn-Mayer Distributing Corp. v. Bijou Theatre Co., 59 F.2d 70, 76 (1st Cir. 1932).

67. *Supra*, 5 F.2d note 66, at 411.

ments vary from the traditional performance concept wherein an individual presents his work in the immediate presence of an audience. Modern technology makes the presence of an audience no longer essential in determining whether or not there is a "performance" because the visual and audio representation of the players acting may be transferred to a far distant and scattered audience over a considerable time period. Thus the Johnny Carson show, actually performed in the traditional sense at 6:30 p. m. to an audience of 400, is "performed" late at night to an audience of several million via the instrument of television.

Whether or not the activities of the CATV system in interrupting the communication of this performance through the air waves and selling the signals it picks out of the air for profit constitutes a performance will be the concern of the remainder of this paper. Since there has been only one case involving this problem to date, the discussion of that case shall be introduced with the presentation of several older cases involving the same conceptual problem of "performance".

THE RADIO BROADCAST CASES

It was decided at a relatively early date that when a radio broadcaster arranged to have a singer, with orchestral accompaniment, perform a copyrighted song in its studio without authorization and then broadcast this song, the broadcaster was "performing" the song publicly and for profit in violation of the Copyright Act.[68] A similar result was reached when a phonograph record was substituted for a live performance.[69] An English court has even found infringement where a radio broadcaster caused an unauthorized live performance of a copyrighted opera to be given in its studio without an audience being present.[70]

In 1917, the Supreme Court, speaking through Justice Holmes, held that two hotels had infringed the copyright owner's exclusive right to perform his work for profit in public when they hired musicians to perform for their guests even though the hotels charged nothing for the guests' pleasure in listening to the music.[71] Justice Holmes noted that, "Performances not different in kind from those of the defendants could be given that might compete with and even destroy the success of the monopoly that the law intends the

68. Jerome H. Remick & Sons v. American Auto. Accessories Co., *supra* note 66. See also, M. Witmark & Sons v. L. Bamberger & Co., 291 F. 776 (D. N.J. 1923).

69. Associated Music Publishers, Inc. v. Debs Memorial Radio Fund, 46 F. Supp. 829 (S.D.N.Y. 1942), *aff'd*, 141 F.2d 852 (2d Cir.), *cert. denied*, 323 U.S. 766 (1944).

70. Messager v. British Broadcasting Co., [1927] 2 K.B. 543, reversed on other grounds, [1928] 1 K.B. 660, *aff'd*, [1929] A.C. 151.

71. Herbert v. Shanley Co., 242 U.S. 591 (1917).

plaintiffs to have."[72] It would appear from this that the Court was primarily concerned with the fact that the exclusivity of plaintiffs' right would be endangered by allowing the performances, so that the Copyright Act should not be construed so narrowly as to eliminate performances, of the same nature as that which the copyright owner could be expected to give, although without the charge which the copyright owner would be expected to impose.

In what appears to be the leading case concerning the liability of one making commercial use of a broadcast performance, *Buck v. Jewell LaSalle Realty Co.*,[73] the Court found infringement in a situation similar to the case just discussed, except that the performance was apparently different in kind than that which the copyright owner could be expected to give. In Buck, the LaSalle Hotel operated a master radio receiving set which was connected by wire to the hotel's public and private rooms. Loudspeakers and headphones were provided so that the hotel guests could hear programs received by the hotel's master receiver. Through this radio connection, the hotel entertained its guests with a performance of a copyrighted song which a radio broadcaster had broadcast without authorization.

The hotel urged that it had not "performed" within the meaning of the act because there can be only a single performance each time a copyrighted song is rendered. Following this premise further, the hotel concluded that if the broadcaster is a performer, the mere act of receiving and transmitting the selection was not a performance within the meaning of the act. The district court found that the hotel's acts were not a "performance".[74] The circuit court applied for certification to determine whether, "the acts of a hotel proprietor, in making available to his guests, through the instrumentality of a radio receiving set and loud speakers installed in his hotel and under his control and for the entertainment of his guests, the hearing of a copyrighted musical composition which has been broadcast from a radio transmitting station, constitute a performance of such composition within the meaning of the Copyright Act.[75]

The Supreme Court held that the hotel's actions did constitute a performance and went on to announce for the first time, the "multiple performance doctrine".

The Court noted that nothing in the act would prevent a single

72. *Id.* at 594.
73. 283 U.S. 191 (1931) (Brandeis, J.).
74. 32 F.2d 366 (W.D. Mo. 1929).
75. *Supra,* note 73, at 195-6.
76. *Id.* at 198.
77. *Id.*
78. *Id.* at 201.

> rendition from giving rise to more than one public performance. "While this may not have been possible before the development of radio broadcasting, the novelty of the means used does not lessen the duty of the courts to give full protection to the monopoly of public performance for profit which Congress has secured to the composer. . . . No reason is suggested why there may not be more than one liability."[76]

In adding to the flexibility of the phrase "to perform" the Court stated that "public reception for profit in itself constitutes an infringement" of the exclusiveness of the copyright owner's right to perform.[77] The Court indicated that much attention would be given to the substance of the case before it in order to adapt the purposes of the copyright law to the realities of the situation. In this regard, the Court noted that substantively there was no difference between a hotel furnishing unauthorized performances to its guests by engaging an orchestra to furnish the music or employing a radio and loudspeaker to accomplish this purpose.[78]

It is also significant for the purpose of this paper to note that in *Buck*, the Court determined that the process of receiving a radio broadcast and then transducing it into audible sound is different from merely hearing the original music. The Court found this electronic reproduction to be such a performance as contemplated by the Copyright Act.[79]

