Cable Television and the Compulsory Copyright License

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Fred H. Cate*

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INTRODUCTION

By February 1989, more than 49 million homes—almost 55 percent of all homes with televisions in the United States—had cable television installed. The rapid and broad expansion of the cable industry has created a number of substantial problems which the legal system has attempted to solve through regulation. One specific issue addressed by federal regulators is how cable operators are to be treated as copyright users. This issue highlights the problems of how to treat cable vis-a-vis traditional broadcast television and newer innovative technologies such as home video and direct broadcast satellite television. Are cable operators required to negotiate with copyright owners for permission to use the copyrighted material, or does the nature of cable warrant different treatment?

This Article addresses the current and most sweeping effort to solve the cable copyright problem: the compulsory licensing scheme for cable's use of copyrighted works. Part I considers the origins of the cable industry, the nature of the copyright problems raised by cable, the interrelation of copyright problems with other issues raised by cable, and the broad variety of solutions that the Federal Communications Commission (“FCC” or “Commission”) and the courts have employed in an effort to resolve those problems. Part II examines the current solution—the compulsory copyright license, administered by the Copyright Office and the Copyright Royalty Tribunal (“CRT” or “Tribunal”)—and regulatory and industry developments subsequent to creation of the compulsory copyright license. Part III

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discusses the prospects for the compulsory license from regulatory, technological, and political perspectives.

The Article concludes that the compulsory copyright license, while viable, does not adequately reflect the market value of the various copyrights' use. This system is, as intended, a subsidy for the cable industry, an industry that has developed to a point that it no longer needs the protection of a subsidy. Moreover, the compulsory license for cable unfairly discriminates against other uses of copyrighted works, particularly home video. The subsidy to the cable industry also endangers traditional over the air broadcasting and threatens to substantially limit the quantity and quality of video programming and information available to the public without direct cost. The political climate is ripe for the abolition of the compulsory copyright license in favor of either ad hoc copyright negotiations or a private system that employs blanket licenses but with rates set at, and adjusted to maintain, market rate for the use of the copyrighted works.

I. THE DEVELOPMENT AND IMPACT OF CABLE: PROBLEMS AND EARLY EFFORTS AT SOLUTIONS

A. The Emergence of the Cable Copyright Problem

Cable television originated in the 1950s as a concept known as "community antenna television" ("CATV"), under which a community would share the use of a large antenna to receive signals more clearly from local television broadcast stations, and, to a lesser degree, from more distant broadcast stations. The local users were connected to this central antenna through coaxial cable, much like several televisions in one home might be connected to a rooftop antenna.

Broadcasters viewed cable systems with apparent favor, since the cable systems allowed additional viewers to receive otherwise unavailable signals. These additional viewers could then be included by the broadcaster in calculating its viewer market, which forms the basis of determining advertising rates. Copyright owners derived some benefit from the cable television viewers because the license fee that the copyright owners received from stations also took into account viewer market statistics. As a given broadcaster's market increased, its advertising
income increased, and a portion of that increase was passed along to copyright owners through increased license fees.

Copyright owners became dissatisfied with this arrangement as cable operators increasingly began importing distant signals containing local, non-network programming. For instance, in 1961 a cable operator in San Diego installed an antenna capable of receiving all three of the Los Angeles network affiliates, plus four independent Los Angeles stations. The advertisers supporting those programs were, on the whole, interested only in the local market. Advertisers interested in national markets support national (i.e., network), rather than local, programming. The importation of network programming from one community into another did not pose major issues with regard to cable, precisely because the advertisers that support national network programming do benefit from the increased viewership via cable and therefore should be willing to pay more for greater viewership, irrespective of where those viewers are located or how they receive the television signal.

A second and related problem resulted from cable's increased importation of distant signals; local television broadcasters were forced to compete against distant broadcasters. The signals from the distant stations, received via microwave and cable, were often clearer than local over-the-air signals. Moreover, distant signals were often received from large, urban broadcasters whose resources gave them programming and technological capabilities far beyond those of typical local broadcasters. In addition, as the signals of local broadcasters were seldom imported into distant urban areas, the smaller stations had no opportunity to compete on an even footing with the large distant stations. The local station could only try to protect its declining market share in the immediate community that could be reached by its broadcast signal, unaided by cable.

The threat to local broadcasters was of concern to copyright owners as well. As cable viewership increased relative to over-the-air viewership, so did the uncompensated use of the

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4. Id. § 9.02[1].
copyrighted work. For every local broadcaster whose audience decreased, the copyright owners lost income. If the audience decreased due to a shift to cable viewing, the copyright owners also suffered increased uncompensated use of the copyrighted works. For every local broadcaster who went out of business, the copyright owners lost another purchaser of copyright licenses.

The situation for copyright owners and many local broadcasters worsened as a result of a variety of new developments. One technological innovation that exacerbated the problem was the perfection and proliferation of color television technology. The interference that results from tall buildings and other obstacles is barely noticeable with black and white television, but it is marked with color television. Cable operators also began originating their own programming not available on broadcast television, such as sports, live entertainment, feature films, and specialized business, adult, and instructional programming. Finally, the development of economical and efficient satellite and microwave transmission technologies enhanced the importation of distant signals and distribution of cable programming, and lowered the price. This in turn yielded economies of scale that furthered the spread of cable. Cable then moved into areas already supporting affiliates of all three networks, as well as independent broadcasters. Copyright owners not only did not receive compensation for the additional audience; they and local broadcasters lost potential revenue as the viewing audience shifted from broadcast to cable television.

B. The Search for Solutions

1. Must-Carry and Other Early Regulatory Strategies

The FCC responded to the twin concerns—unfair use of copyrights without compensation to the copyright owner and

5. FRANKLIN, supra note 2, at 909.

6. This Article focuses on federal regulation of cable. The existence of local regulation, however, should be noted. The relation of local and state regulation to federal regulation of cable is a complicated subject. However, many of the FCC's regulatory approaches and aims have also been adopted by state and local regulators. See Capital Cities Cable v. Crisp, 467 U.S. 691 (1984); see generally T. CARTER, M. FRANKLIN & J. WRIGHT, THE FIRST AMENDMENT AND THE FIFTH ESTATE 338, 347 (1986); K. KALBA, L. LEVINE, Y. BRAUNSTEIN & P. HOCHBERG, EXECUTIVE SUMMARY OF FINDINGS OF THE STATE CABLE TELEVISION REGULATION PROJECT (1978).
harm to local television broadcasters—in a variety of interrelated and often unsuccessful ways. One of the earliest responses came in 1965 when the FCC promulgated wide-ranging rules requiring all cable operators using microwave technology—a necessity for importing distant signals—"upon request, to carry the signals of all local television stations, without material degradation in quality, and to refrain from duplicating the programs of local commercial stations, either simultaneously or within 15 days before or after local broadcast."7

This First Report8 set out in detail the specifics of the "must-carry" and "nonduplication" rules. The powerful impact of the rules arose primarily from the broad definition given the phrase "all local television stations." According to the ultimate revision of the rules, a network affiliate qualified for mandatory carriage if it was watched by noncable homes during three percent of their total weekly viewing time (i.e., a three percent "audience share") and was watched by 25 percent of noncable homes for at least five minutes per week (i.e., a 25 percent "net circulation").9 Independent television stations without any network affiliation needed only to have a two percent audience share and a five percent net circulation.10 Since most cable systems did not carry more than twelve channels in the 1960s and 1970s, the must-carry requirement substantially limited the cable operator's programming discretion. These rules effectively froze the development of the cable industry. On the other hand, the must-carry rules offered substantial protection to local broadcasters, and unquestionably diminished uncompensated use of the copyright owner's work.11 In 1966, the FCC extended the must-carry and nonduplication rules to cable systems that did not use microwave transmission.12

