The FCC Syndicated Exclusivity Rule and Alternatives to Nonduplication Protection

The Federal Communications Commission's repeal of the Syndicated Exclusivity Rule, urged as a step in favor of a free market, has instead created economic inequities between cable television operators and conventional television broadcasters. Although repeal will cause minimal audience diversion from conventional to cable television, it will result in a decline in the supply of syndicated programs and a lessening of program diversity. Repeal will also subject program producers to the inequities of the compulsory copyright license, discouraging production of merit programming and indirectly diminishing entertainer rents. Although compulsory license fees to broadcasters, full copyright liability, and retransmission consent would all eliminate the disadvantages of repeal while preserving the free market advantages, only retransmission consent is within the Commission's "reasonably ancillary" jurisdiction over cable television. Retransmission consent therefore is the best alternative to support repeal of the Rule.

INTRODUCTION

On September 11, 1980,[1] the Federal Communications Commission (FCC) announced its decision to repeal the Syndicated Exclusivity Rule (the Rule).[2] The FCC had been considering repeal of the Rule along with other limitations on cable television since 1976.[3] Attacked by cable producers as restrictive of fair competition,[4] the Rule had become increasingly disfavored among the commissioners themselves.[5]

---

[1] 45 Fed. Reg. 60,186 (1980).

[2] Former 47 C.F.R. §§ 76.151-76.161 (repealed 1980).

[3] *See Notice of Inquiry in Docket 20988*, 61 F.C.C.2d 746 (1976).

[4] *See* notes 68-93 and accompanying text *infra*.

[5] FCC chairman Charles D. Ferris referred to impending repeal as a "watershed," citing the intent of the FCC to move toward a zero-based analysis of all regulatory programming. Separate Statement of Commissioner Charles D. Ferris, *Report in Docket 20988 (Syndicated Exclusivity Report)*, 71 F.C.C.2d 951, 1055 (1979).

HeinOnline -- 15 U.C. Davis L. Rev. 189 1981-1982

Reaction to the Commission's 4-3 decision[6] was swift and sharply divided. Cable owners praised the Commission's action.[7] Local producers and broadcasters remained dubious about the benefits of repeal.[8]

Repeal of the Rule has raised a number of complex and economic and legal issues. A case recently decided by the Second Circuit[9] upheld the FCC's power to repeal the Rule under the "reasonably ancillary" standard of the FCC's cable jurisdiction,[10] but its holding left the jurisdictional contours unclear. Moreover, unless the FCC supplements repeal of the Rule with alternative provisions, the public may experience a decrease in both long-term program supply and diversity.[11] Finally, repeal of the Rule given the limited protection afforded by current copyright law raises serious questions regarding the adequacy of producer and entertainer compensation.[12]

This comment examines these issues and concludes that the most practical solution is a provision for retransmission consent.[13] Without this sort of supportive mechanism, the FCC's repeal of the Rule will only perpetuate the very inequities which the Commission has sought to eliminate.

---

[6] *Report and Order in Dockets 20988 and 21284,* 79 F.C.C.2d 663 (1980), [hereinafter cited as *Deletion Order*].

[7] The president of the National Cable Television Association (NCTA), an organization which had been lobbying the FCC for repeal since early in 1972, maintained that the consumer was the ultimate victor. He proclaimed that "[c]able systems will finally provide the most service to the most consumers in the best possible way." Cremer, *The Cable War Has Moved Directly Into the U.S. Courts*, San Francisco Examiner-Chronicle Datebook, Sept. 7, 1980, at 34.

[8] Vincent Wasilewski, president of the National Association of Broadcasters (NAB), contended that rather than having liberated marketplace forces, the FCC had only discouraged true marketplace interaction. He pointed out that cable does not pay market prices for its programming: "There is no marketplace as long as neither the creator nor the buyer of a program has control over its use." *Id.*

[9] Malrite Televison of New York, Inc. v. F.C.C., 652 F.2d 1140 (2d Cir. 1981). *See* notes 232-241 and accompanying text *infra*.

[10] *See* notes 232-241 and accompanying text *infra*.

[11] *See* notes 94-117 and accompanying text *infra*.

[12] *See* notes 141-154 and accompanying text *infra*.

[13] "Retransmission consent" describes a scheme which specifies that cable operators must obtain the consent of the local broadcaster to rebroadcast that broadcaster's signal. *See* notes 206-270 and accompanying text *infra*.

HeinOnline -- 15 U.C. Davis L. Rev. 190 1981-1982

I. Early Cable Carriage Regulation[14]

As early as 1965, the FCC was aware of the need to regulate the growing cable television industry.[15] The FCC was particularly concerned that basic cable's ability to carry distant competing signals[16] might constitute unfair or unequal competition with local broadcasters.[17]

In response to these concerns, the FCC enacted a series of regulations that initially prohibited competing distant signal carriage within fifteen days before and after local exhibition.[18] The FCC modified[19] those regulations the next year by reducing the blackout period to same-day protection.[20] At the same time, the FCC limited the effect of the exclusivity provisions to the top 100 television markets.[21] It also allowed a cable operator to escape the blackout restrictions entirely if that operator could

---

[14] For a more general overview of early cable industry regulation from a property-rights perspective, *see* Note, *Regulatory versus Property Rights Solutions for the Cable Television Problem,* 69 Calif. L. Rev. 527 (1981).

[15] *See, e.g., First Report and Order in Dockets 14895 and 15233,* 38 F.C.C. 683 (1965).

[16] A "distant competing signal" is loosely defined as a signal that could not ordinarily be received clearly through conventional over-the-air transmission. Basic cable was designed in part to circumvent reception difficulty by carrying the signal via a direct cable linkup from a more powerful receiving source (often a community antenna, hence the acronym CATV — Community Antenna Television) to the cable subscriber. In the early days of cable development, cable operators paid only a nominal licensing fee for an unlimited privilege of carrying these signals. Local broadcasters who were unable to match the clarity of the cable signal paid market prices for programs, only to have cable rebroadcast the same programs without similar payment.

Then, as now, basic cable did not originate programming of its own. Recent developments in cable technology have enabled cable operators to originate programming, primarily feature films, sporting events, and specialized news coverage, for additional fees beyond the license fees. Operators purchase these program packages at market prices; the cable subscriber is then charged a fee, usually on a show-by-show basis, but sometimes on a monthly basis, for the privilege of viewing the programs. *See Deletion Order, supra* note 6, at 668 n.17. This pay cable (feevee) arrangement is not within the scope of this comment.

[17] *First Report and Order in Dockets 14895 and 15233, supra* note 15, at 703-06.

[18] Former 47 C.F.R. §§ 21.712, 91.559 (repealed 1966).

[19] *Second Report and Order in Dockets 14895, 15233, and 15971,* 2 F.C.C.2d 725 (1966).

[20] Former 47 C.F.R. § 71.1103 (repealed 1972).

[21] *Id. See* note 76 *infra.*

HeinOnline -- 15 U.C. Davis L. Rev. 191 1981-1982

show in an evidentiary hearing that "such operation would be consistent with the public interest."[22]

Despite cable's appeal to the consumer who suffered from weak or distorted conventional television signals,[23] concern that rebroadcast could engender liability for copyright infringement initially hampered industry growth.[24] The Supreme Court removed part of this concern with its 1968 decision in *Fortnightly Corp. v. United Artists Television, Inc.*[25] The Court, which viewed cable rebroadcast as analogous to a "boosting" rather than a "performance" of programming,[26] held that rebroadcasts were not copyright infringements within the meaning of the then-existing Copyright Act.[27]

With the rapid growth of cable following *Fortnightly*,[28] the inefficiency of the FCC's case-by-case procedure quickly became apparent.[29] Finally, after detailed administrative proceedings,[30]

---

[22] Former 47 C.F.R. § 74.1109 (repealed 1972). This procedure required a station seeking an evidentiary hearing to file a petition with the FCC along with supporting affidavits stating grounds for its petition. Interested parties were given a "short time," usually thirty days, to file comments and reply comments with the Commission, which also had the authority to order oral arguments or submission of additional evidence from any party. The Commission would then make a final ruling on the merits, which was appealable only to the Federal Courts of Appeal. *See Second Report and Order in Dockets 14895, 15233, and 15971, supra* note 19, at 782.

[23] *Report in Docket 21284 (Economic Inquiry Report),* 71 F.C.C.2d 632, 662 (1979).

[24] *Notice of Proposed Rulemaking in Dockets 20988 and 21284,* 71 F.C.C.2d 1004, 1014 (1979).

[25] 392 U.S. 390 (1968) (copyright infringement action against cable owner for unlicensed rebroadcast of local signals).

[26] *Id.* at 399-401.

[27] *Id.* at 395. The 1909 Copyright Act never expressly defined "infringement." Rather, the Act detailed a series of "exclusive rights" that attached to copyrighted works. If any party but the holder of those rights used a work in one of the ways enumerated in the statute, that use constituted an infringement. "Performance" is one of the enumerated uses in the statute. Former 17 U.S.C. § 1(c) (repealed 1976).

[28] *Notice of Proposed Rulemaking in Dockets 20988 and 21284, supra* note 24, at 1013.

[29] Of the 95 cases involving cable rebroadcast scheduled for hearing under the 1966 *Order,* nearly all were still in litigation in December of 1968. *Economic Inquiry Report, supra* note 23, at 650 n.48. Regarding the contention that the cable industry suffered a growth "freeze" in direct response to cumbersome hearing process, *see id.* at 651 n.50.

[30] *Notice of Proposed Rulemaking in Docket 18397,* 15 F.C.C.2d 417 (1968);

HeinOnline -- 15 U.C. Davis L. Rev. 192 1981-1982

the FCC issued comprehensive regulations for the cable industry.[31] Among them was the Syndicated Exclusivity Rule, which prohibited any cable operator from carrying a syndicated program in the top 100 major television markets for a period of one year following the local sale or licensing of the program.[32] In 1977, the FCC amended the Rule to exempt cable systems having fewer than 1,000 subscribers.[33] With that exception, the Rule remained unchanged until its repeal in 1980.

The FCC designed the Rule to protect local broadcasters from the loss of revenue which might result from competing cable rebroadcasts of the same syndicated program.[34] Since cable did not pay royalties for programs as did local broadcasters, the FCC reasoned that cable "stood on an unequal footing" and should be restricted from interfering with the development of conventional over-the-air televison, especially the relatively infant UHF industry.[35] The FCC recognized that the Rule was a compromise between cable and conventional interests, and it reserved the option to change its mind if the market picture changed.[36]

A dilemma in the copyright law which *Fortnightly* had raised overshadowed the Commission's uncertainty over future economic events.[37] Since the Rule entitled local broadcasters to exclusivity, program producers used the threat of exclusivity to demand that cable operators pay them not to sell to local broadcasters. In effect, this bargaining tool served as a virtual

---

Second Further Notice of Proposed Rulemaking in Docket 18397-A, 24 F.C.C.2d 580 (1970); *Cable Television Proposals*, 31 F.C.C.2d 115 (1971). *See* 47 C.F.R. §§ 1.399-1.430 (1980) (administrative procedures including notices and hearings mandatory when new regulation proposed).

[31] *Cable Television Report and Order*, 36 F.C.C.2d 143 (1972). The FCC adopted similar provisions for network broadcasts. 47 C.F.R. §§ 76.92-76.99 (1980).

[32] Former 47 C.F.R. §§ 76.151-76.161 (repealed 1980).

[33] Former 47 C.F.R. § 76.161 (repealed 1980), promulgated 42 Fed. Reg. 19,347 (1980).

[34] *Cable Television Report and Order, supra* note 31, at 164.

[35] Cable owners did not protest, partly because the Commission had included them in its deliberations. *OTP Consensus Agreement, reprinted as* Appendix D of the *Cable Television Report and Order, supra* note 31, at 284. *See* note 178 *infra*.