One of the factors to be noticed about the *Buck* case is that the hotel actually produced the audible reproduction without any action on the part of its guests. Whether or not the absence of this last act necessary to convert the electromagnetic waves into an audible reproduction would remove the liability for an unauthorized performance was the principle issue in *Society of European State Authors and Composers, Inc. v. New York Hotel Statler Co.*[80] (SESAC case)

In *SESAC* the hotel had installed two master radio receiving sets, appropriate amplifying apparatus, and a cable from which distribution lines were connected to loudspeakers in each of the hotel's individual guest rooms. In order to hear music in his own room, the guest had to operate a switch much like he would have to do in order to hear an ordinary radio broadcast, although his selection of stations was limited to the two being received by the hotel's master sets. An agent of the plaintiff checked into the hotel and during his stay there, he turned on the loudspeaker in his room and heard plaintiff's copyrighted songs. The original broadcast of this copyrighted material was authorized by the plaintiff,

79. *Id.* at 199-201.
80. 19 F. Supp. 1 (S.D.N.Y. 1937).

but he had given no authorization to the hotel to transmit his material to the hotel's guests.

In a suit brought in the Southern District Court of New York for copyright infringement, that court found that the hotel's acts did constitute a performance. The court rejected the argument that it is only the last step in the conversion of electromagnetic waves into sound waves that gives rise to a "performance."[81] The court considered that what was done by the hotel must be considered as within the definition of performance as given by the Supreme Court in *Buck*.[82]

Similarly, it has been held that however novel the combination of mechanical means used to reproduce sound, the principles of *Buck* and *SESAC* are not varied. Thus copyrighted musical compositions played on transcription discs and transmitted by telephone wire to customers who amplify such music and play it over loudspeakers as background music in their business places without the permission of the copyright owners, constituted copyright infringement.[83]

DO CATV OPERATIONS CONSTITUTE A "PERFORMANCE?"

The specific problem of whether the operations of CATV systems constitute a "performance" within the meaning of our copyright statute had never been before a United States court prior to 1966. The Register of Copyrights did conclude in 1965, however, that such operations did represent a performance of the copyright owner's work.[84] Moreover, his study concluded that such a performance could damage the value of the copyright and therefore should not be granted on exemption.[85]

The problem has also been before the Canadian courts. In 1954, a Canadian court found that a CATV system's acts did constitute a performance within the meaning of the Canadian Copyright Act.[86] That court considered insignificant the fact that the last act done to convert the electromagnetic waves into an audible and visible representation of the copyrighted work occurred in the subscribers' homes rather than being done by the CATV system. The performances which took place in the subscribers' homes, however, were not considered to meet the requirement of a performance "in public" of the Canadian Copyright Act.[87]

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81. *Id.* at 4.
82. *Id.* at 4-5.
83. Harms, Inc. v. Sansom House Enterprises, Inc., 162 F. Supp. 129 (E.D. Pa. 1958), *aff'd sub nom.*, Leo Feist, Inc. v. Lew Tendler Tavern, Inc., 267 F.2d 494 (3rd Cir. 1959).
84. REGISTER OF COPYRIGHTS, 6 COPYRIGHT LAW REVISION SUPPLEMENTARY REPORT 42 (1965).
85. *Id.*
86. Canadian Admiral Corp. v. Rediffusion, Inc., [1954] Can. Exch. 382, 404.
87. *Id.* at 408.

In the United States, the law is quite settled that a performance is considered public regardless of the fact that the audience to which the performance is directed is not assembled.[88] Under this rule, it would appear that even though the individual receiving set is located in a private home, if CATV is considered a performance, it would also be a "public" performance.[89] This leads us then to a consideration of the case determining that CATV system operations do constitute a "performance."

In what is certainly destined to become a leading case on the subject, District Judge Herlands, in an extremely thorough consideration of the subject, decided in *United Artists Television, Inc. v. Fortnightly Corp.*[90] that a CATV system was liable for copyright infringement. This case was an action for infringement of plaintiff's copyrights in moving pictures by defendant's CATV systems located in the Clarksburg and Fairmont, West Virginia area. Plaintiff had entered into limited license agreements which covered a specified number of telecasts of plaintiff's motion pictures with three television stations in Pittsburg and one each in Wheeling and Steubenville. These contracts provided that the pictures were to be used only for free home reception and could not be used for any other use or purpose. In its complaint, plaintiff claimed the exclusive right to license the pictures for telecast purposes to stations and to limit this authorization to the station's coverage area.[91] Plaintiff alleged that its compensation derived from such licenses depended on the size of the television audience in the local coverage area but not on areas outside such coverage area. The plaintiff's complaint charged that through its systems and without license, the defendant received, reproduced and distributed to its subscribers the broadcast signals emanating from the five television stations carrying telecasts of the plaintiff's copyrighted motion pictures. These acts, the plaintiff complained, constituted a copyright infringement and that each time a telecast of plaintiff's picture was picked up by defendant's systems, a separate claim under the Copyright Act arose.[92] The complaint also charged unfair competition and trade practices, but these issues were not considered by the court.[93]

The community antenna systems which defendant operated were built in 1953 and served the area in and around Clarksburg and Fairmont, West Virginia which are beyond the range of all of the television stations in Pittsburg, Wheeling and Steubenville, because

88. Jerome H. Remick & Co. v. American Auto. Accessories Co., 5 F.2d 411 (6th Cir. 1925).
89. J. Keller, *Is Community Antenna Television a Copyright Infringer?* 43 U.DET. L. J. 367, 369 n.10 (1966).
90. 255 F. Supp. 177 (S.D.N.Y. 1966).
91. *Id.* at 181.
92. *Id.*
93. *Id.* at 181-2.