The FCC continued, however, to search for other regula-

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8. Id.
9. D. BRENNER & M. PRICE, supra note 3, § 6.06[2][a][iii].
10. Id.
tory strategies. The FCC promulgated "distant signal carriage" rules, which required new cable operators in the top 100 markets\(^\text{13}\) to obtain a waiver from the FCC in order to import distant signals.\(^\text{14}\) To obtain a waiver, the cable operator had to show that local broadcasting would not be harmed and that the public interest would be served by importing distant signals. This standard proved an almost insurmountable hurdle, particularly in the top 25 markets. Thus, the FCC rarely issued distant signal carriage waivers.\(^\text{15}\) In 1972, the FCC modified its distant signal carriage rules to provide merely a limit on the number of distant signals that a cable operator could import.\(^\text{16}\)

In 1968, the FCC initiated a Notice of Proposed Rulemaking to consider promulgating rules requiring "retransmission consent" as a condition of distant signal carriage.\(^\text{17}\) As early as 1959, the FCC had endorsed this policy,\(^\text{18}\) according to which cable operators were to obtain the consent of a broadcaster before importing its signal into a distant market. The retransmission consent policy was formulated primarily to allow the copyright owner to benefit from cable's use of copyrighted works. The copyright owner could contract with television broadcasters, as a condition for granting licenses to use copyrighted works, to have the broadcasters exact some sort of additional license fee from cable operators in exchange for consent to import. This fee could then be shared by the broadcaster and copyright owner.

The retransmission consent approach proved unworkable. "The practical effect of retransmission consent was the absence

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\(13\). For a list of the top 50 television markets, see 47 C.F.R. § 76.51(a) (1988), and for the second 50 markets, see 47 C.F.R. § 76.51(b) (1988).

\(14\). See Second Report, supra note 12, at 782, 6 R.R.2d at 1785.


\(17\). Community Antenna Televisions Sys., Notice of Proposed Rulemaking and Notice of Inquiry, 15 F.C.C.2d 417 (1968) [hereinafter CATV].

of any new signals in the top 100 markets.\textsuperscript{19} Despite FCC encouragement, Congress refused to adopt retransmission consent as a statutorily-mandated system. In 1971, the FCC abandoned the concept of retransmission consent.\textsuperscript{20}

In 1970, the FCC considered a regulatory approach under which cable operators in the top 100 markets would be allowed to import four distant signals from independent broadcasters.\textsuperscript{21} This new approach required the cable operators to strip the commercials from the distant signals and replace them with commercials provided by local broadcasters. The FCC rejected this approach the following year.\textsuperscript{22}

Other cable regulatory approaches, although often designed primarily to address other issues, have also had an impact on the copyright and local broadcaster problems. From time to time, the FCC has required cable operators to allocate a certain number of channels for local non-profit or public-interest programming.\textsuperscript{23} The FCC has also required cable operators to generate a certain amount of original programming.\textsuperscript{24} Both of these rules reduced the amount of copyrighted material that a given system could transmit. They also, in theory, lessened the competition problem for local broadcasters, since cable operators had less space on their systems for imported signals. In reality, however, the allocation and original programming requirements may have furthered cable's competition with local broadcasters, by forcing cable operators to carry programming to which the local broadcasters had little or no access.

The FCC has not been alone in regulating cable. The Supreme Court has also played a significant role, particularly in assessing cable operators' liability for copyright infringement.

\textsuperscript{19} Swackhamer, supra note 15, at 288 n.30.
\textsuperscript{22} See Commission Proposals, supra note 20, at 115.
\textsuperscript{24} See CATV II, supra note 23, at 201.
In the 1968 case *Fortnightly Corp. v. United Artists* the Court examined the copyright liability of cable operators under the 1909 Copyright Act and concluded that passive retransmission of local signals did not constitute an infringement under the 1909 Act. Cable operators thus were not legally liable for retransmitting broadcast signals without compensating the copyright owner. The cable industry used *Fortnightly* to combat the FCC's prohibition on importing distant signals, a regulation that copyright owners had avidly supported.

2. The “Great Compromise” of 1972

By the early 1970s no one was satisfied with the state of cable industry regulations. Cable operators were suffering from the effects of must-carry, nonduplication, and exclusivity rules. Local broadcasters perceived cable to be a very real threat to their future livelihood. And many copyright owners were getting little if any compensation for the cable operators’ increasing use of their copyrighted works, since the operators were under no legal obligation to pay royalties on programming contained in retransmitted broadcast signals. In 1972, with the assistance of Clay Whitehead, Director of the Office of Telecommunications Policy and Chairman of the Cabinet Committee on Cable Television, producers, syndicators, broadcasters, and cable operators reached a compromise. The compromise, entitled the OTP Consensus Agreement, contained four major provisions:

1. Syndicated exclusivity;
2. Distant signal carriage rules;
3. Broadcasters’ right to sue for copyright infringement if a cable operator violated an exclusivity agreement; and
4. Cable copyright liability, to be administered through a compulsory license system.

The Consensus Agreement was the foundation for the modern era of cable regulation.

The first two provisions of the compromise were adopted in 1972 by the FCC in *Cable Television Report.* Syndicated exclu-
sivity "provided that cable systems in large markets could not carry distant signals showing programs to which a local station had acquired exclusive future local rights." The distant signal carriage rules—first tried in a more stringent form in 1966—were modified merely to limit the number of distant signals that a cable operator could import. In its 1972 Cable Television Report the FCC also adopted "anti-leapfrogging" rules, according to which a cable operator who wished to import distant signals had to choose those that originated nearest to the operator. This rule effectively prevented the development of a "superstation"—"an independent television station that makes its programs available to cable systems throughout the country, via satellite transmission." The anti-leapfrogging rules were eliminated in 1975.

The latter two provisions of the OTP Consensus Agreement—relating to cable copyright liability—were ultimately to be adopted by Congress as part of the 1976 Copyright Act.

In 1974 the Supreme Court examined the active importation of distant broadcast signals in Teleprompter Corp. v. Columbia Broadcasting System. In Teleprompter, the Court held that the act of importing distant signals did not distinguish the case from Fortnightly; the cable operator was still not subject to liability for copyright infringement.

However, for at least three reasons, Teleprompter did not extinguish copyright liability for cable operators who retransmitted broadcast programming under the existing copyright laws. First, copyright liability had been part of the Great Compromise. The Court's holding may have made it possible for cable operators to abrogate that element, but such a step would seem likely to bring down the full panoply of earlier FCC regulatory strategies on the cable operators' heads. The danger was not only that cable's development and profitability would be ham-
pered by the regulations, but also that the uncertainty created by the variety of regulatory schemes would be prolonged, making it difficult for cable operators to attract the substantial capital necessary for developing and expanding their networks.

Second, while the Supreme Court declined to find passive retransmission of distant signals to constitute copyright infringement, the Court suggested that Congress could make it a violation, stating: "Detailed regulations of these relationships, and any ultimate resolution of the many sensitive and important problems in this field, must be left to Congress." Moreover, the issue had been under consideration in Congress since the late 1960s, and cable operators had reason to fear that a floor fight in Congress in 1974 against the powerful broadcasting interests, would likely result in an arrangement less favorable for cable operators than the OTP consensus agreement.