[36] *Cable Television Report and Order, supra* note 31, at 167.

[37] *See, e.g., id.*

HeinOnline -- 15 U.C. Davis L. Rev. 193 1981-1982

copyright privilege. The 1909 Copyright Act[38] did not address whether a cable broadcast of programs was in fact copyrightable. *Fortnightly* seemed to indicate that a cable rebroadcast was not a "performance" within the meaning of the Act and therefore did not subject the cable owner to liability for copyright infringement.[39] A cable owner could argue that the *Fortnightly* decision meant that program producers could no longer use exclusivity as a bargaining tool despite the regulation purporting to give them that power.

The stumbling block in this argument was that *Fortnightly* had involved a signal which was already being broadcast within the community via conventional over-the-air methods.[40] In reality, most cable operators were importing distant signals.[41] Since *Fortnightly* was decided on the basis that rebroadcast of local signals was no different from the kinds of "boosting" and clarification that an ordinary television receiver performed,[42] program producers could draw a factual distinction: no television receiver is capable of "boosting" distant signals in the way that cable does, and therefore rebroadcasting of distant signals did not fall within the *Fortnightly* rule.

Two years after *Fortnightly*, the Supreme Court declined to draw this factual distinction. In *TelePrompTer Corp. v. Columbia Broadcasting System, Inc.*,[43] the Court reaffirmed its earlier holding that the Copyright Act of 1909[44] did not give copyright owners the right to charge royalties for cable dissemination of their works.[45] In addition, the Court refused to distinguish between local and distant signals, thus making its holding applicable to all cable carriage.[46] The Court recognized that its decision had created an anomaly. While the Syndicated Exclusivity Rule

---

[38] Former 17 U.S.C. §§ 1-216 (repealed 1976).

[39] Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 395 (1968).

[40] *Id.* at 392.

[41] *Notice of Proposed Rulemaking in Dockets 20988 and 21284, supra* note 24, at 1015.

[42] Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 399 (1968).

[43] 415 U.S. 394 (1974) (copyright infringement action against cable owner for unlicensed rebroadcast of distant signals).

[44] Former 17 U.S.C. §§ 1-216 (repealed 1976).

[45] TelePrompTer Corp. v. Columbia Broadcasting Sys., Inc., 415 U.S. 394, 411-12 (1974).

[46] *Id.* at 409.

HeinOnline -- 15 U.C. Davis L. Rev. 194 1981-1982

apparently gave program producers the right to negotiate with cable operators, *TelePrompTer* effectively rendered these negotiations useless, since cable operators could now simply "steal" the broadcast without incurring liability.[47] Nevertheless, the Court refused to amend either the Rule or the 1909 Act judicially, noting that Congress would have to resolve the contradiction.[48]

Two years later, Congress responded by enacting a new Copyright Law.[49] Among other provisions, the new law imposed a compulsory copyright license on cable operators.[50] Instead of negotiating individual agreements with producers, cable operators must now pay a standard licensing fee to a Congressional Copyright Royalty Tribunal for the right to rebroadcast.[51] The Tribunal then distributes the revenues to program producers in lieu of a royalty payment.[52] In addition, the new Copyright Law granted the Tribunal the authority to arbitrate disputes over fee assessments and to adjust the schedule of license fees in the event of further market changes.[53]

---

[47] *Id.* at 414.

[48] *Id.*

[49] 17 U.S.C. §§ 101-810 (Supp. III 1979).

[50] 17 U.S.C. § 111(d) (Supp. III 1979).

[51] Under the Act, cable broadcasters pay a standard percentage based upon their gross subscriber revenues. A cable operator with semiannual revenues of $107,000 or more pays .817% of these revenues for the first "distant signal equivalent" (dse) carried; .514% more is assessed for the second, third, and fourth dse, and .247% for each additional dse carried. 46 Fed. Reg. 892, 897 (1981) (to be codified in 37 C.F.R. § 308).

A dse is defined as the "value assigned to secondary transmission of any non-network television program carried by a cable system in whole or in part beyond the local service area of the primary transmitter of such programming." 17 U.S.C. § 111(f) (Supp. III 1979). Practically, these values are computed by assigning a value of 1 to each independent station carrying the signal plus a value of ¼ for each network or noncommercial educational station carrying the signal. If, however, a station has substituted a local non-live program for the syndicated program, no dse value is computed for that station. If the substituted program is live, the value assigned is 1 prorated for the period of the substitution. Proration also occurs for stations which broadcast only part of the broadcast day. Cable systems with revenues of less than $107,000 pay lower fees. *Id.* This comment assumes all cable systems pay the maximum fees; any argument that these fees are below market price should apply *a fortiori* to smaller systems paying the lower fees.

[52] 17 U.S.C. § 111 (Supp. III 1979).

[53] 17 U.S.C. § 801 (Supp. III 1979).

HeinOnline -- 15 U.C. Davis L. Rev. 195 1981-1982

The imposition of the compulsory license fee raised questions regarding the need for the Rule. Its opponents contended that compulsory license fees would adequately compensate program producers for the reduced revenue received from local broadcasters due to advertising losses resulting from competing rebroadcasts.[54] Programmers, on the other hand, argued that the Rule should be retained to compensate for the discrepancy[55] between the prices paid by local broadcasters for syndicated programs and the statutorily governed license fees.[56]

After issuing a *Notice of Inquiry* in 1978,[57] the Commission combined extensive data submitted by industry sources with its own commissioned study to produce a *Notice of Proposed Rulemaking*[58] that proposed elimination of the Rule.[59] On July 22, 1980, the proposed changes became final, repealing the Syndicated Exclusivity Rule.[60]

---

[54] *See, e.g.*, Comments of Community Antenna Television Association (CATA), *abstracted in* the *Deletion Order, supra* note 6, at 784.

[55] *See* notes 124-126 and accompanying text *infra.*

[56] *See, e.g.*, Comments of National Telecommunications and Information Administration (NTIA), *abstracted in Notice of Proposed Rulemaking in Dockets 20988 and 21284, supra* note 24, at 1028.

[57] *See* note 3 *supra.*

[58] *See* note 24 *supra.*

[59] *Id.* The FCC also announced its refusal to consider other rules changes, among them retransmission consent. *See* notes 206-270 and accompanying text *infra.*

[60] *Deletion Order, supra* note 6. This final action also eliminated the distant signal limitations, which had prescribed the number of distant signals that a cable system could carry. Former 47 C.F.R. §§ 76.5-76.7, 76.57, 76.59, 76.61 (amended 1980); 76.63 (repealed 1980); 76.65 (amended 1980). *See* note 16 *supra.*

In a last-ditch effort to persuade the FCC to delay repeal, the National Association of Broadcasters and other interests filed a petition in late November of 1980 alleging they would suffer irreparable economic injury if the FCC did not delay its decision in order to give broadcasters a chance to adjust to deregulation. The FCC denied the petition. *Memorandum Opinion and Order in Dockets 20988 and 21284,* 81 F.C.C.2d 395 (1980).

Subsequently, however, the clerk of the U.S. Court of Appeals for the Second Circuit requested that the FCC grant the stay because of pending oral arguments in the *Malrite* case. Malrite Television of New York, Inc. v. F.C.C., 652 F.2d 1140, 1143 (2d Cir. 1981). The FCC then extended the effective date of repeal to Nov. 28, 1980. *Memorandum Order in Dockets 20988 and 21284,* 82 F.C.C.2d 375 (1980).

HeinOnline -- 15 U.C. Davis L. Rev. 196 1981-1982

II. Problems Caused by Repeal

Repeal of the Syndicated Exclusivity Rule, urged by the FCC as a superior marketplace alternative to government intervention,[61] has in reality created serious economic inequities in the marketplace. Critics of the FCC's action contend that repeal restores an unfair competitive advantage to cable operators;[62] discourages production of syndicated programming,[63] especially creative "merit" programming;[64] denies program producers adequate copyright protection;[65] and unfairly depresses entertainer rents.[66] However, only the program supply/diversity and entertainer-rents objections are convincing, although the copyright implications of repeal deserve consideration as a collateral issue.

A. *Repeal Creates Unfair Competition.*[67]

Although the Rule's primary purpose was protection of program suppliers,[68] the FCC acknowledges that aiding local broadcasters was an important additional goal.[69] Earlier, the FCC had expressed concern that local broadcasters could be hurt if cable could import distant competing signals into fringe areas where the local signal was weak or distorted.[70] Local broadcasters would lose audience shares if consumers in these areas chose the clearer cable signal over the local signal.[71] Since advertisers compensate broadcasters based on the predicted local audience share, the FCC feared that the drop in local audience shares would trigger a corresponding decrease in advertising revenue

---

[61] *Notice of Proposed Rulemaking in Dockets 20988 and 21284, supra* note 24, at 1033.

[62] *See* notes 67-93 and accompanying text *infra.*

[63] *See* notes 94-109 and accompanying text *infra.*

[64] *See* notes 110-117 and accompanying text *infra.*

[65] *See* notes 118-140 and accompanying text *infra.*

[66] *See* notes 141-154 and accompanying text *infra.*

[67] "Unfair competition" as used in this comment does not include antitrust issues. Exclusivity has never been held to be a *per se* violation of the antitrust laws. *See, e.g.*, Home Box Office, Inc. v. F.C.C., 587 F.2d 1248, 1253 (D.C. Cir. 1978) (feevee exclusivity not an illegal trust, *citing* U.S. Const. art I, § 8, cl. 8). *See generally* United States v. Paramount Pictures, Inc., 66 F. Supp. 323 (S.D.N.Y. 1946), *modified* 334 U.S. 131 (1948).

[68] *Deletion Order, supra* note 6, at 748.

[69] *Id.* at 751.

[70] *Id.* at 682.

[71] *Id.*

HeinOnline -- 15 U.C. Davis L. Rev. 197 1981-1982

large enough to threaten the economic viability of local broadcasters.[72] The Rule theoretically eliminated this threat by blacking out competing rebroadcasts of syndicated programming, forcing the consumer to choose the local signal.[73]

The Rule's actual effects, however, were more limited. Because the Rule contained an extensive grandfathering provision,[74] it never applied in the majority of television markets.[75] Indeed, as of December 1977, only 11% of the major market cable systems[76] were nonexempt.[77]

Grandfathering aside, it is doubtful whether Syndicated Exclusivity ever had much effect on audiences at all.[78] Rolla E. Park of the Rand Corporation prepared one comprehensive au-

---

[72] TELEVISION FACTBOOK 61a (1976). In reality, viewers do not pay directly for locally-broadcast programs. Rather, advertising supplies the revenue, part of which then goes for the purchase of programs. In 1968, a broadcaster in a top market could expect to pay up to $445 per episode for a first-run syndicated series. ARTHUR D. LITTLE, INC., TELEVISION PROGRAM PRODUCTION, PROCUREMENT, DISTRIBUTION AND SCHEDULING (1979). *See Syndicated Exclusivity Report, supra* note 5, at 980. By way of contrast, the Commission reports that a Los Angeles television station had agreed in 1979 to pay $61,500 *per episode* to license the syndicated program *Laverne and Shirley*. The FCC puckishly suggests that this development "may suggest something of the current fortunes of the program production industry." *Id.* at 980 n.67.

[73] *Cable Television Report and Order, supra* note 31, at 169. In this comment, the Rule is treated as uniform in the top-100 markets. In reality, second-50 markets enjoyed slightly relaxed rules; cable operators in these markets were able to escape the Rule if the program in question was a) an off-network program which would terminate its run before the year period; or b) a distant syndicated program which was telecast in prime time *if* the local station did not also telecast it in prime time. The Rule protected first-run syndicated series, first-run non-series programs, and feature films for two years. Former 47 C.F.R. § 76.151(b) (repealed 1980). These distinctions are negligible in the context of the broad policy arguments advanced in this comment.