of the roughness of the terrain. Defendant operated its system as businesses for profit. Defendant advertised its service through newspapers and radio extensively, pointing out that without their services, the public could receive only the one local channel. In fact, the court found that defendants promotional campaigns were similar to those of a television broadcasting station and actuallly competed with the local station for programming.[94]

Defendant operated its systems pursuant to municipal franchises or ordinances which granted rights of way to erect and operate its television cable service. Defendant charged its subscribers an initial installation fee in addition to a regular monthly fee. Those subscribers having a larger number of viewers than the normal residential premises were charged a higher initial charge and a greater monthly charge.[95] The subscriber could not install additional outlets or connect more sets than that specified in the original contract without paying additional charges. Defendant considered its signals property and did initiate a successful criminal prosecution against a person accused of having "stolen" its signals.[96] Defendant's system served approximately 72 percent of the occupied housing units in the areas covered by their operations.[97]

In answer to plaintiff's complaint, defendant denied engaging in the performance of any motion pictures. Defendant further claimed that because plaintiff licensed the five stations to broadcast the motion pictures, the defendant's subscribers were licensed to receive such broadcasts by means of defendant's antenna and that defendant was licensed to furnish its community antenna service for this reception.[98]

The court found that defendant was liable for infringing plaintiff's exclusive performing rights in the copyrighted motion pictures. Judge Herlands stated that:

> [W]hen a CATV system, for profit, plays so substantial a part in a reproduction of a broadcast performance being seen and heard by the public that the only act necessary to transduce the electro-magnetic waves it has processed and transmitted to subscribers into an audible and visible reproduction of the broadcast performance is a minor, albeit essential one—such as "turning the knob" on a homeowner's television set—the CATV system must be said to have infringed upon the exclusive right to "perform" which [W]hen a CATV system, for profit, plays so substantial a part in a reproduction of a broadcast performance being seen and heard by the public that the only act necessary

94. *Id.* at 186.
95. *Id.*
96. *Id.* at 188.
97. *Id.* at 187.
98. *Id.* at 182.

> to transduce the electro-magnetic waves it has processed and transmitted to subscribers into an audible and visible reproduction of the broadcast performance is a minor, albeit Congress has bestowed upon the copyright proprietor in 17 U.S.C. § 1(c) and (d). In so holding, the court believes that it adopts a construction of section 1 that recognizes contemporary scientific realities, takes into consideration the current technologies of the television industry, effectuates the predominant purposes and policy of the statute, and gives the language of the Act a meaning consonant with the trend of interpretative decisions in cognate fields.[99]

The court had first observed that defendant's description of itself as a "community antenna," was a "misnomer" on his part and reflected a "fundamental misconception." The court pointed out that the systems were large-scale commercial enterprises making a profit out of exploiting television programs. In addition, the court noted that defendant's operations were not mere passive antennas but in fact processed the signals by amplification, relaying, transmitting and distributing the programs by the use of "complex, extensive and expensive instrumentation."[100] The court found "decisive" the fact that defendant had performed copyrighted works for profit by transmitting the electromagnetic waves representing the sights and sounds of these works.[101]

Just how far the decision in this case may be extended is not clear. For example, would an apartment house which furnishes an outlet in each apartment for connection to an antenna located on the roof of the apartment be liable as a copyright infringer? Some clarification to this and similar questions is made by the court when it stated that, "The home set does not create new carriers for transmission whereas the heart of defendant's system is its head end which contains complex equipment for the purpose of adding energy to and processing and preparing the signals for transmission through a coaxial cable, all in a manner wholly dissimilar to that of the connecting line between the ordinary homeowner's antenna and the home receiver."[102] The language of the court implies that at some point between the situation represented by the single receiving set connected to a homeowner's antenna, and a situation where "complex, extensive and expensive instrumentation" is used to relay a signal, for profit, liability arises. Moreover, as the earlier discussion of *Buck* and *SESAC* indicated, the fact that no charge or profit is made is not significant, the determination turning solely on the degree of electronic instrumentation utilized in transmitting the signal.

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99. *Id.* at 214.
100. *Id.* at 180.
101. *Id.* at 197.
102. *Id.* at 197-8.

One of the defenses which the defendant raised in his answer was that the Federal Communications Act of 1934,[103] and the regulations promulgated thereunder, make the collection of royalties in this instance unlawful. Defendant claimed that under this law and the FCC regulations, "no person may lawfully impose [a] charge upon the reception of commercial television broadcasts and every person is free to receive such broadcasts by the equipment of his choice."[104] The defendant went on to reason that since the television stations licensed to broadcast the copyrighted motion pictures were also operating under licenses from the FCC that their FCC licenses precluded charging for reception, and that a recovery by plaintiff would "impose an unlawful charge upon the reception by defendant's subscribers of broadcasts by commercial television. . . ."[105] The court answered this defense by stating that: "Beyond cavil, neither the policy nor the language of the Federal Communications Act or the regulations promulgated thereunder, nor the reports of the FCC are intended to or have the effect of repealing or modifying section 1 of the Copyright Act."[106] This result is certainly logical because even if the FCC regulations would have acted as a repealer of section 1 of the copyright act, it is questionable whether that agency would have authority to do so. In addition, the court might also have noted that the subscribers were actually beyond the effective range of the originating stations so that there would be some doubt if the charge would be one on the subscribers' reception when without defendant's services they would be unable to receive an effective signal. Moreover, it would seem doubtful that defendant would be the correct party to raise this defense since it is the subscribers' who are being levied the charge in effect. One might also reason that in order to claim the effect of the regulations, you must show that you are the party being protected by such regulations. The regulations look toward protection of the public and it would be anamalous to say that the provisions precluding a charge for reception give protection to one whose business is charging subscribers for the signals it picks out of the air free of charge.