Third, the compulsory licensing scheme in the Consensus Agreement, while requiring payments that cable operators had not until then been required to make, still promised to be a relatively inexpensive solution for the cable operators. It was certainly less expensive than the full cost of ad hoc copyright licenses combined with the transaction costs involved in negotiating those licenses.

After almost three decades of experimentation, the scene was set for a regulatory approach based on the 1972 OTP Consensus Agreement that would balance the interests of cable operators, broadcasters, and copyright owners. Following Teleprompter and more than a decade of Congressional debate over revising the 1909 Copyright Act, the copyright issues raised by cable still had not been solved. The experience of the FCC, as well as the dictates of the Supreme Court, made clear that the


40. There is little available evidence to demonstrate what a “free market” negotiation system for cable royalty licenses would have cost cable operators. Most industry analysts, representing both cable and broadcast television, the federal government, and copyright owners, agree that the royalty payments due under the 1972 compromise and under the 1976 compulsory license scheme did not reflect the full market value of the programming being used. See infra notes 66-71 and accompanying text.
cable-copyright issues would have to be addressed by Congress in the form of copyright legislation, rather than by the FCC adopting more rules focusing on diminishing the impact of cable's infringing use of copyrighted works.

II. THE COMPULSORY COPYRIGHT LICENSE SYSTEM

I. 1976 Copyright Act

In 1976 Congress concluded its revision of the 1909 Copyright Act and passed the Copyright Revision Act of 1976.\(^{41}\) The provisions of the 1976 Act dealing specifically with cable, reflect the latter two provisions of the 1972 OTP Consensus Agreement, and are embodied in sections 111, 501, and 510 of the Act. The Act's primary effect on cable is to specify that cable retransmission is a public performance and therefore subject to full copyright liability. The Act provides:

Notwithstanding the provisions of subsections (a) and (c), the secondary transmission to the public of a primary transmission embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and 509.\(^{42}\)

Congress concluded, however, that "it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system."\(^{43}\) Therefore, Congress established a compulsory copyright license system for cable.\(^{44}\)

It is not altogether clear why Congress determined that ad hoc copyright license negotiations would be "impractical" and "unduly burdensome," or whether those determinations were correct. Leslie Swackhamer suggests that Congress was concerned with two primary problems.\(^{45}\) First, Congress perceived that broadcast interests were economically and politically very


\(^{42}\) Id. § 111(b).


\(^{44}\) 17 U.S.C. § 111(c) (1976). Congress also retained or created three other compulsory licenses: the statutory mechanical royalty, the jukebox royalty, and the educational broadcasting royalty. See generally Greenman & Deutsch, The Copyright Royalty Tribunal and the Statutory Mechanical Royalty: History and Prospect, 1 CARDOZO ARTS & ENT. L.J. 1 (1982).

\(^{45}\) See Swackhamer, supra note 15, at 295 n.62.
strong; free market negotiations between broadcasters and cable operators would result in unfairly costly copyright licenses, or in no licenses at all. Swackhamer notes particularly Congress's concern with "big television networks, big television stations and big television program producers." The second problem was that "given the numerous cable systems, channels, distant signals and programs, an individual cable system's bargaining on a signal-by-signal basis would be prohibitive in terms of time and cost." Part III will discuss these concerns, the degree to which Congress correctly assessed them in 1976, and the degree to which they exist today.

Congress only applied the compulsory license to distant signals imported by a cable operator, and to non-network programming. Retransmission of local broadcast signals was exempted from copyright liability by Congress. Congress also exempted the retransmission of network programming from copyright liability.

The rationale behind both of these exemptions was that copyright owners in those two situations were already being fully compensated for the performance of their works. Congress exempted local programming on the theory that local advertisers would pay the broadcasters more for a larger local audience whether that audience was reached via broadcast or cable television. The copyright owner, in turn, would charge the broadcaster a higher license fee based on the larger audience. In the case of the exemption for network programming, Congress assumed that the advertisers supporting national programming were interested in a national audience and would therefore pay for every viewer, irrespective of where that viewer was located and how that viewer received the program. Copyright owners could again exact a higher license fee from the broadcaster. Congress also provided exemptions for the retransmission of governmental and non-profit signals, and for apartment and hotel master antenna systems.

46. Id.
47. Id.
49. Id.
The 1976 Act provides detailed requirements for cable system licensing. The signals protected by the compulsory license must be imported in strict compliance with FCC rules. The Act also specifically notes that the cable operator must comply with FCC and CRT notice and royalty fee deposit requirements. The imported signals may not be altered in any way, effectively preventing a cable operator from importing a distant signal, stripping its advertising, and then selling the newly created slots to new advertisers. The one exception to the Act's prohibition on altering imported signals—for commercial advertising market research—specifically notes that any alteration must not be "performed for the purpose of deriving income from the sale of that commercial time."

The Act further prohibits cable operators from importing signals from other countries, with certain limited exceptions for Canadian and Mexican stations available in the immediate area where the United States borders those countries. Signals must be transmitted simultaneously to be covered by the compulsory license, except that a cable system may transmit a videotaped recording of an imported signal once, without deleting or editing, and only if the operator ensures that the tape will not be further broadcast, given to another person, or copied. The tape must be erased following its transmission and the cable operator must file an affidavit attesting to compliance with these requirements. Failure to comply with section 111's requirements renders the compulsory license invalid, and subjects the cable operator to full copyright liability.

51. See id. § 111(c); see also Swackhamer, supra note 15, at 296.
53. Id. §§ 111(c)(2)(A)-(B). The requirements dealing specifically with copyright are enumerated in § 111(d).
54. Id. § 111(c)(3).
55. Id.
56. Id. § 111(c)(4).
57. Id. §§ 111(c)(1)(A).
58. Id. §§ 111(c)(1)(B).
59. Id. § 111(c)(1)(C). Section 111(c)(2) provides a limited exception to allow cable operators in Alaska, Hawaii, Guam, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands to share a tape with another cable operator in the same area.
60. Id. § 111(e)(1)(C).
61. Id. § 111(e)(1)(D).
62. Congress did exempt certain programming from the compulsory license sys-
The Copyright Act provides an initial set of statutory license fees, which reflects a last-minute compromise between the National Cable Television Association ("NCTA") and the Motion Picture Association of America ("MPAA"). The CRT is authorized to revise those rates in response to changes in FCC distant signal carriage or syndicated exclusivity rules and, on a five-year basis, in response to inflation or deflation.

It seems certain, and almost all commentators have accepted, that Congress gave cable operators a subsidy in the form of below-market royalty rates. When the CRT undertook to revise the statutory royalty rates in response to FCC regulatory changes, the Tribunal discontinued the below-market royalty

tem. Programming originated by the cable operator or by the operator of a nonbroadcast, satellite-distributed network is not covered by the compulsory license. Id. § 111(a)(3).

63. See Hatfield & Garrett, supra note 39, at 437.
65. Id. §§ 801(b)(2)(A), (D).
66. For purposes of this Article, I accept the overwhelming consensus of industry analysts, government officials, and scholarly commentators, as well as the logic of the 1972 OTP Consensus Agreement and the 1976 Royalty Rate Compromise, that the royalty rates provided in the Copyright Act do not equal the rates that would be arrived at if freely negotiated between cable operators and copyright owners. According to Swackhamer:

An examination into the history of the development of the cable compulsory license reveals a desire to give the infant cable industry a financial break so that it could afford the costly process of laying cable. The royalty fees were extremely low, approximately one percent of subscriber revenues. Although the copyright owners in principle opposed such low rates, they agreed to support the arrangement because of the protection afforded by the FCC distant signal and syndicated exclusivity rules.