[74] The provision exempted from the Rule any carrier that was broadcasting local syndicated programming before Mar. 31, 1972. Former 47 C.F.R. § 76.159 (repealed 1980).

[75] *Syndicated Exclusivity Report, supra* note 5, at 964.

[76] A "major market" is defined as "the specified zone of a commercial television station licensed to a community listed in § 76.51 or a combination of such specified zones where more than one community is listed." 47 C.F.R. § 76.5(g) (1980). The FCC determines which communities to list according to viewer data compiled by the American Research Bureau (Arbitron data). *See* 47 C.F.R. § 76.51 (1980).

[77] *Syndicated Exclusivity Report, supra* note 5, at 965.

[78] The FCC estimates that the Rule affected no more than 4.4% of all television households. *Deletion Order, supra* note 6, at 750 n.230.

HeinOnline -- 15 U.C. Davis L. Rev. 198 1981-1982

dience-diversion study which supports this view.[79] Employing a sophisticated statistical analysis,[80] Park estimated that at present cable penetration levels,[81] repeal of *all* existing cable carriage regulations would result in a net audience loss to cable of no more than 5% in any top-100 market.[82] At maximum equilibrium penetration,[83] there would be no more than a 19% audience loss in any top-100 market from repeal of all regulations.[84]

---

[79] Park, *Audience Diversion Due to Cable Television: A Statistical Analysis of New Data, reprinted in* 71 F.C.C.2d 716 (1979). The study appeared first in May of 1979 and was released in a revised version along with the FCC's final action. Park, *Audience Diversion Due to Cable Television: Response to Industry Comments, reprinted as* Appendix B to *Deletion Order, supra* note 6, at 827 [hereinafter cited as Park (revised)].

[80] Park employed the method of generalized least squares to develop projections of consumer behavior from hypothetical audience share models. He postulated an "attractiveness index" for local stations based upon a number of factors including the type of signal carriage (distant, local, UHF, and VHF) and whether the station is subject to nonduplication blackout protection. For purposes of the study, Park assumed that 100% of the loss to local broadcasters was attributable to cable diversion; as a result of this assumption, Park's figures may be overstated. He did not, however, incorporate features such as pay cable into his estimates, but this omission is irrelevant for the purposes of this comment. Park (revised), *supra* note 79, at 831.

[81] Park used the term "near-run" to describe the market at present levels of cable penetration as determined by the FCC's Cable Bureau. *Id.* at 837, 839.

[82] Park derived this loss figure by comparing his diversion estimates in the present market with his projections of potential diversion in a market without the Rule and distant signal limitations, and in a totally deregulated market. Park calculated the loss as a range of values depending on how much increased cable viewing may lead to a net increase in *total* viewing by attracting new viewers to the market. This gain would tend to offset the diversion loss to cable. The figures cited in the text represent the lower end of this range, where increased cable viewing attracts no new viewers to the market. This assumption would also tend to overstate actual losses due to cable. *Id.* at 839.

[83] "Penetration" is defined as the number of households which accept cable service. Penetration may be measured "systemwide" or "marketwide." Systemwide penetration refers to the percentage of households passed by cable that actually accept cable service. Marketwide penetration refers to the percentage of the total number of television households that are cable subscribers. *Deletion Order, supra* note 6, at 684. Penetration levels cited in this comment are at marketwide levels. Park assumes 100% of all television homes will ultimately be passed by cable (maximum equilibrium cable penetration); his figures therefore eliminate the systemwide-marketwide distinction but may tend to overstate the actual case. *See id.* at 749.

[84] Park derived these "long-run" estimates using his own projections of potential cable growth. He derived these projections from an econometric analysis of the supply and demand for cable television. *See* Park, *Prospects for*

HeinOnline -- 15 U.C. Davis L. Rev. 199 1981-1982

Relying on Park's projections, the FCC concludes that repeal of the Rule alone would affect no more than 3%[85] of any top-100 local broadcaster's audience at current cable penetration levels.[86]

Park used projections based upon past patterns of cable growth[87] to predict an audience loss of no more than 13% in any top-50 market and no more than 19% in any second-50 market under the most relaxed cable regulations.[88] Applying the same methodology it used in its near-run analysis, the FCC concluded that repeal of the Rule would ultimately affect no more than 9% of local broadcasters' audience shares in any case.[89] The FCC, noting that it considered these figures "liberal estimates,"[90] concluded that even if the figures do not overstate the potential audience diversion due to repeal, they are not of sufficient magnitude to support an unfair competition argument based on audience diversion.[91]

Cable in the 100 Largest Television Markets, 3 BELL J. ECON. & MANAGEMENT SCI. 130 (1972).

[85] *Deletion Order, supra* note 6, at 753. The FCC uses the fraction of programs subject to blackout protection as a multiplier. Thus if partial deregulation caused a 10% audience loss to cable and the Rule protected 10% of these programs, 1% of that audience loss would be attributed to repeal of exclusivity alone. While this method may be inaccurate, no data exist as to the effect of the Rule alone (since it has always been in effect in conjunction with distant signal limitations), and no authority has challenged the FCC's assumptions. *Syndicated Exclusivity Report, supra* note 5, at 972. The blackout data themselves are derived from R. PARK, EXCLUSIVITY PROVISIONS OF THE FEDERAL COMMUNICATIONS COMMISSION'S CABLE TELEVISION REGULATIONS (1972).

[86] Other authorities agree at least with Park's near-run findings. *See* note 91 *infra*. *But see* Dissenting Statement of Commissioner Robert E. Lee, *Syndicated Exclusivity Report, supra* note 5, at 1058 (charging that "a distinguished group of outside experts aided and abetted by our able staff" produced the data on which the Commission relied).

[87] *See* note 83 *supra*.

[88] Park (revised), *supra* note 79, at 844.

[89] *Deletion Order, supra* note 6, at 753.

[90] The estimates are "liberal" in that they do not incorporate either grandfathering or net viewer increases due to cable attraction. Both factors could reduce diversion. *Syndicated Exclusivity Report, supra* note 5, at 974. The FCC assumes that local broadcasters exercise their rights to exclusivity 100% of the time. *Deletion Order, supra* note 6, at 753.

[91] *Deletion Order, supra* note 6, at 698. The FCC relied on four major studies submitted to it in response to the 1979 *Notice of Proposed Rulemaking*. It characterized the results of each study as broadly consistent. *See* Comments of Natonal Cable Television Association (NCTA) in Docket 21284, *Economic Inquiry Report, supra* note 23, at 674; Schink & Thanawala, *The Impact of*

HeinOnline -- 15 U.C. Davis L. Rev. 200 1981-1982

The audience-diversion argument is not supported by empirical data. Although doubts about long-term cable penetration[92] may make future audience diversion patterns difficult to predict, this particular objection to repeal of the Syndicated Exclusivity Rule is not convincing.[93]

B. *Repeal Discourages Program Supply and Inhibits Program Diversity.*

Programmers also contend that repeal of the Rule will result in a decline in the supply and diversity of syndicated programming. As audiences are diverted to cable, local broadcasters lose advertising revenue and can pay less for programming at every demand level.[94] Further, they may be less willing to pay for syndicated programming which threatens to bring in comparatively lower revenue.[95] In either case, decreased revenue to producers results in a decline in syndicated programming supply at every price level.[96]

Cable Television on Local Station Audiences, id. at 680 [hereinafter cited as NAB-WEFA study]; Reply Comments of Motion Picture Association of America (MPAA) in Docket 21284, *id.* at 677. In his new study, Park attempted to harmonize the results of these and other studies with his own results. Park (revised), *supra* note 79, at 840-63. Both the MPAA and NAB-WEFA hotly dispute Park's conclusion that his results do not contradict theirs. *Deletion Order, supra* note 6, *passim.* The FCC has not been able to duplicate the NAB-WEFA results but notes that the inconsistencies stem from a different statistical model which has no greater validity than Park's. The Commission also termed the MPAA study of limited usefulness since it relies on county geographic boundaries rather than market boundaries, but characterized the MPAA's results as broadly consistent with Park's. *Deletion Order, supra* note 6, at 708. *See also* note 83 *supra*; note 152 *infra.*

[92] *See* note 152 *infra.*

[93] The labor unions agree with these conclusions. *See, e.g.*, Letter from Jack Valenti, MPAA president, to FCC Commissioner Charles D. Ferris, *reprinted in* 22 SCREEN ACTOR 21 (1980). *See also* CBS Television Network Affiliates Ass'n v. F.C.C., 555 F.2d 985, 991 (D.C. Cir. 1977) (Levenberg, J., concurring) (although FCC modification of network nonduplication rules might affect local broadcasters, possibility of grievous injury not shown).

[94] *Syndicated Exclusivity Report, supra* note 5, at 975.

[95] *Deletion Order, supra* note 6, at 759.

[96] *Id.* Exactly how much this loss in revenue is passed on to producers depends on the elasticity of program supply. "Elasticity" refers to the change in price delta-P proportional to the change in unit price P. A perfectly inelastic supply of programming would mean that revenue loss would not affect the quantity but only the price of programs supplied. Conversely, a perfectly elas-

HeinOnline -- 15 U.C. Davis L. Rev. 201 1981-1982

The validity of this argument is unclear, primarily because empirical data is lacking.[97] The FCC concluded that near-run effects of repeal on program supply will be minimal.[98] Repeal's long-run effect on program supply is less certain, however,[99] mainly because the authorities differ in their estimates of equilibrium cable penetration levels.[100] Assuming that the FCC has correctly extrapolated Park's data, the effect of long-run audience diversion on program supply will be minimal.[101]

The primary objection to repeal of the Rule is therefore that program diversity will suffer. The FCC treats television programs as homogenous and hence perfectly interchangeable goods.[102] Because repeal would increase the volume of syndicated programming available by permitting simultaneous transmission of syndicated programs, the FCC argues that cable audiences will have a greater program choice.[103] From the standpoint of program diversity, however, this is an arguably meaningless choice. Since cable does not create its own programs but merely

---

tic supply would result in no change in price from a change in demand for programs, only a change in the quantity supplied. Although the FCC indicates that little empirical data is available from which to judge program supply elasticity, *Syndicated Exclusivity Report, supra* note 5, at 978, one study has concluded that program supply is relatively elastic. *See* B. Owen, J. Beebe, & W. Manning, Television Economics 28-35 (1973).

[97] *Syndicated Exclusivity Report, supra* note 5, at 984. The FCC characterizes this limitation as "not insignificant." *Id.* at 978.

[98] *Id.* at 981.

[99] *Id.* at 982.

[100] *See, e.g.*, Comanor & Mitchell, *Cable Televison and the Impact of Regulation,* 2 Bell J. Econ. & Management Sci. 154, 163 (1971) (estimating ultimate major-market penetration at 59%); Park, *Prospects for Cable Television in the 100 Largest Television Markets, supra* note 84, at 197 (ultimate penetration no more than 35%). The discrepancy may be due to Park's assumption that eventually 100% of all major market homes will be passed by cable. *See* note 83 *supra.*

[101] Besen & Mitchell, *Noll, Park, and McGowan's Economic Aspects of Television Regulation,* 5 Bell J. Econ. & Management Sci. 301, 312-313 (1974). An extensive debate over the supply effects of deregulation including comments, reply comments, and amended reply comments is abstracted at 71 F.C.C.2d 915 (1979). Even the attorneys for the research firms submitted comments. *Id.* at 941. The FCC concluded that there was no compelling demonstration of a detrimental supply effect serious enough to warrant reconsideraton of repeal. *See also* the discussion of the burden of proof, *infra* note 155.

[102] *Syndicated Exclusivity Report, supra* note 5, at 987; *Deletion Order, supra* note 6, at 749-50.