One of the defenses raised which does have substantial merit was that based on a license implied in law. To fully understand this defense, it should be remembered that in the Supreme Court decision in *Buck*[107] where the Court held a hotel liable as an infringer for furnishing its guests with radio music, the radio broadcast

103. 47 U.S.C. §§ 151-609 (1964).
104. United Artists Television, Inc. v. Fortnightly Corp., 255 F. Supp. 177, 211 (S.D.N.Y. 1966).
105. *Id.* at 211-2.
106. *Id.* at 212.
107. *Supra* notes 73-9 and accompanying text.

was also unauthorized. In *Buck*, the Supreme Court remarked in a footnote that had the broadcast been authorized, "a license for its commercial reception and distribution by the hotel company might possibly have been implied."[108] The Court did not decide the question but suggested that the answer might be found in *Buck v. Debaum*.[109]

In *Debaum*, a cafe owner provided music for his customers' enjoyment by playing a radio which carried an authorized broadcast of plaintiff's copyrighted works. The court held that the cafe owner was not liable for copyright infringement because when the copyright holders "licensed the broadcasting station to disseminate the [copyrighted song] they impliedly sanctioned and consented to any 'pick up' out of the air that was possible in radio reception."[110] The reason given for this conclusion was that:

> The owner of a copyrighted musical composition can fully protect himself against any unauthorized invasion of his property right by refusing to license the broadcasting station to perform his musical composition; but, when he expressly licenses and consents to a radio broadcast of his copyrighted composition, he must be held to have acquiesced in the utilization of all forces of nature that are resultant from the licensed broadcast of his copyrighted musical composition.[111]

Since the Supreme Court in *Buck* referred to *Debaum* in passing over the question of whether there was an implied in law license, it seems logical that they did so in approval of the language just quoted. With this assumption, the conclusion should appear inevitable that the Supreme Court had indeed approved an implied in law license theory in the *Buck* case. This conclusion was not reached in *Fortnightly*, however, as the court stated:

> The question being not whether there *is* an implied in law license to perform publicly for profit but rather whether there *should* be, this court holds that there should not. Unlike the District Court in the *Debaum* case, this court cannot find that the copyright proprietor of today "can fully protect himself against any unauthorized invasion of his property right by refusing to license the broadcasting station."[112]

While this language by the court surely furthers the processes of dynamic decision making, it hardly appears consistent with a logical reading of the *Buck* and *Debaum* cases. The conclusion is consistent with the result reached in its own district in an earlier

108. 283 U.S. at 199 n.6.
109. 40 F.2d 734 (S.D. Cal. 1929).
110. *Id.* at 735.
111. *Id.* at 736.
112. *Supra* note 104, at 211.

case as it will be recalled that in the *SESAC* case the broadcasts had been authorized and that court applied no license implied in law theory. Neither does it appear in that case, however, that the court's attention was directed to that question. It thus seems doubtful that the court was correct in concluding that there was no implied in law license.[113] Moreover, it may have been unnecessary for the court to ignore the implied in law license approved in *Debaum* because it is limited to "the utilization of all forces of nature that are resultant from the licensed broadcast. . . ."[114] It would appear that as soon as energy was applied to the signal that something other than the forces of nature resulting from the broadcast were being utilized in transmitting the broadcast signal. Under this theory, the implied license would not extend to amplification and conversion of the signal as those are not "forces of nature resultant from the licensed broadcast."

The decision in *Fortnightly* rested quite heavily on the *Buck* and *SESAC* cases. It has been suggested, however, that there is a "distinction of sufficient importance to cast serious doubt upon the precedental value of *Buck* and [*SESAC*] insofar as CATV is concerned."[115] This claimed distinction is based on the fact that in those cases the hotels completely controlled and operated all the equipment necessary for the conversion of the signals to readily intelligible entertainment for its guests. With CATV systems it is noted, however, that the instrument necessary to convert the signal to intelligent entertainment is under the exclusive ownership and control of the individual subscriber.[116] While of course it is essential for one to "turn on the knob," the court found this distinction too "minor" to be decisive.[117] In addition, *Buck* and *SESAC* are still persuasive in the general result that utilization of broadcast signals for commercial purposes was deemed a copyright infringement.

"PERFORMANCE"—TECHNICAL, LEGAL AND ECONOMICAL ASPECTS

When a court is called upon to give meaning to a word or group of words in a statute, it must consider a number of factors. These factors may generally be described as those technical factors and realities relevant to the situation to which the word is being applied; the legal factors, based primarily on the attitudes of various courts toward what a particular word expresses; and finally the economic realities involved in applying a word as descriptive of a

113. Compare, note, 41 ST. JOHN'S L. REV. 225, 233-4 (1966).
114. Buck v. Debaum, *supra* note 109 at 736.
115. J. Keller, *Is Community Antenna Television a Copyright Infringer?*, 43 U.DET. L. J. 367 at 371 (1966).
116. *Id.*
117. *Supra* note 104, at 214.

certain situation. To this list, of course, might be added the linguistic realities;[118] however, courts are policy makers, not dictionary editors so that the linguistic aspects, or the meaning of the word as used in every day parlance, should actually be given little effect as the three factors noted may very well determine the linguistic realities of the word. Moreover, the word "performance" when stated as a "telelvision performance" or "television performer" has already been accepted as an adequate expression of the conception that a work is being rendered at a place physically or geographicallly distant and apart from where a scattered but yet intended audience perceives the work.[119]