Swackhamer, supra note 15, at 306-07 (footnotes omitted).

Another commentator observed, "program suppliers certainly assumed they were getting less than they would if cable were subjected to full copyright liability." Note, The Collapse of Consensus: Effects of the Deregulation of Cable Television, 81 Colum. L. Rev. 612, 622 (1981). See also Copyright Law Revision: Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the House Comm. on the Judiciary, 94th Cong., 1st Sess. 732 (1975) (testimony of Jack Valenti); Id. at 778 (testimony of John Summers).

Only the cable industry itself has suggested that the compulsory copyright license results in market or above-market payments to copyright owners, because of the CRT's practice of aggregating contiguous, commonly owned cable systems, even if they do not share programming. Since payments under the compulsory license are based on size of cable systems, even if the rate by which the license fee is calculated is below market, the NCTA charges that the fee itself may be inflated. NCTA Says Copyright Office Artificially Inflates Cable Fees, Comm. Daily, Dec. 7, 1989, at 6.

67. See infra text accompanying notes 74-75.
rates for cable operators.\textsuperscript{68} According to the CRT, the rates "could not be considered those that would result from full marketplace conditions if the compulsory license did not exist."\textsuperscript{69}

In 1985, the NTIA Office of Policy Analysis and Development ("NTIA") concluded: "The current cable copyright regime, with its artificial compulsory license and governmentally dictated royalty payments, constitutes a subsidy to the cable television industry."\textsuperscript{70} Four years later, the FCC stated: "Logic and evidence suggest that compulsory copyright license rates paid by cable systems and hence the distributions made by the CRT to program suppliers, are below market prices."\textsuperscript{71}

In 1980 the FCC repealed its distant signal carriage and syndicated exclusivity rules,\textsuperscript{72} upsetting the previous rate structure. Cable operators now had unlimited access to copyrighted works, for the use of which the operators had to pay only the below-market rates of the compulsory copyright license. Neither broadcasters nor copyright owners had any action against cable operators, so long as the operators kept their contributions to the CRT current.

The CRT responded quickly, as Congress had authorized it to do in the event that the distant signal carriage or syndicated exclusivity rules were deleted. The CRT imposed higher rates—in some cases as much as 1500 percent higher—for those signals that would have been protected by distant signal carriage or syndicated exclusivity rules.\textsuperscript{73} The Tribunal indicated that, while the transaction costs argument in favor of the compulsory license was still valid, the cable television industry did not warrant below market royalty rates:

Testimony before both the Tribunal and congressional commit-

\begin{itemize}
\item 68. Adjustment of the Royalty Rate for Cable Systems, 47 Fed. Reg. 52,146, 52,153 (1982).
\item 69. \textit{Id.} at 52,153.
\item 73. Adjustment of the Royalty Rate for Cable Systems, 47 Fed. Reg. 52,146 (1982).
\end{itemize}
tees, including that of cable industry representatives and operators, permits the conclusion that the principal current justification for the cable compulsory license is the burden of the transaction costs with individual copyright owners. *We do not find in the compulsory license as it exists today, any public policy justification for establishing royalty rates below reasonable marketplace expectations of the copyright owners.*

The CRT concluded that the statutory rates “could not be considered those that would result from full marketplace conditions if the compulsory license did not exist.” Congress, however, had given the Tribunal authority only to revise rates in response to FCC regulatory actions. Thus, the Tribunal could create “market” royalty rates only for those signals affected by the FCC’s repeal of distant signal carriage and syndicated exclusivity rules. For the first time, the compulsory copyright license fee for at least some signals neared the market rate.

**B. The Compulsory Copyright License System in Operation**

The foundation of the compulsory copyright license system is the Copyright Office and the Copyright Royalty Tribunal. The CRT was specially created by the 1976 Copyright Act; it is composed of five commissioners, appointed by the President and is designed to operate as an independent entity, within the legislative branch. The CRT oversees the collection and distribution of compulsory copyright royalties and periodically revises the rate structure. The first two CRT responsibilities—gathering and distributing copyright royalties—are discussed below.

1. **Fee Gathering**

In order to obtain the protection of the compulsory license, cable operators must register with the Copyright Office, file accounting forms, and pay copyright royalty fees every six months to the U.S. Register of Copyrights, an agency of the Library of Congress. The Register of Copyrights holds the money in an

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74. *Id.* at 52,153 (emphasis added).
75. *Id.* at 52,154.
76. *See 17 U.S.C. §§ 801-10 (1976).*
77. The following discussion relies in large part upon the rules set forth among the general provisions of Title 37 regarding patents, trademarks, and copyrights. Compulsory Licenses for Secondary Transmissions by Cable Systems, 37 C.F.R. § 201.17 (1988).
escrow account until it is time for distributions to copyright owners.

The fees are determined according to a complicated series of calculations. There are four primary elements involved in the calculations. First, all cable operators pay a fee in order to carry distant broadcast signals. Second, each operator pays a low per signal fee for every broadcast signal that would have been permitted under the FCC's distant signal carriage rules, as of June 24, 1981, the date that *Malrite TV v. FCC,*78 affirming the FCC's decision to eliminate the distant signal carriage and syndicated exclusivity rules, came into effect. Third, each operator pays a significantly higher per signal fee for broadcast signals that would not have been permitted under the FCC's distant signal carriage rules on June 24, 1981. Fourth, for cable systems operating in the top 100 markets, each operator must pay a surcharge fee ("syndex surcharge") for every broadcast signal that would not have been permitted under the FCC's syndicated exclusivity rules.79

The fees, except for the smallest cable systems, are determined as a percentage of the cable operator's "gross receipts."80 These elements are adjusted according to the size and location of the system involved, as well as an approximate measure of the amount of non-network programming that the system imports.81

2. Royalty Distribution

Once the royalty fees have been collected from cable operators, the CRT distributes those fees to copyright owners according to procedures set forth in section 111 of the Copyright Revision Act. Every person claiming to be entitled to the compulsory license fees must file a claim with the CRT. The Act grants a specific exemption from the antitrust laws to encourage claimants to agree among themselves as to the division of the compulsory license fees. Beginning August 1st of each year, the CRT determines whether a controversy concerning the distribution of royalty fees exists.82

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78. 652 F.2d 1140 (2d Cir. 1981).
79. The definition of "gross receipts" is discussed infra section II B2.
81. 37 C.F.R. § 308.2(d) (1988).
Not surprisingly, some controversy over the distribution of fees always exists, so the CRT is empowered to conduct a proceeding to determine the distribution of royalty fees. Chapter 8 of the Act, which covers the operation of the CRT, provides little guidance about how the CRT is to conduct distribution proceedings. The CRT has adopted a two-step procedure: (1) in “Phase I,” the CRT “determine[s] the allocation of cable royalties to specific groups of claimants;” 83 (2) in “Phase II,” the CRT “allocate[s] cable royalties to individual claimants within each group.” 84

The claimant groups usually include: 85
1. Program Syndicators (“Syndicators”) 86
2. Joint Sports Claimants (“JSC”) 87
3. Public Broadcasting Service (“PBS”) 88
4. National Association of Broadcasters (“NAB”) 89
5. Music Claimants (“Music”) 90
6. Devotional Claimants (“Devotional”) 91
7. Canadian Claimants (“Canadian”) 92
8. National Public Radio (“NPR”) 93