[103] *Syndicated Exclusivity Report, supra* note 5, at 976.

HeinOnline -- 15 U.C. Davis L. Rev. 202 1981-1982

rebroadcasts existing programs,[104] the increase in choice relates solely to when the programs may be seen and not to what programs are available.[105] It has not been determined how valuable this increase in time choice is to the consumer, but some evidence indicates that re-runs benefit only an average of 10% of the total viewing audience.[106]

Repeal of the Rule arguably will actually discourage program diversity. While audience diversion may be minimal,[107] the inadequacy of producer compensation under the current compulsory license[108] will undoubtedly increase pressure for program profitability at the local station level. Thus producers will be less willing to develop innovative programs which could be unprofitable.[109]

This potential dampening effect is especially significant with respect to local public service and merit programming. Conventional industry wisdom holds that this programming is rarely profitable in itself. Rather, it is aired partly to fulfill the FCC's "public trustee" concept of television stations and partly to foster good community relations.[110] While acknowledging the lack of available data,[111] the FCC nonetheless concludes that repeal will have minimal effect on local merit programming.[112] By eval-

---

[104] *See* note 16 *supra*.

[105] Since broadcasters select program broadcast times based on their own particular audience demographics, syndicated programming is rarely broadcast simultaneously. Besen, Manning, & Mitchell, *Copyright Liability for Cable Televison: Compulsory Licensing and the Coase Theorem*, 21 J. L. & ECON. 67, 77 (1978) [hereinafter cited as Besen *et al.*].

[106] *Syndicated Exclusivity Report*, *supra* note 5, at 986 n.83.

[107] *See* notes 81-91 and accompanying text *supra*.

[108] *See* notes 118-133 and accompanying text *infra*.

[109] For a comprehensive discussion of the effects of FCC policies on program diversity, *see* Bakeman, *A Regulatory Approach to Diversifying Commercial Television Entertainment*, 89 YALE L.J. 694 (1980).

[110] *Syndicated Exclusivity Report*, *supra* note 5, at 966 n.31.

[111] The only known study of cable regulation's effects on noncommercial stations appears as Appendix C to the *Deletion Order*, *supra* note 6, at 874. The FCC finds little audience diversion in those markets with maximum cable penetration, including in its example two grandfathered markets. This study is of limited usefulness since noncommercial stations cannot exercise exclusivity rights. Moreover, any spillover effects due to diversion from noncommercial broadcasters appear to be minimal, since these broadcasters receive the bulk of their funding from public donations and federal subsidies. *Deletion Order*, *supra* note 6, at 876 n.11, 879.

[112] *Economic Inquiry Report*, *supra* note 23, at 714.

HeinOnline -- 15 U.C. Davis L. Rev. 203 1981-1982

uating expense data from both six representative stations and its own revenue-loss estimates, the FCC predicts that a typical top-50 market station would lose only five minutes of programming per week.[113] Nevertheless, this loss is significant because public service programming in an average market constitutes a negligible part of the broadcast week.[114] With such a low percentage devoted to merit programming, local audiences can ill afford to lose more.[115]

Thus, the program-diversity argument against repeal has merit. Because programmers are reluctant to be innovative in the face of questionable profitability,[116] and because reduced revenues demonstrably cut local public service programming,[117] some form of rebroadcast protection is clearly warranted.

C. Repeal Deprives Program Producers of Adequate Copyright Protection.

Another central objection to repeal is that the Rule mitigated the effect of the 1976 Copyright Law on producers. Producers contend that the Copyright Law's compulsory-licensing scheme[118] inadequately compensates program owners for dissemination of their works.[119] Since the Rule granted local broadcast-

---

[113] *Id.* at 713. This figure is derived from FCC estimates that these stations would cut back 14 minutes of public service programming for every $1 million lost in revenue. *Id.* at 712.

[114] For example, only two broadcast hours per week, or about 1-2% of the total broadcast week, is devoted to public service spot programming. *Report and Order in BC Docket 78-251,* 81 F.C.C.2d 346 (1980). *Cf.* Crandall, *Regulation of Television Broadcasting: How Costly is the 'Public Interest?',* REGULATION, Jan./Feb. 1978, at 31, 37 (reporting random sample of local broadcasters devoted an average of 13.1 hours in a typical broadcast week to local programming).

[115] Moreover, it is unclear whether the increased time choice will offset the loss in program choice. *See* notes 103-106 and accompanying text *supra.*

[116] *See* note 113 *supra. See generally Report and Order in Docket 19988,* 49 F.C.C.2d 1090 (1974).

[117] *See, e.g.,* Crandall, *supra* note 114, at 37-38.

[118] *See* note 51 *supra.*

[119] In particular, the Screen Actors Guild (SAG) protested that the "mere pittance" offered by cable for rebroadcast was a "blatant inconsistency," alleging that cable's "right legally to take someone else's property without consent or meaningful payment . . . [i]n any other situation . . . would be called stealing." Testimony of Kay Peters, Chairman of Telecommunications Committee, Screen Actors Guild, before House Judiciary Committee, Nov. 20, 1979, *reprinted in* 22 SCREEN ACTOR 22 (1980).

HeinOnline -- 15 U.C. Davis L. Rev. 204 1981-1982

ers a copyright-like exclusivity privilege, producers could negotiate with those broadcasters for full compensation, knowing that cable operators could not lower the price of programs by "stealing" them for rebroadcast.[120]

Critics have attacked the compulsory-licensing system as an inadequate substitute for this copyright-like privilege. Economists Stanley M. Besen, Willard G. Manning, Jr., and Bridger M. Mitchell object to compulsory licensing on two grounds.[121] First, they contend that the fee schedule established by the 1976 Copyright Law[122] does not reflect the realities of the marketplace. Using data supplied by cable producers and local broadcasters,[123] they found that in 1976 cable subscribers paid from 4 cents to 11.7 cents per month for syndicated programming.[124] On the other hand, comparable costs for local broadcasting averaged $2.78 per household.[125] This disparity in cost, they argue, suggests that cable's license fees under the Copyright Law are unrelated to market-determined prices.[126]

Second, Besen and his colleagues argue that the present compulsory-licensing system inefficiently allocates costs of compensating program owners between cable and conventional television. Although the Copyright Royalty Tribunal is authorized to readjust the fee schedule to respond to inflation and regulatory changes,[127] it cannot do so in response to other economic changes, such as economies of scale occasioned by an increase in cable penetration.[128] Moreover, the adjustment procedure itself is cumbersome and time-consuming. For example, the Tribunal may not make any adjustments for general inflation until 1985, and after that, it may adjust only once every five years.[129]

---

[120] *See* notes 38-47 and accompanying text *supra*.

[121] Besen *et al., supra* note 105.

[122] *See* note 51 *supra*.

[123] Besen *et al., supra* note 105, at 68.

[124] *Id.* at 88. These data apply to systems with semiannual revenues of $160,000 or more. *Id.* Since the argument is that compulsory license fees are too low, it should apply *a fortiori* to smaller systems which pay lower fees. *See* note 51 *supra*.

[125] Besen *et al., supra* note 105, at 88.

[126] *Id.*

[127] 17 U.S.C. § 801 (Supp. III 1979).

[128] Besen *et al., supra* note 105, at 91.

[129] 17 U.S.C. § 804(a) (Supp. III 1979). Adjustments in response to FCC rule changes may be made within one year of the change, but are not reviewable for five years thereafter. 17 U.S.C. § 804(b) (Supp. III 1979).

HeinOnline -- 15 U.C. Davis L. Rev. 205 1981-1982

Besen and his associates further criticize both the lack of guidelines for disbursing revenues that the Tribunal currently receives and the absence of a pragmatic way to resolve disputes.[130] Although the Tribunal has the authority to arbitrate disputes over the allocation of compensation among program producers,[131] Congress did not supply criteria for resolving these disputes.[132] The FCC has not suggested appropriate criteria.[133]

Despite these shortcomings of the compulsory-licensing scheme, the FCC has chosen to regard its scope as exclusively within Congressional domain. The Commission twice expressly declined to consider additional copyright protection because of its reluctance to interfere with "Congress' role with matters so fundamental as the allocation of property rights in copyrighted material."[134]

The copyright protection argument against repeal of the Syndicated Exclusivity Rule is thus valid insofar as the Rule somewhat mitigated the inequities caused by compulsory licensing. Repeal exposes copyright owners to a risk of economic loss,[135] since compulsory license fees represent only a fraction of the revenues previously paid by local broadcasters.[136] The inadequacy of revenues argument is also related to the program supply issue. Park's figures predicting a minimal near-run revenue loss to program producers[137] do not address the issue of revenue

---

[130] Besen *et al.*, *supra* note 105, at 92.

[131] 17 U.S.C. § 801(b)(3) (Supp. III 1979).

[132] Besen *et al.*, *supra* note 105, at 92.

[133] "[I]t would be difficult for us to determine the appropriate level of fees." *Deletion Order*, *supra* note 6, at 763.

[134] *Notice of Proposed Rulemaking in Dockets 20988 and 21284*, *supra* note 24, at 1037. *See also* the *Deletion Order*, *supra* note 6.

[135] This argument assumes that broadcasters pass on revenue losses to program producers. How much of these losses actually are passed on depends on the elasticity of program supply. *See* note 96 *supra*.

[136] Besen and his colleagues used 1974 data to try to determine revenue losses and gains caused by audience redistribution. Using the basis of $2.80 per month per household, and assuming that 25% of total revenue goes to suppliers, they concluded that in a typical top-50 market the copyright owner would need to recoup $.35 per month from each subscriber to avoid suffering a loss. However, the 1976 Copyright Law accounts for only $.07 recovery per subscriber, leaving the rest to be recouped through income gains as the cable industry and audience grow. Besen *et al.*, *supra* note 105, at 90. *But see Economic Inquiry Report*, *supra* note 23, at 672 (predicting that cable growth may offset loss).

[137] *See* notes 80-82 and accompanying text *supra*.

HeinOnline -- 15 U.C. Davis L. Rev. 206 1981-1982

loss from sources other than audience diversion.[138] Significantly, the FCC does not address the merits of compulsory licensing,[139] instead relying primarily on a jurisdictional argument.[140] As a policy issue, then, the copyright protection argument against repeal deserves consideration.

D. Repeal Depresses Entertainer Rents.

Both entertainers and program producers also argue that repeal of Syndicated Exclusivity will unfairly depress entertainer rents.[141] Although *Fortnightly* and *TelePrompTer*[142] preclude entertainers from recovering from cable operators for copyright infringement, the 1976 Copyright Law's compulsory-licensing scheme[143] indirectly affects entertainer compensation. Reduced advertising revenues resulting from repeal will to a greater or lesser extent[144] lower producer compensation, resulting in an ultimate decrease in entertainer rents at every demand level.[145] Only 20% of Screen Actors Guild members earn more than $3,500 a year from employment in the television industry.[146] The Guild, television's largest entertainment union, is therefore understandably concerned that without the protection of the Rule,

---

[138] Park, *supra* note 79, at 723. *See* notes 81-83 *supra*.

[139] *Deletion Order, supra* note 6, at 762. The FCC does make a passing reference to the offsetting effects of net income growth. *Economic Inquiry Report, supra* note 23, at 672. *See also* notes 74-76 and accompanying text *supra*.

[140] *See* notes 155-184 and accompanying text *infra*.

[141] *See The Shows Will Go On—Perhaps*, TIME, October 6, 1980, at 86.

[142] TelePrompTer Corp. v. Columbia Broadcasting Sys., Inc., 415 U.S. 394, 411-12 (1974); Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 395 (1968).

[143] *See* note 51 *supra*.

[144] *See* note 96 *supra*.