TECHNOLOGICAL REALITIES

When the technological realities of the CATV systems' operations are analyzed closely, the conclusion reached by the *Fortnightly* decision loses some of its persuasiveness. In this decision, the court emphasized that defendant's systems were not merely passive antennas which received signals and passed those signals to the subscriber. Rather, the court seized upon the fact that defendant amplified and, in some instances, modulated and converted the signals to different channels, and the court concluded that this process constituted a "performance." While it is true that defendant does transmit reproductions of the signals received, the central fact remains that those reproductions contain the precise information and intelligence contained on the signal received. The court also noted that the fact that the telecasts received by defendant's systems were visible and audible only on the subscribers' television sets and not within the defendant's systems emphasized an "essential similarity between a CATV system and a broadcasting station. . . ."[120] This supposed similarity is true only when the television station is merely transmitting network shows received by it, or to a more limited extent, when it is projecting a motion picture, because the projection occurs in a small camera tube. It in no way indicates a smiliarity when a television station is televising a "live" show with its cameras. The logical extension of an infringement theory based on this similarity, would make the question of liability in many instances turn upon the percentage of programs carried "live" by a station. It would appear that if the station carried a large percentage of "live" shows, liability would not result, because the operations of the television station and the CATV system would then be too "dissimilar" to claim an infringement by the CATV

118. *Id.* at 201.
119. *Id.* at 203.
120. *Id.* at 204.

system. If relevant at all, such a comparison would seem to be restricted to determining an issue of unfair competition rather than copyright infringement.[121]

In placing primary emphasis on the fact that defendant processes the signals it receives by modulation, amplification and conversion to a different channel, the court fails to realize the significance of the fact that the reproduced signals contain the same intelligence as the original signal. This emphasis once again makes the question of infringement depend on an uncertain measure of degree. Since not all CATV systems modulate or convert the signals to different channels, the question of liability would depend on the degree of amplification the CATV system applies to the signal. Moreover, since all television sets amplify the signals they receive,[122] would it not be possible that the owners of powerful receiving sets could also be prosecuted as infringers under this theory? This emphasis also ignores another "reality" of television technology—transduction. By seizing on the fact of modulation and amplification in order to define a "performance," the court ignores the transduction stage which would appear to be the most logical phase to call a "performance" in an electronic sense.

It should be noted that the intelligence emanating from a performance may be represented by two interconvertible forms of energy. The one is light energy, representing the intelligence as a visual image; the other is electrical energy representing the same intelligence seen by light energy as a visual image, as an electric current of varying intensity. As noted in the earlier technical description of television, light energy is converted into electronic energy by the process of transduction. It would seem apparent that when we are trying to distinguish a performance in electronic terms, the process of transduction would be the most logical to term a "performance." Quite obviously, without transduction, there can be no conversion in the first place. Moreover, when we think of the concept of performance in terms of light energy, we think of the "creation" of the image by movement or reflection, as well, the transduction process "creates" an electronic signal. The time of creation in both instances would appear to be the determining characteristic of a "performance." Under this theory then, if the CATV system employed an instrument such as SONY "Videocorder," which records pictures and sounds on magnetic videotape,[123] so that the pictures and sounds could be played back at a more convenient time, a "performance," within the Copyright Act would take place

121. Compare, Intermountain Broadcasting & Television Corp. v. Idaho Microwave, Inc., 196 F. Supp. 315 (D. Ida. 1961).
122. 2 ILLUSTRATED ENCYCLOPEDIA OF MODERN SCIENCE 1430 (1958).
123. N.Y. Times, March 4, 1966, p. 43, Col. 5.

because the processing by the CATV system would include transduction.

The point is simply that modulation and amplification are only phases in the televising process and actually subservient to the transduction phase. If any of these phases can be said to constitute a "performance," the transduction phase, since it is the most crucial, would seem to be the relevant phase. Since CATV systems do not participate in the transduction process, there is no "performance" on their part in a technological sense.

LEGAL REALITIES—THE QUESTION OF PRECEDENT

Precedent is a curious word in legal terminology. In a specific or overly academic way, it can probably never be said that there is precedent for a decision. This is apparent from the obvious fact that it is highly improbable that any two cases would involve the precise situation, each presenting all of the same factors and alternatives for a decision maker to consider in deciding the question before him. Moreover, if such a situation did apply, the issue would have, in effect, been already settled by the prior decision, there would be nothing for the decision maker to decide, but rather there would merely be a process of application. Thus in the sense just described, precedent has little importance. In another, broader, more general sense, however, precedent is valuable and indeed necessary. When a court decides a case, it is assumed that the court exhibits an attitude toward the particular type of legal issue it has just decided. These general attitudes, one might further assume, will remain farily consistent so that the parties who find themselves in the type of situation which presented a claim and prompted a decision in the earlier case, will have some idea of what reaction is expected on their part by the decision maker. In this general sense of precedent, as indicating an attitude of the decision maker, precedent has value. Because this latter type of precedent—that which indicates attitudes—was available, the court in *Fortnightly* erred when it stated there was no precedent for its decision.