The CRT evaluates each group’s claim on the cable copyright royalties according to three primary and two secondary
criteria. The primary criteria are: (1) harm caused to copyright owners by cable transmissions of copyrighted works; (2) benefit derived from the secondary transmission of copyrighted works; and (3) marketplace value of the copyrighted works that are transmitted. The secondary criteria are: (1) the quality of the copyrighted works; and (2) time-related considerations.\textsuperscript{94} According to the CRT, the Tribunal's underlying goal is "to simulate market evaluation."\textsuperscript{95}

The claimant groups present voluminous evidence, consisting largely of specially-commissioned studies on the importance of copyrighted works to the cable systems and the impact of cable's use of the copyrighted works on copyright owners and broadcasters. The CRT then makes its Phase I determinations. This part of the process, as discussed below, may take years to complete. For example, the CRT published its 1983 Phase I determinations on February 4, 1986.\textsuperscript{96}

Once the CRT has completed its Phase I allocations, it begins Phase II, in which it evaluates disputed claims among members of specific groups. In practice, the Phase II distributions are almost entirely settled by private negotiations. The group in which the CRT has repeatedly declared that a controversy has existed is the Program Syndicator (or Supplier) group. Here the CRT has settled disputes between MPAA, Multimedia, and the NAB.

The process is more easily understood by examining the distributions that the CRT has actually ordered. The 1978 distributions are summarized in Table 1.

\begin{table}[h]
\centering
\begin{tabular}{l|c}
\hline
\textbf{Phase I} & \\
\hline
Syndicators and Devotionals & 75.00\% \\
JSC & 12.00 \\
PBS & 5.25 \\
U.S. and Canadian Broadcasters & 3.25 \\
Music & 4.50 \\
\hline
\textbf{Phase II} & \\
\hline
\end{tabular}
\caption{1978 CRT CABLE ROYALTY DISTRIBUTIONS\textsuperscript{97}}
\end{table}

\textsuperscript{94} 1983 Proceeding, \textit{supra} note 83, at 12,793.
\textsuperscript{95} \textit{Id.}
\textsuperscript{96} \textit{Id.}
\textsuperscript{97} The chart is compiled from data in the 1978 Cable Royalty Distribution Determination, Notice of Final Determination, 45 Fed. Reg. 63,026 (1980).
In 1978 the CRT found no Phase II distributions to be in controversy and therefore conducted no Phase II hearings; all individual claimants settled privately.

The 1979-1982 distributions are summarized in Table 2.

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Syndicators</td>
<td>69.20%</td>
<td>69.20</td>
<td>69.20</td>
<td>68.75</td>
</tr>
<tr>
<td>JSC</td>
<td>15.00</td>
<td>14.95</td>
<td>14.95</td>
<td>14.85</td>
</tr>
<tr>
<td>PBS</td>
<td>5.25</td>
<td>5.23</td>
<td>5.23</td>
<td>5.20</td>
</tr>
<tr>
<td>NAB (I&amp;II)</td>
<td>5.06</td>
<td>5.04</td>
<td>5.04</td>
<td>5.01</td>
</tr>
<tr>
<td>Music</td>
<td>4.25</td>
<td>4.24</td>
<td>4.24</td>
<td>4.21</td>
</tr>
<tr>
<td>Canadian</td>
<td>.75</td>
<td>.75</td>
<td>.75</td>
<td>.74</td>
</tr>
<tr>
<td>NPR</td>
<td>.25</td>
<td>.25</td>
<td>.25</td>
<td>.25</td>
</tr>
<tr>
<td>Devotionals</td>
<td>.35</td>
<td>.35</td>
<td>.35</td>
<td>1.00</td>
</tr>
</tbody>
</table>

There are five points to be made about the 1979-1982 CRT distributions. First, these distributions were not finalized until 1986. They were revised three times in 1985 alone, before the last final order for the distribution was issued in 1986. Second, most of the percentages for specific groups were arrived at through private negotiations. Third, even with the lengthy delay before a final order and even with private negotiations, for each year there remain disputed claims for which a portion of the total fee pool has been retained by the CRT pending final resolution. The CRT retained four percent to settle the 1979 controversies, 14 percent for 1980, four percent for 1981, and four percent for 1982. The fourth and most obvious point is that the

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100. See 50 Fed. Reg. 5290 (1985); 50 Fed. Reg. 6027 (1985); 50 Fed. Reg. 9112 (1985). A large portion of the funds were dispersed earlier to claimant groups where no controversy existed, according to CRT partial distribution orders.
lion's share of the royalties are going to the MPAA. The next largest allotment, only one-fourth of the size of MPAA's portion, goes to the JSC. If these two groups are omitted, the other nine groups of claimants are battling over only 18 percent of the royalties. Fifth and finally, the tinkering that takes place from year to year is so small as to be statistically insignificant.

The actual dollar amounts involved are not insubstantial; the dollar amounts involved in the adjustments from year to year, however, may be. The total royalty pool in 1978 was $13 million; in 1979 was $21 million; in 1980 was $26 million; in 1981 was $32 million; and in 1982 was $42 million.101

Despite these sizeable amounts, the adjustments from year to year are small. For instance, in 1979 the MPAA claimed $14.4 million of the total fund.102 In 1982, after three rounds of adjustments, the MPAA claimed $28.49 million. Without those adjustments, had the MPAA been required to claim in 1982 under its 1979 percentage, it could have claimed only $28.42 million—a difference of only $70,000. This amount is divided, after attorneys' fees, among the 83 producers comprising the MPAA. PBS claimed $1.12 million in 1979 and $2.19 million in 1982. Without the three rounds of adjustments, PBS could have claimed $2.21 million in 1982—a difference of $20,000, to be divided among 258 individual claimants.

The 1983 distribution cycle involved a new set of concerns. The two categories of higher fees imposed by the CRT first took effect in 1983, in response to the FCC's elimination of distant signal carriage and syndicated exclusivity rules. The CRT determined that the funds generated under the 3.75 percent category and the syndex surcharge should be distributed separately from the rest of the royalty pool.103 For the first time, the CRT undertook Phase I hearings for three separate funds; Phase II hear-

101. Id. These figures are rounded and are not adjusted to reflect current dollar value.

102. These figures are calculated from the total fund amount and the percentage of the fund awarded to the group in question. These are not the amounts of actual distributions because: (1) they do not take into account the reserve that the CRT maintains to settle disputed claims; (2) they are not calculated in real dollars paid out over time; and (3) they do not reflect interest accrued by the funds while awaiting CRT distribution.

ings were unaffected. The resulting distributions are shown in Table 3.

<table>
<thead>
<tr>
<th>Phase</th>
<th>Syndicators</th>
<th>Basic</th>
<th>3.75%</th>
<th>Syndex</th>
</tr>
</thead>
<tbody>
<tr>
<td>I</td>
<td>67.10%</td>
<td>72.00</td>
<td>95.50</td>
<td></td>
</tr>
<tr>
<td>ISC</td>
<td>16.35</td>
<td>17.50</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>PBS</td>
<td>5.20</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>NAB</td>
<td>5.00</td>
<td>5.00</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Music</td>
<td>4.50</td>
<td>4.50</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Canadian</td>
<td>.75</td>
<td>.25</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>NPRt</td>
<td>Special settlement of $144,497.85.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Devotionals</td>
<td>1.10</td>
<td>.75</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The 1984, 1985, and 1986 CRT royalty distributions are identical to the 1983 distributions in Phase I, and differ only minimally in Phase II.