[145] The FCC is also unsure about factor supply elasticities. *Syndicated Exclusivity Report, supra* note 5, at 978. For a view that the factor supply of entertainment is price elastic and therefore that compulsory licensing, although inequitable, may tend to drive up entertainer rents, *see* R. NOLL, M. PECK, & J. MCGOWAN, ECONOMIC ASPECTS OF TELEVISION REGULATION (1973). *But see* Besen and Mitchell's arguments, *supra* note 119.

[146] Testimony of Kay Peters, *supra* note 119. Rule #1 of the SAG by-laws prohibits members from working for any producer who has not signed the SAG Basic Agreement. The practical effect of this rule forces virtually all television programmers to employ union members, and hence the SAG figures are fairly representative for all television industry entertainers. Indeed, any discrepancy between union and nonunion compensation would tend to reflect *lower* nonunion wages, skewing the overall average figure downward.

HeinOnline -- 15 U.C. Davis L. Rev. 207 1981-1982

the 1976 Copyright Law may indirectly deny union members fair compensation by limiting royalties paid to producers.[147]

Repeal also poses the additional danger that entertainers stand to lose bargaining power with producers. Since the 1976 Copyright Law sets mandatory cable license fees, entertainers will have proportionately fewer chances to negotiate their compensation as the number of locally-transmitted programs which are not simultaneously retransmitted drops.[148] The increase in the number of retransmitted programs, by contrast, will not increase entertainers' opportunity to bargain for compensation.[149] Without some protective mechanism such as the Rule, entertainers may go undercompensated, leading to a conceivable "ripple effect" which could damage existing program quality.[150]

Despite these serious objections to repeal of the Syndicated Exclusivity Rule, the FCC has concluded that the advantages of a freer market outweigh them. The Commission has consistently declined to enact remedial measures[151] that could eliminate the problems caused by repeal while preserving the free market advantages.[152] The Commission has rejected these proposals pri-

---

[147] Testimony of Kay Peters, *supra* note 119.

[148] The Guild admits, however, that its interests are only temporarily aligned with those of program producers, since they would still have to negotiate for a share of any producer's increased compensation. *See Where Are We Now?*, 22 SCREEN ACTOR 29, 30 (1980).

[149] Since television programs are public goods, the revenue loss to entertainers is less a function of audience diversion than of the overall cable retransmission volume. Besen *et al.*, *supra* note 105, at 82-83. A "public good" is one which does not cost more to produce as demand for the good increases. *Id. See generally* Borcherding, *Competition, Exclusion, and the Optimal Supply of Public Goods*, 21 J.L. & ECON. 111 (1978).

[150] SAG Board member Norma Connolly admits that to union members financial concerns are immediate: "We're talking about the bread and butter of every actor . . . There is no forseeable way that actors are going to survive without eating off that plate in the coming years." Connolly, *Home Box Office*, 22 SCREEN ACTOR 23 (1980).

[151] *See* notes 185-270 and accompanying text *infra*.

[152] Two other advantages urged on behalf of repeal are that repeal would encourage growth of the cable industry and would restore distributional equity between UHF and VHF concerns. *See, e.g.*, Comments of National Cable Television Association, Inc. in Docket 21284, not published. A summary of the NCTA position appears in the *Economic Inquiry Report*, *supra* note 23, at 925, 935, 939. The growth-stimulus argument is not convincing, since cable's greatest penetration has been in nonmetropolitan and fringe markets poorly served by traditional transmission. FCC 1977 data showed that roughly 67.1%

HeinOnline -- 15 U.C. Davis L. Rev. 208 1981-1982

marily on the grounds that enacting them is beyond its authority.[153] Since the major industry challenge to repeal is based on a similar ground,[154] the Commission's jurisdiction over cable television warrants closer scrutiny.

---

of the 12.5 million households then subscribing the cable were located in such areas. *Id.* at 662, 665. Since the Rule never applied to these markets, its repeal would not affect them. *See* 47 C.F.R. § 76.92 (1980) (rule applies only in 35-mile radius of major market) & former 47 C.F.R. § 76.151(a) (repealed 1980) (exemption for nonmajor markets). *See also* notes 74-77 and accompanying text *supra.* In fact, cable penetration in the top 100 markets as of 1977 amounted to only 18% of the households with receivers; repeal of the Rule has affected only 6.5% of all television homes and a smaller percentage of cable homes. *Syndicated Exclusivity Report, supra* note 5, at 990. Further, studies have shown that this low penetration was not *attributable* to the Rule. *Economic Inquiry Report, supra* note 23, at 670-71, 672 n.105 (estimating ultimate penetration at no more than 48%); *id.* at 672 (predicting that growth will occur in non-urban markets except for a smaller number of metropolitan dwellers whose conventional signal reception is blocked by skyscrapers, etc.); *id.* at 669 (case study of Baltimore and Cleveland markets concluding that ultimate marketwide penetration will not exceed 15-20%). *See* note 83 *supra.* Although these conclusions do not incorporate the development of pay cable or other incentives which might stimulate urban cable growth, these studies do suggest that repeal of the Rule will not significantly bolster cable growth. *Cf. Syndicated Exclusivity Report, supra* note 5, at 1015 (statistics show cable grew rapidly when feevee technology first developed); *Deletion Order, supra* note 6, at 691 (possible offset of feevee effect as conventional broadcasters duplicate cable technology, *e.g.*, subscription television).

The argument that repeal helps UHF concerns is based on the suggestion that while VHF is carried by many cable systems, small UHF broadcasters are not. Therefore UHF concerns cannot recoup higher revenues available from larger markets. *See* Simon, *A Copyright Approach to Protection of the Local Television Station in the Face of Competition from Cable Television,* 8 PERFORMING ARTS REV. 305, 323 (1978). Simon argues that the only broadcasters who benefited from the Rule were the large major-market VHF concerns. He points out that these concerns are sufficiently strong to absorb any losses repeal might cause. *Id.* at 340, 348-51. Despite the intuitive appeal of this analysis, empirical data do not support it, primarily because of the effect of grandfathering on the Rule. *See* note 30 *supra.* Moreover, since cable penetraton is greatest in nonmetropolitan areas, any significant shift in relative competitive advantage caused by repeal should occur not from large to small markets but from local broadcasters to cable. *Economic Inquiry Report, supra* note 23, at 670.

[153] *Deletion Order, supra* note 6, at 665.

[154] *See* note 9 and accompanying text *supra.*

HeinOnline -- 15 U.C. Davis L. Rev. 209 1981-1982

III. The FCC's Jurisdiction Over Cable[155]

Shortly after the FCC announced its intention to repeal the Rule, Malrite Television of New York, a local broadcaster, filed for a stay in the United States Court of Appeals for the Second Circuit.[156] Malrite asserted that the FCC lacked jurisdiction to repeal the Rule, which was the FCC's own argument against enactment of retransmission consent.[157] In a brief opinion handed down last June, the court upheld the FCC's jurisdiction to repeal the Rule, but held that the Commission was jurisdictionally precluded from enacting retransmission consent.[158] Unfortunately, the opinion fails to fit these conclusions into the framework of "reasonably ancillary" jurisdiction. Indeed, the court's opinion is highly conclusory.[159]

A. *Background.*

Since cable television is a relatively new communications development, the courts have been uncertain regarding the extent of the FCC's jurisdiction over cable. The Supreme Court first addressed the issue in *United States v. Southwestern Cable Co.*[160] In that case, the Court held that the FCC had the authority to regulate cable as part of its "reasonably ancillary" juris-

---

[155] As a preliminary issue, the FCC notes that several parties protested that the Commission unfairly allocated the burden of proof to the interests which sought continued enforcement of the Rule. *Deletion Order, supra* note 6, at 677. The Commission denied that it had done so, citing the Administrative Procedure Act, 5 U.S.C. §§ 101-703 (1976). Section 553 of the Act describes detailed procedures for notice-giving, hearing, and review pursuant to an agency's rulemaking function: "rulemaking" under this section includes repeal of existing regulations. The FCC's conformity with the procedures vested its rulemaking with a presumption of validity. *See, e.g.*, American Tel. & Tel. Co. v. F.C.C., 572 F.2d 17, 21-24 (2d Cir.) (FCC elimination of telephone and telegraph tariffs was not arbitrary where Commission had complied with Administrative Procedures Act and decision was supported by substantial evidence), *cert. denied*, 439 U.S. 875 (1978). *Cf.* Hercules, Inc. v. Environmental Protection Agency, 598 F.2d 91, 117 (D.C. Cir. 1978) (agency did not abuse discretion by promulgating toxic waste regulations since rulemaking is not an "adjudication" requiring adversary hearing).

[156] Malrite Television of New York, Inc. v. F.C.C., 652 F.2d 1140 (2d Cir. 1981).

[157] *Id.* at 1147-48.

[158] *Id.* at 1148.

[159] *See* notes 232-241 and accompanying text *infra*.

[160] 392 U.S. 157 (1968).

HeinOnline -- 15 U.C. Davis L. Rev. 210 1981-1982

diction over matters with a "factual nexus to television broadcasting."[161] However, commentators have criticized the difficulty of applying this standard to concrete factual situations.[162]

The Court began with the premise that the FCC's jurisdiction stems from Congress' power to promote "the public convenience, interest, or necessity" in the area of wire and radio communications.[163] In the Communications Act of 1934 Congress created the FCC and authorized it to promulgate regulations to further that goal.[164]

The structure of the Communications Act makes determining the scope of the FCC's jurisdiction over cable difficult. Title II of the Act regulates broadcasters;[165] Title III regulates common carriers.[166] The Act's drafters did not anticipate the technological development of cable, which possesses characteristics similar to those of both common carriers and broadcasters. As do common carriers, basic cable retransmits previously packaged programs and does not originate programming of its own.[167] Additionally, cable's subscription rates are often statutorily controlled, either by the state or by a local franchising authority.[168] Unlike common carriers, however, cable is free to make many of the same choices broadcasters do. For example, it may choose which programs it will transmit and when it will transmit them.[169]

---

[161] *Id.* at 178.

[162] *See, e.g.*, M. HAMBURG, ALL ABOUT CABLE (1979); Comment, *Community Antenna Television and the Law*, 11 N.C. CENT. L.J. 99 (1979).

[163] United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968); note 169 *infra*.

[164] 47 U.S.C. § 151 (1976). *See* United States v. Southwestern Cable Co., 392 U.S. 157, 178-79 (1968).

[165] 47 U.S.C. §§ 201-224 (1976 & Supp. III 1979).

[166] 47 U.S.C. §§ 301-399 (1976 & Supp. III 1979).

[167] United States v. Southwestern Cable Co., 392 U.S. 157, 161-62 (1968).

[168] Former 47 C.F.R. § 76.31(a)(4) (repealed 1976) required cable franchise to submit subscriber rates to the local franchising authority for approval. No rate changes could be made without "an appropriate proceeding affording due process." In its *Report and Order in Docket 20681*, 69 F.C.C.2d 672 (1976), the FCC repealed this provision. Local authorities now have full discretion in regulating franchising and subscription fees. *See, e.g.*, CAL. GOV'T CODE §§ 53066-53066.1 (West Cum. Supp. 1981).

[169] *See* Note, F.C.C. v. Midwest Video Corp.: *Public Access Teetering on the Tightrope of FCC Jurisdiction Over Cable Television*, 16 IDAHO L. REV. 123, 132 (1979). Note that the Communications Act subjects common carriers to mandatory carriage obligations: "It shall be the duty of every common carrier

HeinOnline -- 15 U.C. Davis L. Rev. 211 1981-1982

The *Southwestern Cable* court avoided deciding how cable should be classified for purposes of the Act by invoking the "umbrella jurisdiction" of section 2(a) of the Act,[170] which specifies that "provisions of [the Act] shall apply to all interstate communications by wire or radio."[171] As a result, the Court held that although cable falls under the general provisions of the Act, it is regulated exclusively neither by Title II nor Title III.[172] However, the Court noted it was not holding that the FCC's jurisdiction over cable was absolute.[173] Rather, the Act limited the FCC's authority to regulate cable by requiring that it show a "reasonably ancillary relationship to *television broadcasting*."[174] Thus although cable is not a broadcaster, it is cable's broadcasting-like functions over which the FCC has jurisdiction.