The court was obviously correct in stating that the "precise question" had never been presented for decision.[124] The community antenna television systems have been before the federal courts in other contexts, however, and by merely noting these cases in a footnote,[125] and not examining the general attitude of these cases, the court not only overlooks their value in determining an attitude

124. United Artists Television, Inc. v. Fortnightly Corp., 255 F. Supp. 177 (S.D.N.Y. 1966).
125. *Id.* at 206 n. 15.

that the parties before it may have relied upon, but the court also places itself in the embarrassing position of reaching a different decision on one of the same issues decided in two of the cases it overlooked. It will be recalled that in *Fortnightly*, the court noted that the fact that no visual reproduction occurred at any point in the CATV system, pointed out a similarity between CATV systems and television stations and went on to reach the conclusion that if what television stations did was a "performance," then what the CATV system was doing must be a "performance."[126] This question of similarity in operation, of course, is one of the factors considered in the unfair competition cases discussed earlier, all reaching the conclusion that there was no unfair competition.[127] The language of *Intermountain Broadcasting & Television Corp. v. Idaho Microwave, Inc.* is illustrative. "In the pending cases the plaintiffs and the defendants are not engaged in the same kind of business. They operate in different ways for different purposes."[128]

There is additional language in *Intermountain* that the court in *Fortnightly* might very well have found informative on the question of copyright infringement. The attitude of the federal court as to this issue in 1961 was expressed in the following language:

> Turning to another aspect of the pending question, the Court notes that plaintiffs concede that individual owners of receiving sets in the Twin Falls area, or groups of such owners, could, without infringing on any rights of plaintiffs, construct their own antenna of sufficient height, location and design to pick up the plaintiffs' broadcasts and bring them to their home receiving sets. The fact that owners, unable or unwilling to undertake the difficulties and expense of such construction, prefer to use the similar antenna service provided by defendants does not change the essential situation.
>
> Defendants' antenna service facility is simple a more expensive and elaborate application of the antenna principle needed for all television reception. It does not otherwise differ from what the owners could do for themselves.[129]

A further perusal of the CATV cases which have been before the federal courts would have disclosed the case of *Lilly v. United States*.[130] While reaching the decision that CATV could not be taxed as a communications facility under the Internal Revenue Code, the court stated, "We think it clear that this community antenna service

126. *Id.* at 203-5. See *supra* notes 120-1 and accompanying text.
127. See *supra* notes 56-62 and acompanying text.
128. 196 F. Supp. 315 at 325 (D. Ida. 1961).
129. *Id.* at 327.
130. 238 F.2d 584 (4th Cir. 1956).

was a mere adjunct of the television receiving sets with which it was connected and was in no sense a communication service or facility. . . ."[131]

In general sense then, the question considered by the court in *Fortnightly* had been before the federal courts and in each instance the federal courts evinced an attitude favoring the conclusion that CATV operations were not copyright infringements.[132]

ECONOMIC REALITIES

In its consideration of the "economic realities," the court in *Fortnightly* is also led astray by its failure to consider the CATV cases involving unfair competition. In *Fortnightly*, for example, the court states that "it is apparent that in certain circumstances, defendant's CATV systems do, in a very real sense, perform the same function as broadcasters or rebroadcasters and are in direct competition with them for audience."[133] This language would seem in apposite to the language in *Intermountain* that: "Plaintiffs are in the business of selling their broadcasting time and facilities to the sponsors to whom they look for their profits. They do not and cannot charge the public for their broadcasts which are beamed."[134] That court then reached the conclusion that there was no unfair competition because the CATV systems were not engaged in the same type of business as the television stations. The television station receives its money from advertisers and it would seem that the fact that a CATV system was picking up a station's broadcast and transferring it to a larger audience than that possible through natural reception, that such a station would be even more attractive to advertisers.

It is through a consideration of the economic realities, however, that *Fortnightly* would appear to have reached the proper result. The purpose of the Copyright Act is to grant to the copyright holder a monopoly power over his product, and it is this monopoly which the courts should try to protect within the scope of the grant from Congress. It is easy to see that in this sense, the activities of CATV systems do infringe on a copyright. For example, when the copyright holder grants a license to station A to telecast his work, he knows that a second license to telecast that work in the same coverage area of station A will be worth substantially less than the first license since the audience has already been exposed to the work and will probably switch to another channel. Now if the CATV system transfers the television signal from

131. *Id.* at 587.
132. Keller, *supra* note 115, at 371-2.
133. *Supra* note 124, at 205.
134. 196 F. Supp. 315 at 325 (1961).

coverage area A to coverage area B, the value of a license to television station B is also lowered because a substantial portion of the audience in coverage area B will already have been exposed to the copyrighted work. The significance of the copyright owner's monopoly power and his right to the exclusive control of his work is thereby weakened. Since the monopoly power and the power of exclusivity are the essential reasons for seeking a copyright, it seems logical that technical niceties aside, the copyright is being infringed. Concentrating on the substance rather than the form, the activities of the CATV systems do appear to thwart the underlying purposes of the Copyright Act. Moreover, the Supreme Court decision in *Buck* does evince a desire to adopt a flexible approach of the concept "to perform."[135]

In considering the scope of the monopoly power granted by Congress, however, it would seem relevant to note that any decision at this late date would give the infringed copyright holder a virtual cudgel to destroy the entire network of CATV systems. Since the CATV systems obviously cannot operate unless they do carry copyrighted work, they would seem to be at the mercy of the copyright holders if no limits are put on the scope of the monopoly power granted to copyright holders. Not only could misuse of this cudgel in the hands of the copyright owners (who it is worth noting, are often large movie studios or their subsidiary corporations) price the existing CATV systems out of existence, they could also, in this manner, deny television coverage to the areas of the country which rely exclusively on CATV for their reception. These factors concerning the "economic realities" were not considered by *Fortnightly*.