<table>
<thead>
<tr>
<th>Phase</th>
<th>MPAA</th>
<th>Multimedia</th>
<th>NAB</th>
</tr>
</thead>
<tbody>
<tr>
<td>II</td>
<td>98.20%</td>
<td>.83</td>
<td>.70</td>
</tr>
<tr>
<td>(All other individual claimants settled privately.)</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The small shifts in each claimant's percentage share of the

<table>
<thead>
<tr>
<th>1984-86 CRT CABLE ROYALTY DISTRIBUTIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Phase II</td>
</tr>
<tr>
<td>MPAA</td>
</tr>
<tr>
<td>Multimedia</td>
</tr>
<tr>
<td>NAB</td>
</tr>
<tr>
<td>(All other individual claimants settled privately.)</td>
</tr>
</tbody>
</table>

104. This table is adapted from Cable Royalty, id. at 12,818.
105. The special settlement in Phase I for NPR was determined to be a percentage of the entire fund—0.18 percent—in the 1985 and 1986 settlements, rather than a lump sum.
107. In 1985 the Asociacion de Compositores y Editores de Musica Latinoamericana received a $1.00 settlement.
cable royalty fund has not stopped the various claimants from appealing in federal court all but one cycle, between 1978 and 1983, in an effort to have their share increased. The only distribution cycle during that period that was not appealed—1981—involved no change from the previous year's distribution, which was appealed. In every appeal, the courts have upheld the distributions and affirmed the CRT's broad discretionary powers. The language of the case deciding the appeals from the 1983 distributions gives some indication of the courts' view of these annual appeals:

Each distribution was affirmed in substantial part by a court increasingly critical of "the claimants' studied tack to date of 'boundless litigiousness,' and increasingly unwilling to engage in detailed analysis of 'the various nooks and crannies of the Tribunal's decisions.' Thus encouraged either to forgo the usual automatic challenge to the Tribunal's determinations, no doubt an unthinkable alternative in the "highly litigious copyright-owner subculture," or to seek a different Court of Appeals, claimants to the 1983 Cable Royalty Fund petitioned us [the Second Circuit] for review of the cable royalty distribution. With the exception of two issues, however, only the circuit is new, and the petitions raise the usual array of noisily contested minutiae concerning the precise allocations of cable royalty fees. . . .

We emerge from our analysis of these inherently subjective judgment calls and rough balancing of hotly competing claims with one overriding conclusion: it is the Tribunal which Congress, for better or worse, has entrusted with an unenviable mission of dividing up the booty among copyright holders. . . . We will not hesitate henceforth, should this tack of litigation-to-the-hilt continue to characterize the aftermath of CRT distribution decisions, to refrain from elaborately responding to the myriad of claims and contentions advanced by a highly litigious copyright-owner subculture.109

The CRT has announced the completion of its Phase I determinations for the 1987 cable royalty distribution, but has not


yet completed the Phase II proceedings.\textsuperscript{110}

\textbf{C. Developments Since the 1976 Act}

1. Rejection of Must-Carry Rules

Two of the most significant developments in cable since the passage of the Copyright Revision Act were the elimination of the distant signal carriage and syndicated exclusivity rules,\textsuperscript{111} to which the CRT's response was quick and dramatic.\textsuperscript{112} Another important change in cable regulation, to which the CRT has not responded and may lack the statutory ability to do so, is the rejection of must-carry rules by the D.C. Circuit in 1985.

\textit{Quincy Cable TV v. FCC}\textsuperscript{113} involved a direct challenge, based on the First Amendment, to the FCC's must-carry rules. The court evaluated the harm that must-carry rules were designed to remedy and concluded:

> Although the goals of the rules—preserving local broadcasting—can be viewed as unrelated to the suppression or protection of any set of ideas, the rules nonetheless profoundly affect values that lie near the heart of the First Amendment. They favor one group of speakers over another. They severely impinge on editorial discretion.\textsuperscript{114}

In rejecting the must-carry rules, the court did not touch on the role that those rules play as an important factor underlying the compulsory copyright license, in reducing cable copyright infringement, or in balancing the relationship between broadcasters, cable operators, and copyright owners. The U.S. Supreme Court denied a petition for certiorari.\textsuperscript{115}

Following the \textit{Quincy} decision, the FCC responded to intense congressional and broadcast industry pressure and proposed revised must-carry rules.\textsuperscript{116} The new rules—reflecting a compromise between the broadcast and cable industries—re-

\begin{itemize}
  \item \textsuperscript{111} See supra note 72 and accompanying text.
  \item \textsuperscript{112} See supra notes 72-73 and accompanying text.
  \item \textsuperscript{113} 768 F.2d 1434 (D.C. Cir. 1985), cert. denied, 476 U.S. 1169 (1986).
  \item \textsuperscript{114} Id. at 1453.
  \item \textsuperscript{115} National Ass'n of Broadcasters v. Quincy Cable TV, 476 U.S. 1169 (1986).
\end{itemize}
quired cable systems, depending upon their channel capacity, to carry a limited number of "significantly viewed" broadcast signals. Cable operators were also required to inform subscribers that not all over-the-air broadcast signals may be available via cable service, and to offer to each subscriber, until 1991, an input selector switch ("A/B switch") that allows viewers to easily select between cable and broadcast signals.\footnote{117}{Without such a switch, a viewer would have to manually unplug the cable lead from the television set and attach in its place an antenna lead.}

The FCC's new must-carry rules were struck down as unconstitutional by the Court of Appeals for the D.C. Circuit in \textit{Century Communications Corp. v. FCC}.\footnote{118}{835 F.2d 292 (D.C. Cir. 1987), modified, 837 F.2d 517, cert. denied, 108 S. Ct. 2014 (1988).} The court applied the test set out in \textit{United States v. O'Brien},\footnote{119}{391 U.S. 367 (1968).} which is traditionally applied to government restrictions which burden speech only incidentally. But even under that relatively unrestrictive test, the court held that the FCC had failed to demonstrate that the rules were necessary to advance any "substantial governmental interest" or were "narrowly tailored" as required by \textit{O'Brien}.\footnote{120}{\textit{Century Communications Corp. v. FCC}, 837 F.2d 517 (D.C. Cir.), cert. denied, 108 S. Ct. 2014 (1988).} The Court of Appeals subsequently clarified that the FCC's consumer education and A/B switch requirements are not affected by the court's decision striking down the Commission's must-carry rules.\footnote{121}{\textit{Id}.}

Absent action by Congress, the appellate court's decision in \textit{Century} appears to foreclose the possibility of must-carry rules from the FCC. As discussed below,\footnote{122}{\textit{See infra} section III B.} some commentators viewed must-carry as the trade-off for the compulsory copyright license: if cable operators were to be forced to carry local broadcast signals, they should at least be sheltered from copyright liability. With the elimination of must-carry, the need for the compulsory license may be called into question. And while the CRT has adjusted the compulsory license system in response to regulatory changes, such as elimination of the distant signal and syndicated exclusivity rules, even if it believed that the absence...
of must-carry rules warrants similar adjustments, it may lack the statutory authority to respond.

2. Definition of Gross Receipts

The second significant development since passage of the 1976 Act was the D.C. Circuit Court of Appeal’s clarification as to what portion of cable operators’ income must be used as the basis of the royalty calculation. In 1986 D.C. District Court Judge June Green ruled that the Copyright Act requirement that cable operators pay copyright royalties based on their “gross receipts,” applied only to gross receipts from retransmission of broadcast signals. According to Judge Green, income from original programming and premium programming did not have to be included in the calculation of the royalty. In January 1988, the Court of Appeals overturned Judge Green’s decision and reinstated the original interpretation of the Copyright Office; gross receipts includes the full amount of fees derived from cable customers for any tier of cable services that included one or more broadcast signals.