The *Southwestern Cable* court also hinted that the Commission's responsibility to issue regulations only as the "public convenience, interest, or necessity requires"[175] further restricted the FCC's jurisdiction over cable. In *United States v. Midwest Video Corp.*[176] the Supreme Court confirmed the existence of

---

engaged in interstate or foreign communication by wire or radio to furnish such a communication service upon reasonable request therefor . . . ." 47 U.S.C. § 201(a) (1976).

An additional distinction not before the *Southwestern Cable* court is that while cable operators and broadcasters are both subject to some form of copyright liability, common carriers are not. *See* Besen *et al., supra* note 105, at 67-68.

[170] United States v. Southwestern Cable Co., 392 U.S. 157, 168 (1968).

[171] 47 U.S.C. § 152(a) (1976). *See* F.C.C. v. Pottsville Broadcasting Co. 309 U.S. 134, 137 (1940) ("Congress . . . formulated a unified and comprehensive regulatory system for the [broadcasting] industry.").

[172] United States v. Southwestern Cable Co., 392 U.S. 157, 164, 170 n.29 (1968).

[173] *Id.* at 167 n.4. *See Second Report and Order in Dockets 14895, 15233, and 15971, supra* note 19, at 728-34.

[174] United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968) (emphasis added).

[175] *Id. See* 47 U.S.C. § 303(r) (1976).

[176] 406 U.S. 649 (1972). The case involved the FCC's attempt to encourage public access to cable by requiring cable to originate its own programming in addition to retransmitting packaged programs. *See* former 47 C.F.R. § 76.804 (repealed 1974), promulgated in the *First Report and Order in Docket 18397*, 20 F.C.C.2d 201 (1969). The FCC indicated that it had also regarded encouragement of program diversity as a reason for the origination regulations. *Second Report and Order in Dockets 14895, 15233 and 15971, supra* note 19, at 745.

HeinOnline -- 15 U.C. Davis L. Rev. 212 1981-1982

this second prong of "reasonably ancillary" jurisdiction. The Court noted that the "umbrella" jurisdiction of section 2(a) was only a starting point.[177] The FCC's authority to promulgate any regulation additionally depends upon the FCC's showing of "substantial evidence that it will promote the public interest."[178]

The FCC cable regulations must therefore satisfy a two-prong test of "reasonably ancillary" jurisdiction. First, the regulation must relate to the television broadcasting function of cable. Second, it must be calculated to serve the public interest.[179]

B. *The Test Applied to Repeal of the Rule.*

Under the two-prong *Southwestern Cable/Midwest Video* test, the FCC clearly had jurisdiction to repeal the Syndicated Exclusivity rule. Since the Rule directly restricted cable *broadcasting*, it meets the first prong of the test.[180] Further, although

---

[177] United States v. Midwest Video Corp., 406 U.S. 649, 661 (1972).

[178] *Id.* at 671. Chief Justice Burger, concurring, warned that the authority to issue origination rules "strained the outer limits" of the Commission's jurisdiction. *Id.* at 676. *See also* Geller v. F.C.C., 610 F.2d 973, 978-80 (D.C. Cir. 1979) (FCC abused discretion when relying on *OTP Consensus Agreement* it denied rulemaking petition without evaluating petition's effect on public interest).

[179] The FCC repealed the origination rules shortly after the favorable decision, instead substituting mandatory access rules. *Report and Order in Docket 19988*, 49 F.C.C.2d 1090 (1974) (repeal); *Report and Order in Docket 20508*, 59 F.C.C.2d 294 (1976) (promulgation of access rules). These new regulations required cable owners to provide twenty channels available for programming. Four of these channels were to be dedicated respectively to public broadcasting, educational programming, local government, and leased public access. Other provisions mandated two-way communications capability and dictated specifications for the leased access channels. In the case of the four dedicated channels, the regulations provided that public broadcasting should have a permanent right to free use of the channel. The regulations granted a similar free access to the educational and local government channels for five years. Former 47 C.F.R. §§ 76.252-76.258 (repealed 1980). *See Order in Docket 20508*, 83 F.C.C.2d 147 (1980). Note that under the mandatory origination rules, cable owners could exercise programming discretion, but under the access regulations they could not.

[180] *Compare* F.C.C. v. Midwest Video Corp., 440 U.S. 689 (1979), where the Supreme Court struck down the FCC's access rules, largely on the grounds that access rules pertained to the common carrier function of cable and not to the broadcasting function. The FCC therefore lacked jurisdiction to promulgate the rules. *Id.* at 700, 706. It was not sufficient that the FCC had demonstrated that mandatory access would serve a legitimate public interest. *See Report and Order in Docket 20508*, *supra* note 179, at 296.

HeinOnline -- 15 U.C. Davis L. Rev. 213 1981-1982

there is scholarly disagreement over repeal's cost and benefits,[181] the Commission has attempted a rational balancing and evaluation of policies in arriving at its conclusion that repeal would serve the public interest.[182]

While there are strong policy and jurisdictional arguments to support repeal of the Rule,[183] the issues of program supply and diversity, copyright protection, and compensation for entertainers and producers pose equally serious objections. However, a variety of alternative protective mechanisms would permit the liberal interaction of market forces while eliminating the inequities that repeal has caused. Of these mechanisms, the proposal for retransmission consent[184] is the most effective solution to the economic inequities of repeal and the most appropriate for an exercise of the Commission's jurisdiction.

IV. Alternatives To The Rule

Most proposals for reform of cable television signal carriage regulations have called for eliminating the Syndicated Exclusivity Rule and enacting administrative or legislative schemes which would protect those harmed by repeal.[185] Common suggestions have included variations of the compulsory license, institution of full copyright liability, and retransmission consent. Only the last alternative, however, surmounts the legislative impediments and jurisdictional objections which face the proposals.

A. *Compulsory License Variations.*

Commentator David F. Simon suggests that in addition to the license fees currently paid to program owners under the 1976 Copyright Law, cable should pay license fees to compensate lo-

---

[181] *See* notes 61-154 and accompanying text *supra.*

[182] The courts may not overturn an FCC decision merely because they disagree with its judgment. The sole issue on appeal is whether the Commission exercised a "rational, legislative-type judgment" concerning a matter within its jurisdiction. United States v. Midwest Video Corp., 406 U.S. 649, 674-75 (1972); Home Box Office, Inc. v. F.C.C., 587 F.2d 1248, 1253 (D.C. Cir. 1978).

[183] *See* Malrite Television of New York, Inc. v. F.C.C., 652 F.2d 1140, 1149-52 (2d Cir. 1981). *See also* note 237 *infra.*

[184] *See* notes 206-270 and accompanying text *infra*; note 13 *supra.*

[185] *See, e.g.*, Petition of National Telecommunications and Information Administration (NTIA), *abstracted in Notice of Proposed Rulemaking in Dockets 20988 and 21284, supra* note 24, at 1027.

HeinOnline -- 15 U.C. Davis L. Rev. 214 1981-1982

cal broadcasters.[186] These fees would subsidize local merit and public service programs, and then only to the extent that advertising revenues failed to recoup the costs of producing these programs.[187] Simon argues that subsidies would ease the economic burden on local broadcasters caused by audience diversion to cable.[188] Moreover, subsidies would encourage the production of local merit programming because broadcasters would recover their costs.[189] Finally, Simon argues that cable can afford to pay these larger fees.[190]

Simon's proposal suffers from three weaknesses. First, it is unclear from the proposal how the additional license fees are to be computed. Simon suggests three possible alternatives: an increase in the rates assessed per dse, a flat percentage-of-revenues assessment, or a profit-based fee.[191] He does not, however, discuss the practical implementation of any of these methods, noting only that the choice of formula is a "complex policy issue."[192]

Second, any fee formula would be sluggish and unresponsive to market changes. The current Copyright Law provides that the Copyright Royalty Tribunal may review the compulsory license fee structure only once every five years.[193] Since the success of any alternative to the Rule depends on how well it can adjust to market conditions, this regulatory lag could hamper the effectiveness of Simon's proposal.

---

[186] Simon, *supra* note 152, at 332-33.

[187] *Id.* at 333.

[188] *See* notes 67-93 and accompanying text *supra*.

[189] Simon, *supra* note 152, at 340-43.

[190] *Id.* at 336-38. Simon cites *Hearings on S. 1361 before the Subcomm. on Patent, Trademark, and Copyright of the Senate Comm. on the Judiciary*, 93rd Cong., 1st Sess. 315 (1973), during which cable experts testified that cable could afford to spend up to 13% of its gross revenues on license fees. *Id.* Cable now pays 1% or less. *See* note 51 *supra*. According to the FCC, cable television earned a total of $1.2 million from operations in 1977, $12 million of which it paid to the Register of Copyrights the following year. *Notice of Proposed Rulemaking in Dockets 20988 and 21284*, *supra* note 24, at 1016-17. By contrast, broadcast television in 1977 earned $5.9 billion, discounting for advertising commissions. *Id.* at 1012. $1.4 billion of this sum was paid for program packages alone and $2.8 billion for total production costs. *Id.* at 1018. These figures show that cable pays a proportionately discounted sum to compensate program producers. *Id.* at 1018.

[191] Simon, *supra* note 152, at 339.

[192] *Id.*

[193] 17 U.S.C. § 804(a)(2)(A) (1976).

HeinOnline -- 15 U.C. Davis L. Rev. 215 1981-1982

Third, Simon's proposal must surmount the formidable obstacle of legislative inertia. Simon acknowledges that the Commission could not enact his scheme under its "reasonably ancillary" jurisdiction.[194] However, Congress is unlikely soon to modify the Law again, especially since it spent 21 years crafting the 1976 revision.[195] Moreover, only Congress can expressly authorize additional copyright license fees.[196]

B. *Full Copyright Liability.*

Another alternative support mechanism is full copyright liability, which would require cable operators to negotiate with copyright owners for program use. Under this approach, a market-determined compensation rate would prevail. According to economists Besen, Manning, and Mitchell, this is an efficient method of program reallocation since it would eliminate the artificially low price levels resulting from compulsory-licensing schemes.[197]

Full copyright liability has the advantage of being completely responsive to market forces, and would eliminate both the program supply and inadequacy of entertainer rents objections to repeal.[198] By forcing cable to pay market prices for programming, full liability would eliminate the free-rider problem by merely reallocating revenue sources rather than reducing them. Thus although cable could still divert audiences away from local

---

[194] Simon, *supra* note 152, at 321. Indeed, the compulsory license fee is strictly a copyright and not a broadcasting mechanism. Not only is the compulsory license established under Title 17 of the United States Code (Copyrights), but the drafting committee expressly referred to compulsory licensing as a "copyright license." H.R. REP. No. 1476, 94th Cong., 2d Sess. 89 (1976), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5659, 5704.

[195] H.R. REP. No. 1476, 94th Cong., 2d Sess. 47, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5659, 5660.

[196] *Deletion Order, supra* note 6, at 763. *See* F.C.C. v. Pottsville Broadcasting Co., 309 U.S. 134, 137 (1940).

[197] Besen *et al.* rely on economist Robert Coase's assertion that net supply losses result when property-right reallocation produces negotiation and transaction costs. Besen *et al., supra* note 105, at 79. *See generally* Coase, *The Problem of Social Cost,* 3 J.L. & ECON. 1 (1960). "Transaction costs" are defined as the costs of reaching an agreement among multiple parties. Besen *et al., supra* note 105, at 87 n.53. A recent student comment also advocates full copyright liability. Note, *Regulatory versus Property Rights Solutions for the Cable Television Problem, supra* note 14, at 549-53.