PROPOSED STATUTORY CHANGES AND POLICIES

There has been no substantial revision of the original 1909 enactment of the Copyright Act. Legislation is planned, however, and in fact, the CATV problem has been given extensive audience in the study of copyright law revision on hearings before the subcommittee on patents, trademarks, and copyrights. Of major concern in the discussion of how the proposed copyright law should handle the CATV systems has been the problem last posed above. At least three major expressions of opinion concerning possible alternatives have been given.

The first solution, presented by representatives of the copyright holders, is that the revised copyright act grant no exemption to CATV systems. This proposal is based on the assumption that the

135. The Court stated that "public reception for profit in itself constitutes an infringement" of the exclusive right to perform. 283 U.S. at 198.

copyright owners and CATV systems can adequately negotiate their differences and arrive at a fair and equitable price for the copyright usage by the CATV systems.[136] Since it is true that the CATV systems are taking a property right by using copyrighted work, the property owner logically should have a right to negotiate the price for such use. This position assumes, of course, that the copyright statute should grant an unlimited rather than a limited property right, which is really the central issue. While it would simplify the statute to grant an unlimited property right to the copyright owner, the consequences of an abuse of that property right on the CATV systems and the public interest are too serious to grant such a right without putting some restrictions on its use.

The second proposal, which would attach limits to the property right granted under the Copyright Act, is put forward by the representatives of the CATV systems. These representatives propose first, that no copyright liability should attach to a CATV system carrying broadcasts within the normal reception range of the station broadcasting the program in question.[137] This proposal is consistent with the FCC regulations noted earlier[138] which require the CATV system to carry local stations. Second, the CATV systems conclude that where the CATV system carries a signal beyond the normal reception range, they should obtain a license. Where their systems import signals into an "underserved" area (with no stations or which receive fewer than three network programs) the proposal is that the license be compulsory but with provisions for a reasonable license fee defined by statute.[139] Third, in those areas having adequate service, the CATV systems have no objection to requiring the CATV system to bargain for a license with the copyright owners for every program obtained from a "distant station" within a statutory fee limit.[140] Fourth, CATV proposes that copyright legislation not inhibit the CATV system from originating its own programs,[141] although such systems would have to bargain for copyrighted material as a broadcast station.[142] Finally, the CATV systems representatives propose that all music rights received in connection with programs not require a further license and that no limitation be placed on receiving uncopyrighted programs.[143] These proposals

136. See, Meyer, *Community Antenna Television*, 10 IDEA 163 (1966).

137. *Hearings, supra* note 4, at page 86.

138. *Supra* note 17 and accompanying test.

139. *Supra* note 4, at 87.

140. *Id.* at 87-8.

141. Approximately 150 systems originate programs such as local weather reports and newscasts. Address by Frederick W. Ford before the 15th Annual Convention of the National Community Television Association, Inc. June 27, 1966, in *Hearings, supra* note 4, at 101.

142. *Supra* note 4, at 88.

143. *Id.* at 89.

represent some considerable concessions on the part of the CATV operators, although principally, they are designed to limit the bargaining position of the copyright owners to a flat statutory fee.

The third major proposal, and for the present the most important since it has been adopted by the proposed statutory revision bills,[144] are the Kastenmeier proposals originally contined in a letter of May 5, 1966, sent by the acting chairman for Copyright Revision Subcommittee Number 3, Representative Robert W. Kastenmeier.[145] This complex proposal seeks to base liability on the impact the CATV system's operations have on the copyright owner's market. The compromise arrangement would divide CATV coverage into three general areas which can be termed "white," "black," and "gray." Generally, under this proposal, operations in the "white" area would involve no copyright liability, operations in the "black" area would be subject to full copyright liability, while operations in the "gray" area would be subject to a compulsory license arrangement.

The Kastenmeier proposal considers the "white" area as the normal coverage area of the station's signals picked up by the CATV operator. Thus where a CATV system picks up Minneapolis signals and transmits them to Minneapolis subscribers, the copyright owner is not damaged because he has already authorized a broadcast in Minneapolis and no liability attaches to the CATV system.

In contrast, the CATV system operating in the "black" area is transmitting signals out of the normal coverage area of the authorized broadcasting station into an area not yet exposed to the program. There the copyright owner does lose a potential market and the revised statute adopting the Kastenmeier proposals would allow a recovery of damages.[146] To lessen the difficulty of the CATV operator's obtaining advance clearances, however, the copyright owner must give advance notice before the "black" area transmission becomes fully actionable. A failure to give advance notice would result in making the transmission merely subject to a reasonable license fee.

Under the proposals, a "gray" area results when no direct

144. See, § 111, "Limitations on Exclusive Rights: Secondary Transmission," H.R. 2512, 90th Cong. 1st Sess., introduced on January 17, 1967, by the Chairman of the House Judiciary Committee, Representative Emanuel Celler. On January 23, 1967, Senator John L. McClellan introduced an identical bill, S. 597, in the Senate. Section 111, dealing with CATV systems, was deleated from H.R. 2512 on the floor of the House for further study by the Committees on Interstate and Foreign Commerce and on the Judiciary. See 113 Cong. Rec. H3624-28, H3643-47 (daily ed. April 6, 1967), H3857-59 (daily ed. April 11, 1967).

145. *Hearings, supra* note 4, at 4-6. The relevant provisions are explained in H.R. Rep. No. 83, 90th Cong., 1st Sess. 48-59.