The D.C. Circuit held that the district court erred in not deferring to the Copyright Office, the administrative agency responsible for applying provisions of the copyright law. In addition, the court found that allowing cable operators to allocate receipts between broadcast and non-broadcast programming would undermine Congress’ goal, in adopting the compulsory license, of minimizing transaction costs. Finally, the court noted that defining gross receipts irrespective of the source of the programming was “perhaps the only reasonable way of computing gross receipts that ensures a revenue base large enough to perform the function Congress intended—reimbursing copyright owners.”

The court’s opinion is significant because it has the potential to dramatically change the amount of the royalties paid by

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124. Id.
126. Id. at 612.
cable operators under the compulsory license. Some commentators have suggested that the decision could as much as double copyright fees, and MPAA President Jack Valenti applauded the decision as "restoring to copyright owners their rightful share of an already undervalued copyright royalty fund." However, cable operators may be able to minimize the impact of the decision by placing all broadcast signals on one tier. Programming from other sources would then be offered to subscribers on a separate tier of service, the receipts from which would not be used for calculating copyright royalties as no broadcast signal would be included on the tier. As a result, the royalty fees paid by cable operators would not be higher as a result of the appellate court's decision. In the absence of higher royalties, pressure from copyright owners to eliminate the compulsory license system is unlikely to abate.

3. Reimposition of Syndicated Exclusivity Rules

On May 18, 1988, the FCC reimposed the syndicated exclusivity rules. Under the new rules, a local television broadcaster can negotiate with suppliers of non-network programming for exclusive distribution rights. Cable operators are then prevented from acquiring the same programming through the importation of distant signals.

Three features of the syndicated exclusivity rules are certain to substantially diminish the impact of the new rules. First, the new rules apply to exclusivity contracts only if they contain the precise language specified by the Commission regarding the enforceability of exclusive programming rights. Second, the new rules do not apply to cable systems with fewer than 1000 subscribers—about 50 percent of operating cable systems. Third, the rules also do not require cable systems to delete a program in situations where two or more broadcast stations carrying a pro-


130. Network non-duplication rules give the same protection to contracts negotiated by network affiliates for network programming.
gram are "significantly viewed" within the area served by the cable system, or where that area is within the Grade B contours of two or more such stations.

4. Changes in the Cable Industry

The cable industry in particular has changed dramatically since the compulsory copyright license was adopted in 1976. Three of these developments particularly influence the debate over the compulsory copyright license.

First, as the FCC recently noted, "In 1976, cable television was primarily a retransmission medium for broadcast signals. Today, it is an active participant in the program distribution marketplace." Various recent analyses have concluded that between 92 and 94 percent of cable services do not involve the retransmission of broadcast signals.

Second, multiple system operators ("MSOs") and large individual cable systems account for an increasing percentage of cable subscribers. For instance, in 1976 the largest 50 MSOs, accounted for 69 percent of cable subscribers; in 1987 the largest 50 MSOs accounted for more than 83 percent of cable subscribers. Similarly, in 1976, there were 68 cable systems with more than 20,000 subscribers; in 1987, 464 systems had more than 20,000 subscribers respectively.

Third, the capacity of most cable systems has increased dramatically. In 1976 only 12 percent of cable systems offered more than 20 channels; in 1987 more than 65 percent offered more than 20 channels. Ninety-one percent of cable subscribers in

131. "Significantly viewed" signals include both: (1) those signals that the FCC has determined are significantly viewed in a given county and that are contained in Appendix A of the Cable Television Report, supra note 16; and (2) signals determined by an independent professional audience survey to be significantly viewed in a given community. 47 C.F.R. §§ 76.54(a)-(b) (1988).

132. The "Grade B Contour" of a television station is the approximate coverage over average terrain in the absence of intervening stations. 47 C.F.R. § 73.683(a) (1988).


135. Cable Retransmission, supra note 133, at 6570, 66 R.R.2d at 1272.

136. Id.

137. Id. at 6569, 66 R.R.2d at 1271.
1987 had access to 20 or more channels; 77 percent had access to 30 or more channels.

These three developments, especially when combined with the general proliferation of cable service, increase both cable system demand for non-broadcast programming and the ability of cable operators to negotiate effectively and efficiently for permission to carry such programming. As discussed below, cable operators are confronted with the question of why their ability to negotiate for non-broadcast programming might not be applied to obtaining the copyright holder’s consent for retransmission of broadcast programming as well.

III. PROSPECT FOR THE COMPULSORY LICENSE

The compulsory cable copyright license has come under considerable attack from broadcasters, copyright owners, commentators, the FCC, the Justice Department, the Copyright Office, and even the former Chairman of the CRT itself. The arguments generally focus on one or more of the features of the system that are inherently unnecessary or unfair, or on regulatory and technological changes that make the current system unworkable or inequitable.

A. Attacks on the Compulsory License System

The compulsory license system has been the target of opposition since it was first proposed in the Great Compromise of 1972. One obvious criticism is that the system is slow and inefficient. In its first decade of operation, the CRT has not been able to operate according to the annual distribution system provided in the 1976 Copyright Revision Act. The 1978 distributions were not finalized until 1980. The 1979 through 1982 distributions were not finalized until 1986. Subsequent distributions have required three years each to finalize.

Much of the slow start could initially be attributed to the

138. By 1989, cable systems had been installed in 49.5 million homes, almost 55 percent of U.S. homes that have televisions. Cable Television Developments, supra note 1, at 1.
fact that this was the first decade of the CRT's operations. The CRT had to create its own procedures, and then have each proposed distribution arrived at according to the new procedures, tested in court. But today its procedures have become more regularized and a jurisprudence supporting the CRT has developed. Nevertheless, the CRT continues to operate at a snail's pace.

Another common and justifiable criticism levelled at the CRT is that much time and expense is required to obtain minimal results. The CRT's total distributions are significant, but the change in allotments from year to year is statistically insignificant. Nonetheless, these distributions are the result of days of hearings, countless studies, and the work of staffs of lawyers, accountants, and experts. One obvious response to this problem is to amend the law to require distribution hearings less frequently, such as only every three or five years. Also, the fact that the changes from year to year are not necessarily significant does not change the fact that the CRT oversees an annual fund that has exceeded the $40 million level at a fairly low administrative cost.

Other criticisms of the compulsory license are directed at the heart of the system. Congress failed to articulate a valid reason for treating cable so favorably as compared with other users of copyrighted works. The House Report on the 1976 Copyright Act concluded that ad hoc negotiations between cable operators and copyright owners would be "impractical" and "unduly burdensome," but the Report did not present evidence to support its conclusions. Subsequent findings by government agencies have disagreed with Congress' conclusions.

Leslie Swackhamer identified congressional concern with the threat of "big television networks, big television stations and big television program producers." Yet much of this concern is alleviated by Congress' determination in the 1976 Act that cable retransmission of network programming did not constitute

142. See supra note 110.
143. See supra note 6 and accompanying text.
144. See supra notes 104-107 and accompanying text.
145. 1976 House REPORT, supra note 43.
146. See infra notes 176-178.
147. Swackhamer, supra note 15, at 295 n.62.
copyright infringement. The threat of "big stations" has been diminished with the elimination of the FCC's distant signal carriage and must-carry rules.148 Cable operators now have the legal and economic standing to deal with powerful broadcaster interests.