[198] Besen *et al., supra* note 105, at 90.

HeinOnline -- 15 U.C. Davis L. Rev. 216 1981-1982

broadcasters, the cable operators would make up for the lost revenue by paying producers directly.[199]

The FCC objects to full liability on the grounds that it would create initially high transaction costs that would offset any revenue gains. The Commission notes that full liability would require cable operators to negotiate individually for compensation, a concept which Congress seems to have rejected.[200] However, two factors mitigate such transaction costs: the proliferation of standardized contracts within the entertainment industry,[201] and the use of grandfathering clauses to exempt existing exclusivity contracts between cable and networks.[202] Both mechanisms would reduce transaction costs associated with full liability.

Full copyright liability faces a far more serious difficulty. It would require Congress to repeal the compulsory-licensing provisions of the 1976 Copyright Law. Full copyright liability thus faces the same hurdle as the compulsory-licensing alternatives.[203] Moreover, because cable interests will resist full copyright liability,[204] some authorities conclude that Congress will not adopt it in the near future.[205]

---

[199] *Id.* at 90-91. This reallocation would not threaten local broadcasters' economic viability. *See* notes 67-93 and accompanying text *supra*. Some broadcasters may be negatively affected, however. *Economic Inquiry Report, supra* note 23, at 703-11.

[200] *Notice of Proposed Rulemaking in Dockets 20988 and 21284, supra* note 24, at 1032.

[201] These contracts, currently in use for copyright agreements, could conceivably be adapted to cable retransmission without much difficulty, practically eliminating transaction costs after a short period. Besen *et al., supra* note 105, at 87. Initially, of course, these costs would be higher than those of compulsory licensing, which requires no negotiation at all. *Id.*

[202] Grandfathering provisions would allow cable owners to adjust their expense allocatons to meet projected market costs. Grandfathering was used in both the network and former syndicated programming exclusivity provisions. *See* 47 C.F.R. § 76.99 1980); former 47 C.F.R. § 76.159 (repealed 1980).

[203] *See* notes 194-196 and accompanying text *supra*.

[204] *See, e.g.*, comments of cable producers in the *Notice of Proposed Rulemaking in Dockets 20988 and 21284, supra* note 24, at 1032.

[205] Besen *et al., supra* note 105, at 94-95. Besen and his associates also suggest a hybrid system as an alternative to full liability. Under this system, cable would continue to pay the license fee for carriage up to the former distant signal limitations, but would have the option of carrying additional signals at full liability. *Id.* at 94. While this system would protect smaller stations from being bankrupted through excess royalty obligations, it would increase transaction costs for those larger concerns opting for the extra carriage, thereby reduc-

HeinOnline -- 15 U.C. Davis L. Rev. 217 1981-1982

C. Retransmission Consent.

The alternative supported by most entertainers[206] and program producers[207] is retransmission consent. Under this proposal, cable broadcasters must first obtain the consent of the originating broadcaster before they may rebroadcast non-network programs.[208] Market forces would determine the price for consent.[209] As with full copyright liability, retransmission consent would reflect changing market conditions and would protect program supply and entertainer rents.[210] However, this alternative would not pose the same legislative impediments as would full copyright liability.

The FCC has previously considered retransmission consent. Indeed, at one point the Commission regarded retransmission consent as the best solution to the dilemma created by *Fortnightly* and *TelePrompTer*,[211] and instituted formal rulemaking procedures.[212] However, it refrained from promulgating any regulations because of the then-pending Congressional hearings on what became the 1976 Copyright Law.[213] Eventually, Congress enacted the compulsory license.[214] Since then, the FCC has refused to consider several retransmission consent proposals, primarily on jurisdictional grounds.[215]

---

ing revenue-expense inequities among cable broadcasters. The success of this system depends on the relative accuracy of cable growth projections and a multitude of elasticity and tradeoff patterns. Regardless of the economic results, however, the legislative impediment to this proposal remains.

[206] 22 SCREEN ACTOR 29, 29-30 (1980).

[207] *See Deletion Order, supra* note 6, at 779-80.

[208] Because program producers generally negotiate payment for network programs on the presumption they will be shown nationwide, they have arguably already been fully compensated. *Notice of Proposed Rulemaking in Dockets 20988 and 21284, supra* note 24, at 1028 n.70.

[209] *Id.* at 1035.

[210] *Id.* at 1031.

[211] *See* notes 43-48 and accompanying text *supra.*

[212] *Notice of Proposed Rulemaking and Notice of Inquiry in Docket 18937,* 15 F.C.C.2d 417, 432 (1968).

[213] *Deletion Order, supra* note 6, at 771.

[214] 17 U.S.C. § 111(d) (1976). *See* note 51 *supra.*

[215] The latest proposal is backed by the National Telecommunications and Information Administration of the U.S. Dept. of Commerce. Its president is the White House's chief adviser on telecommunications affairs. *Notice of Proposed Rulemaking in Dockets 20988 and 21284, supra* note 24, at 1027-42. The petition recommends adoption of retransmission consent combined with a grandfathering proposal for existing systems. It calls for retention of network

HeinOnline -- 15 U.C. Davis L. Rev. 218 1981-1982

1. Jurisdictional Objections.[216]

As noted above,[217] the cases since *Southwestern Cable*[218] have continued to refine the FCC's jurisdiction over cable. Retransmission consent complicates the contours of "reasonably ancillary" jurisdiction because it is unclear whether retransmission consent sounds in copyright or in communications. The FCC maintains that retransmission consent is a copyright mechanism because it is functionally equivalent to full copyright liability.[219] Thus, the Commission reasons that the Copyright Law preempts the entire issue from its consideration.[220]

It is not clear, however, that retransmission consent constitutes primarily a copyright privilege. Not all dissemination restrictions sound in copyright. For example, the FCC has not as-

---

exclusivity, distant signal limitations, and an extension of the Syndicated Exclusivity Rule to the top 100 markets. The Commission's July decision makes the last two items in the petition moot, but the primary thrust of the petition remains viable.

As of August 27, 1980, three bills had been introduced in Congress proposing retransmission consent. The only legislation to survive without deletion of the concept was H.R. 3333, 96th Cong., 2d Sess. (1980), sponsored by Congressman Lionel Van Deerlin (D-Calif.). The bill died in committee.

Two other bills introduced in this session of Congress, H.R. 3528 (renumbered 3844), 97th Cong., 1st Sess. (1981) and H.R. 3560, 97th Cong., 1st Sess. (1981), both containing retransmission consent proposals, were still in Judiciary Commitee hearings as this issue went to print. Since the Commission has already deregulated cable carriage, swift Congressional action appears unlikely. *See Deletion Order, supra* note 6, at 665, 771, 782, 813.

[216] Some cable interests raised constitutional objections to retransmission consent, arguing that the scheme may infringe on first amendment free speech rights and public access values. *Notice of Proposed Rulemaking in Dockets 20988 and 21284, supra* note 24, at 1032-33. These arguments are without merit. Retransmission consent, like copyright, is in the nature of a time, place, and manner restriction and is not a prior restraint. *See* Home Box Office, Inc. v. F.C.C., 567 F.2d 9, 46-47 (D.C. Cir.) (anti-siphoning rules), *cert. denied* 434 U.S. 829 (1977). *Cf.* Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 386-401 (1969) (fairness doctrine); Home Box Office, Inc. v. F.C.C., 587 F.2d 1248, 1253 (D.C. Cir. 1978) (program exclusivity).

[217] *See* notes 155-179 and accompanying text *supra*.

[218] United States v. Southwestern Cable Co., 392 U.S. 157 (1968).

[219] *Deletion Order, supra* note 6, at 790-91. Although the FCC suggests that NTIA had once characterized the retransmission consent proposal as a copyright concept, in fact this is not the case. Rather, NTIA consistently referred to retransmission consent as a matter of communications policy. *Id.* at 802-03.

[220] *Notice of Proposed Rulemaking in Dockets 20988 and 21284, supra* note 24, at 1036-37.

HeinOnline -- 15 U.C. Davis L. Rev. 219 1981-1982

serted that the 1976 Copyright Law preempted network exclusivity contracts, although these contracts limit program dissemination in order to protect the proprietary interests of program producers.[221] When tested against the two-prong *Southwestern Cable/Midwest Video* test,[222] retransmission consent arguably is within the FCC's "reasonably ancillary" jurisdiction. The Commission concedes that retransmission consent has "considerable theoretical attractiveness" as a policy proposal.[223] One prong of "reasonably ancillary" jurisdiction, a showing of public interest, is thus met.[224]

More difficulty concededly exists with respect to the other prong. The FCC argues that Congress sought a compromise between compensating program producers fully for their works and encouraging cable growth by relieving cable owners of copyright liability.[225] Since Congress had asserted its domain over these issues in the 1976 Copyright Law, the FCC felt precluded from taking further action.[226] The FCC notes that both the United States Department of Justice and a Congressional research group had reached similar conclusions.[227]

Because market conditions have changed since Congress' earlier failure to consider retransmission consent, the FCC's preemption argument is unconvincing.[228] Moreover, Congress' inaction does not set a conclusive precedent. As Justice Harlan stated in *Southwestern Cable*, a legislative decision not to consider a policy "is not dispositive" of that policy.[229] Finally, the FCC has not consistently accorded congressional intent the high

---

[221] *See* 47 C.F.R. § 76.95(d) (1980).

[222] *See* notes 155-179 and accompanying text *supra*.

[223] *Notice of Proposed Rulemaking in Dockets 20988 and 21284, supra* note 24, at 1035.

[224] "It may be that regulation of this nature would prove a preferable and more effective means of achieving fair recognition of the exclusivity contracts of the program marketplace." *Second Report and Order in Dockets 14895, 15233 and 15971, supra* note 19, at 748.

[225] *Deletion Order, supra* note 6, at 798-805.

[226] *Id.* at 812.

[227] *Id.* at 782.

[228] For example, developments such as the superstation, satellite technology, and two-way communication, all of which involve the broadcasting function of cable, were unknown at that time. *See Deletion Order, id.* at 779. *See also* Besen *et al., supra* note 105, at 87, 91-94.

[229] United States v. Southwestern Cable Co., 392 U.S. 157, 170 (1968).

HeinOnline -- 15 U.C. Davis L. Rev. 220 1981-1982

deference that it invokes to buttress its preemption argument.[230] For example, the FCC blatantly ignored a request from Congress to delay repeal of the Syndicated Exclusivity Rule.[231]

The latest case addressing the issues of retransmission consent and repeal of the Rule under the FCC's "reasonably ancillary" jurisdiction is *Malrite Television of New York, Inc. v. F.C.C.*[232] The petitioners in that case were a coalition of local broadcasters and program producers[233] which sought to block the FCC's repeal of the Rule on the ground that the Commission lacked jurisdiction to repeal.[234] The petitioners also sought to compel the FCC to enact a retransmission consent requirement.[235]

The court held that the FCC had jurisdiction to repeal the Rule, but did not have the authority to enact a retransmission consent scheme.[236] Unfortunately, the court's jurisdictional analysis is shaky with respect to its holding concerning repeal of the Rule[237] and fails utterly with respect to retransmission consent.

---

[230] *E.g.*, *Deletion Order*, *supra* note 6, at 807-08.

[231] *Id.* at 680. Ironically, one of the principal authors of that request was Congressman Robert W. Kastenmeier (D-Wis.), chair of the House subcommittee responsible for drafting the 1976 Copyright Law revision. *Id.*

[232] 652 F.2d 1140 (2d Cir. 1981).