146. H.R. 2512 § 111(b), 90th Cong., 1st Sess. 1967).

destruction of an existing market would result from the transmission, but there is a possibility of indirect damage and an uncompensated "free ride." Two types of "gray" area are involved. The first is where the broadcaster's signals are imported into an unserved area, and the second is where the area does have existing service by an authorized broadcaster carrying the same program. The operator's liability in the absence of agreement would be limited to a reasonable license fee as fixed by a court. The court would also be given authority to triple the fee, or alternatively, reduce the fee, if there was an apparent failure to bargain in good faith.

The Kastenmeier proposals have not been without their critics. They note that the proposals still do not give the television station exclusivity against the CATV systems. Moreover, the CATV system is forced to stake its future on negotiations with vindictive copyright owners and a court battle could result in each instance over what is a "reasonable" fee in the "gray" area.[147] The proposals, while complex and cumbersome, do appear to represent a careful balancing of the factors pointed out earlier. It is submitted, nevertheless, that rather than force the parties to seek the aid of a court in determining a "reasonable" fee, the alternative of an administrative board to decide this issue would be more efficient. This alternative is particularly attractive in view of the highly technical and involved evidence necessary to the determination. Moreover, such a board would, hopefully, acquire sufficient expertise in weighing the impact of CATV on various markets so that their decision would most accurately represent a "reasonable" license fee. Such centralized decision-making would also eliminate the inevitable forum shopping resulting from conflicting opinions in different jurisdictions over what constitutes a "reasonable" license fee.

CONCLUSIONS

The rapidly growing and richly rewarding[148] CATV business has sparked considerable argument as to whether CATV operations should be exempted from copyright infringement liability. The proponents of such exemption summarize their arguments by noting first, that home viewers are entitled to free reception and CATV simply enables them to improve that reception. Charging the CATV system for copyrights would be a charge on home reception and in fact would discriminate against those subscribers who must depend on CATV for reception. Second, since the CATV operator has no way of controlling the content of his broadcasts and often

147. Woodard, *Community Antenna Television*, 10 IDEA 159, 161 (1966).
148. "What is it that towers hundreds of feet into the air, mints money, and sells what television stations give away free?" Business Week, May 1, 1965, p. 30.

does not know in advance what his cable will carry, and since the establishment of a clearing house to obtain advance clearance would be most difficult, a giant monopoly of copyright owners would result. Third, since the royalties paid by the broadcasters take into consideration the total potential audience, including CATV subscribers, the copyright owners would be paid twice if allowed to charge CATV operators.

The opponents of CATV copyright exemption point out first that the CATV system is not a "passive device" but is a complex communication system operating like a television station transmitting telelvision programs to the public. Unlike the station, however, the CATV system not only receives its program material free, but is allowed to charge the public for its reception. Second, CATV operations result in loss of control and exclusivity of the copyright owners' work and deprive them of substantial markets. Third, the prosperity of the CATV systems is inconsistent with their insistence on the need for a "free ride;" their activities constitute a "clear moral wrong" by making money at the considerable expense of the copyright owners.[149]

At least one court decision has resolved the debate adversely to the CATV systems,[150] while the bills introduced in the 90th Congress for a general revision of the Copyright Law offer a more comprehensive solution. The remaining area for debate is the proper balancing of the interests between the public, the copyright owners, the CATV systems, and the telelvision stations. The Kastenmeier proposals, while complex, commendably accomplish a delicate balance of all the competing factors, although it is submitted herein that this is an area where an administrative decision-maker could be utilized to add some efficiency to the procedure adopted by the proposals.

APPENDIX

Since the completion of this article, the United States Court of Appeals for the Second Circuit has affirmed Judge Herland's decision in the *Fortnightly* case.[151] The second circuit placed substantial reliance on the *Buck v. Jewell-LaSalle* case and the SESAC case in phrasing the test of the CATV's copyright liability to be "how much did the defendant do to bring about the viewing and hearing of a copyrighted work?"[152] Concluding that the defendant

149. REGISTER OF COPYRIGHTS, 6 COPYRIGHT LAW REVISION SUPPLEMENTARY REPORT 42 (1965).
150. United Artists Television, Inc. v. Fortnightly Corp., 255 F. Supp. 177 (S.D.N.Y. 1966).
151. United Artists Television, Inc. v. Fortnightly Corp., 377 F.2d 872 (2nd Cir. 1967).
152. *Id.* at 877.

CATV's operations violated a "fundamental purpose" of the Copyright Act by diluting the market of the copyright proprietors, the court found that the "result" of CATV operations did constitute a performance within the meaning of the Copyright Act.[153] As suggested earlier in this article, basing CATV copyright liability on technological grounds is tenuous and the court wisely declined to base its decision on those grounds but based its holding instead on the broader economic realities noted in this article.

The second circuit also affirmed the lower court holding that no implied license in law should be granted to CATV systems to broadcast copyrighted works. In this regard, the court noted that, "it would seem self-evident that a copyright proprietor must be allowed substantial freedom to limit licenses to perform his work in public to defined periods and areas or audiences; and his right to do so has apparently never been seriously challenged."[154] The court recognized the difficulties of obtaining licenses for CATV transmission, but felt that these considerations did not justify an implied-in-law license. This decision apparently leaves open the question of implied-in-law licenses where the copyright owner's contract with the broadcasting station does not expressly exclude retransmission over CATV systems or limit transmission to the licensee's transmitter. The court also agreed that the FCC policies in regard to CATV in no way limit the applicability of the Copyright Act to CATV systems.

Finally, while the court agreed that the copyright problems of CATV systems raise fundamental problems of public policy which can only be resolved by legislative determination, the court felt bound to decide the issue of whether CATV operations are proscribed by the present Copyright Act in the affirmative.[155]

153. *Id.* at 878, 879-80 n.9.
154. *Id.* at 882.
155. *Id.* 884-5.