[233] The coalition included the petitioner, a local broadcaster; other broadcasting interests; the NAB; the MPAA; professional sports interests; and the ABC and CBS networks. *Id.* at 1142.

[234] *Id.* at 1149.

[235] *Id.* at 1147.

[236] *Id.* at 1148.

[237] The court, instead of explicitly applying the two-prong "reasonably ancillary" jurisdiction, discussed at length the FCC's evidence-gathering and subsequent balancing of repeal's costs and benefits. One prong of "reasonably ancillary" jurisdiction, a showing of public interest, is thus satisfied. *Id.* at 1148-52.

The court was less explicit with respect to the second prong, a factual nexus to broadcasting. Rather, it confused congressional preemption under the 1976 Copyright Act with the required nexus to broadcasting under the 1934 Communications Act. The court noted that section 801 of the 1976 Copyright Law authorized the Copyright Royalty Tribunal to adjust copyright fees in response to FCC rules changes. *Id.* at 1148. The court therefore concluded, "[t]he plain import of § 801 is that the FCC, in its development of *communications* policy, may . . . eliminate the syndicated exclusivity rules, in which event the Tribunal is free to respond with rate increases." *Id.* (emphasis added).

While this conclusion is sound, the analysis underlying it is faulty. The 1976 Copyright Law does not bar repeal of the Rule because the Rule constitutes communications policy, as the court correctly notes. But it is only because the Rule restricts the broadcasting function and not the common carrier function of cable that the FCC had jurisdiction to repeal it. *See* note 180 and accompa-

HeinOnline -- 15 U.C. Davis L. Rev. 221 1981-1982

Instead of following the two-prong analysis of the *Southwestern Cable/Midwest Video* line of cases,[238] the court focused on the free-market effects of retransmission consent.[239] The court also relied on the exclusive authority of the Copyright Royalty Tribunal to set license fees,[240] ignoring the substantive differences between those fees and retransmission consent payments.[241]

Since the *Malrite* court based its decision solely on the grounds of congressional preemption, it did not reach the issue of whether the FCC has the statutory authority to satisfy the factual-nexus-to-broadcasting prong of the jurisdictional test.[242] Although section 325 of the Communications Act of 1934[243] prohibits retransmission of programs by a "broadcasting station" without the express authority of the originating station, the FCC views this section as inapplicable to cable. Cable interests, insists the FCC, are not "broadcasters" within the meaning of section 325.[244] The Commission bases its position on *Fortnightly*,[245] which held that under the former Copyright Act, cable operators were not "broadcasting."[246]

The Commission also contends that it lacks the requisite authority under section 303(g) of the Communications Act to adopt retransmission consent. That section charges the Commission with the duty "generally [to] encourage the larger and more effective use of radio in the public interest."[247]

---

nying text *supra*. Indeed, because common carriers are statutorily restricted from exercising exclusivity rights, the Rule cannot apply to cable's common carrier function. *See* 47 U.S.C. § 201(a) (1976).

[238] *See* notes 160-179 and accompanying text *supra*.

[239] Malrite Television of New York, Inc. v. F.C.C., 652 F.2d 1140, 1148 (2d Cir. 1981). Retransmission consent is the functional equivalent of full copyright liability in the sense that market forces determine program prices in both schemes. *Notice of Proposed Rulemaking in Dockets 20988 and 21284, supra* note 24, at 1035.

[240] Malrite Television of New York, Inc. v. F.C.C., 652 F.2d 1140, 1148 (2d Cir. 1981), *citing* 17 U.S.C. § 801 (Supp. III 1979).

[241] For example, license fees compensate program owners, while retransmission consent fees would compensate local broadcasters. *Deletion Order, supra* note 6, at 800 n.315.

[242] Malrite Television of New York, Inc. v. F.C.C., 652 F.2d 1140, 1148 n.11 (2d Cir. 1981).

[243] 47 U.S.C. § 325 (1976).

[244] *Deletion Order, supra* note 6, at 791-92.

[245] Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968).

[246] *Id.* at 399-401.

[247] 47 U.S.C. § 303(g) (1976). "Radio" as used in the act encompasses televi-

HeinOnline -- 15 U.C. Davis L. Rev. 222 1981-1982

The primary flaw in the FCC's statutory objections is its assertion that cable is not "broadcasting." Cable is neither a pure broadcaster[248] nor a mere common carrier.[249] Therefore, the scope of the FCC's jurisdiction depends on the particular cable function involved.[250] Under retransmission consent, cable operators have full programming discretion.[251] As the first *Midwest Video* decision made clear, this discretion indicates the broadcasting and not the common carrier function of cable.[252]

Section 303(g) also applies to cable because retransmission consent affects the broadcasting functions of cable. Therefore, the Commission does have statutory authority to enact retransmission consent. The measure would thus satisfy the factual-nexus requirement, and therefore fall within the FCC's "reasonably ancillary" jurisdiction.[253]

2. Economic Objections.

Some cable operators fear retransmission consent will allow local broadcasters to jeopardize cable's existence by overwitholding programs.[254] They argue that without a sufficient quantity of programs to offer, cable will collapse. They also argue that cable cannot afford to pay the high market costs of programming.[255]

Both of these objections are unfounded. The FCC could easily enact retransmission consent rules to control unfair overwithold-

---

sion over-the-air transmissions.

[248] Basic cable does not originate programming. *See* note 16 *supra*.

[249] United States v. Southwestern Cable Co., 392 U.S. 157, 170 (1968).

[250] *See* United States v. Midwest Video Corp., 406 U.S. 649, 663 & n.22, 665 & n.23 (1972).

[251] *Notice of Proposed Rulemaking in Dockets 20988 and 21284, supra* note 24, at 1031.

[252] *See* notes 176-178 and accompanying text *supra*.

[253] *Compare* United States v. Midwest Video Corp., 406 U.S. 649, 668-70 (1972) (mandatory origination rules regulate content of programming and are therefore "reasonably ancillary" to television broadcasting) *with* F.C.C. v. Midwest Video Corp., 440 U.S. 689, 700-01 (1979) (mandatory access rules deprive cable owners of discretion, relegating them to common carriers outside of "reasonably ancillary" jurisdiction). The first *Midwest Video* case indicated the *Fortnightly* holding that cable was not a "broadcaster" applied only in the copyright context and did not restrict FCC jurisdiction over cable's broadcasting functions. United States v. Midwest Video Corp., 406 U.S. 649, 663 n.22 (1972).

[254] *Deletion Order, supra* note 6, at 786.

[255] *Id.* at 787.

HeinOnline -- 15 U.C. Davis L. Rev. 223 1981-1982

ing (warehousing) and other potential abuses of the consent privilege.[256] The FCC could also exempt small cable systems from the requirement as it once did from the Rule,[257] thereby protecting them from overly burdensome costs. In addition, while retransmission consent would undoubtedly raise cable's costs, this effect would not necessarily render the proposal inconsistent with broader public interest goals.[258] Moreover, there is no evidence that retransmission consent would economically cripple the cable industry. To the contrary, studies indicate that freer market prices for programs might even benefit the industry by encouraging operating cost efficiency.[259]

Retransmission consent is not, as the FCC insists,[260] inconsistent with the current scheme of compulsory licensing. In fact, while compulsory license fees compensate program producers, retransmission consent payments compensate local broadcasters.[261] Further, there is strong support for the contention that cable can well afford to pay these prices.[262]

Finally, the FCC argues that requiring individual negotiation of retransmission consent agreements would be a costly and inefficient method of controlling producer compensation.[263] Negotiation costs, claims the FCC, more than offset the revenue gain to local broadcasters, resulting in a net revenue loss to program producers. The FCC also uses this argument against full copyright liability.[264] However, the use of standardized contracts

---

[256] *Id.* at 770 n.276.

[257] *See, e.g.*, 47 C.F.R. § 76.95(b) (1980); former 47 C.F.R. § 76.161 (repealed 1980).

[258] We believe the Copyright Revision Act does not bar FCC judgments on communications policy . . . .

> We believe [the] FCC not only has the jurisdiction but the responsibility of establishing and updating policy to deal with new major developments that pose a potential of gross inequities or an ultimate threat to an established, orderly allocations system.

Statement of Commissioners James H. Quello and Abbot Washburn, *Syndicated Exclusivity Report, supra* note 5, at 1059.

[259] Besen *et al., supra* note 105, at 86-87.

[260] *Deletion Order, supra* note 6, at 789-90.

[261] *Id.* at 800 n.315.

[262] *See* Dissenting Statement of Commissioner James H. Quello, *id.* at 893, 895; note 270 *infra.*

[263] *Notice of Proposed Rulemaking in Dockets 20988 and 21284, supra* note 24, at 1032.

[264] *See* Besen *et al., supra* note 105, at 86.

HeinOnline -- 15 U.C. Davis L. Rev. 224 1981-1982

and small systems exemptions could mitigate retransmission consent negotiation costs.[265] Additionally, the FCC can and has used grandfathering to ease the transition to the free market.[266] Finally, temporary market disturbances caused by regulatory changes should not preclude the changes. The FCC has stated it will not always protect parties who may have entered into arrangements based upon assumptions about market conditions when new rules or technology change those conditions.[267]

Finally, private negotiation regularly occurs in the feevee industry, which is not subject to compulsory licensing.[268] The FCC also provides for exclusivity contract negotiations for network programming.[269] These provisions have not adversely affected either the networks, pay television, or cable; indeed, all three industries continue to prosper.[270] Thus it should be clear that private negotiation costs do not pose a threat to cable's viability.

CONCLUSION

The Syndicated Exclusivity Rule was designed to protect the interests of local broadcasters and program producers by limiting cable's right to rebroadcast syndicated programs without paying market prices for them. Repeal of the Rule has threatened the continued availability and diversity of programming and the adequacy of entertainer compensation, both of which relate to the compensation paid to program producers.

---

[265] Besen notes that at the time retransmission consent was first proposed, many local stations bound by previous syndicated agreements could not negotiate individual contracts. However, since no such agreements are presently in force, broadcasters may be more receptive to retransmission consent than they were formerly. Besen *et al.*, *supra* note 105, at 87.

[266] *E.g.*, 47 C.F.R. § 76.91 (1980); former 47 C.F.R. § 76.159 (repealed 1980).

[267] *Syndicated Exclusivity Report, supra* note 5, at 988.

[268] *Deletion Order, supra* note 6, at 772.

[269] 47 C.F.R. § 76.95(d) (1980).

[270] The FCC reports comparative profits in 1977 for the three industries before taxes as follows:

CBS Network	$217.6 million
NBC Network	$146.6 million
ABC Network	$267.4 million
Cable	$133.7 million
Feevee	$85.8 million

All industries increased their profits the following year, although NBC reported a 20% loss, attributing it to program development costs. *Notice of Proposed Rulemaking in Dockets 20988 and 21284, supra* note 24, at 1012 & n.20.

HeinOnline -- 15 U.C. Davis L. Rev. 225 1981-1982

Because the 1976 Copyright Law's compulsory licensing scheme does not adequately reflect marketplace fluctuations, it exacerbates the problems created by repeal of the rule.

Retransmission consent constitutes a pragmatic approach to the problems created by compulsory licensing and repeal of the Rule. Because it is responsive to market changes, retransmission consent meets the needs of both cable and conventional broadcasting interests. Additionally, it need not overcome the legislative barriers which impede such alternative proposals as compulsory license fees to broadcasters and full copyright liability. Unlike these two "pure" copyright restrictions, retransmission consent concerns the broadcasting function of cable and thus is within the FCC's "reasonably ancillary" jurisdiction over cable systems. If the public is to enjoy the benefits to be created by repeal of the Syndicated Exclusivity Rule, retransmission consent or a similar mechanism must compensate for the detriments of repeal.

Jonathan G. Wong

HeinOnline -- 15 U.C. Davis L. Rev. 226 1981-1982