Swackhamer identifies a second congressional concern underlying the compulsory license system to be the problem of transaction costs.149 However, there are at least five reasons to believe that these costs are exaggerated. First, broadcasters have been negotiating for licenses for copyrighted programs without a legislative scheme for more than two decades. Second, under the compulsory license scheme, the lion's share of the royalties have been taken by only two distinct groups: MPAA and the sports program producers.150 Third, cable already negotiates with producers of cable programming. According to Dennis Patrick, former FCC Chairman, and Diane Killory, former FCC General Counsel, cable operators already negotiate directly for three out of four programs their systems carry.151 Fourth, most cable programming is taken from a limited number of sources, for instance, a commercial supplier like Home Box Office ("HBO") or a superstation like TBS. Fifth, the problems caused by ad hoc negotiation costs have been remedied in the past in the music field by the creation of private schemes—like ASCAP and BMI—which are more responsive to market pressures than any legislative scheme.

Another set of arguments levelled against the compulsory license system recognizes that cable, as an infant industry, may at one time have needed the sort of subsidy that the system seems to provide. However, cable now is sufficiently large and established to compete on even terms with broadcasters, and no longer warrants the type of protection that the compulsory license offers. Between 1976 and 1983, the number of subscribers to basic cable service increased from 12 million to over 28 mil-

148. See supra notes 72, 113-21 and accompanying text.
149. Swackhamer, supra note 15, at 295 n.62.
150. Since 1978, syndicators (suppliers) have not received less than 67.1% of the royalty pool. The JSC have never received less than 12%, and usually received 15%. See supra notes 97-98; 106 and accompanying text.
lion.\textsuperscript{152} By 1989, cable systems had been installed in 49.5 million homes, i.e. almost 55 percent of the U.S. homes that have television.\textsuperscript{153} It is projected that the cable industry will have nearly $15 billion in revenues and a 57 percent penetration rate by 1991.\textsuperscript{154}

Even with the CRT's dramatic increase in rates for prohibited signals following the elimination of distant signal carriage and syndicated exclusivity rules, the rates do not equal, nor in the case of rates for permitted signals do they near, the real market value of the use copyrighted works to cable operators.\textsuperscript{155} If the rates reflect market value, then there is no need for the CRT. If they do not, then the CRT is blocking market equilibrium, to the unfair advantage of cable operators and disadvantage of broadcasters, copyright owners, and competing new technologies.

A study conducted by Shooshan \& Jackson, Inc., concludes that the imbalance created by the compulsory license system in relative position between cable operators on the one hand, and broadcasters and copyright owners on the other, threatens to severely disadvantage the public.\textsuperscript{156} Shooshan and Jackson argue that the compulsory license system unfairly favors cable operators, and that their position has been further improved by the elimination of distant signal carriage and syndicated exclusivity rules. The study observes:

Once a producer sells his program rights to any broadcaster, the program may appear on any cable system in the country—and the producer is powerless to prevent it. . . .

Given such negative effects, copyright owners have resorted to other means of regaining control over their product. For example, some producers have withdrawn their programs from over-the-air broadcast stations in order to prevent cable carriage. In at least one case, a producer has reportedly paid cable systems \textit{not} to carry his program.\textsuperscript{157}

\begin{itemize}
\item \textsuperscript{152} \textit{CableVision}, Apr. 18, 1983, at 145.
\item \textsuperscript{153} \textit{Cable Television Developments}, \textit{supra} note 1, at 1.
\item \textsuperscript{154} \textit{Comm. Daily}, Dec. 16, 1987, at 7 (untitled).
\item \textsuperscript{155} \textit{See supra} note 69 and accompanying text.
\item \textsuperscript{156} H. Shooshan, C. Jackson, S. Besen \& J. Wilson, \textit{Cable Copyright and Consumer Welfare: The Hidden Cost of the Compulsory License} (1981) [hereinafter H. Shooshan].
\item \textsuperscript{157} \textit{Id.} at 2-3.
\end{itemize}
The Shooshan & Jackson study is discussed in greater detail below.

The imbalance between cable operators and broadcasters and copyright owners is particularly ironic because the cable industry is aggressively seeking regulatory treatment that is denied broadcasters and other transmission technologies. In addition, while benefitting from the compulsory license regulatory structure which limits the amount that cable operators pay for programming, the cable industry has argued that cable wishes to compete against broadcasters in an unregulated market. For instance, cable operators have asked the FCC to deregulate the fees that cable operators can charge customers for programming.158

B. Attacks Based on New Developments

Almost all of the arguments above are exacerbated by regulatory changes and technological developments that have occurred since the passage of the Copyright Revision Act. The abolition of the FCC’s distant signal carriage and syndicated exclusivity rules already have been discussed.159 It is sufficient to note that these changes in regulatory policy were anticipated by Congress, and that the CRT responded quickly by dramatically increasing royalty rates. Whether the CRT responded adequately, or whether an appropriate response within a compulsory license system is possible, is more difficult to measure, but, with the reimposition of syndicated exclusivity rules, less necessary.

The more striking regulatory change, and the one to which the CRT has not responded, is the abolition of must-carry rules in 1985 and again in 1987. The termination of these rules has become the focal point of much of the criticism of the compulsory license system. Some critics charge that the compulsory license system and the must-carry rules were opposite sides of a coin. They argue that if cable operators were going to be forced to carry all local broadcast stations, then at least they should be insured from copyright liability for so doing. In a sense, the

158. Patrick & Killory, supra note 151, at 5.
compulsory license was the price paid for the must-carry regulatory strategy. Now, with must-carry eliminated, cable operators can both choose which signals they wish to carry and use the compulsory license to protect themselves from copyright liability.

However, the must-carry argument against the compulsory license is flawed at several points. First, the compulsory license from the outset applied only to broadcast signals that the cable operator was not required to carry under the must-carry rules. Had Congress seen the compulsory license as a trade-off for must-carry, it could have tailored the compulsory license system to more readily reflect that trade-off. Congress, instead, completely excluded must-carry signals from copyright liability, rejecting the relationship between the compulsory license and must-carry. Other signals—distant, non-network signals, unrelated to must-carry signals, for which the cable operator would otherwise be subject to copyright liability for using—were protected under the below-market compulsory license royalty rates.

Second, following *Malrite* and the dramatic increase in compulsory copyright royalty rates, it is not clear that cable operators are reaping as much benefit from the compulsory license as some critics suggest. Certainly, in the case of the signals that were not permissible pre-*Malrite*, the cable operators are now paying at or near market rate. One could argue that the CRT should raise the royalty rates on those signals that used to be covered by must-carry rules. However, such a raise would offend the FCC's interest in localism and in maintaining a healthy local broadcast industry. The *Quincy* court, in abolishing the must-carry rules, did not hold that the FCC's interest in localism was unconstitutional but that must-carry constituted too great an infringement on the First Amendment to be a valid means of achieving the desired end. A dramatic increase in royalty rates would cause a percentage of the signals that used to be carried under must-carry, which cable operators may have chosen to continue, to suddenly be discontinued.

There are other problems with the must-carry-based argu-

160. This may already be the case, according to an FCC survey. *Cable System Broadcast Signal Carriage Survey Report* (Sept. 1, 1988) (available in the FCLJ office). According to the survey, 31% of the television stations that responded said that cable systems had dropped their signals or denied carriage since must-carry
ment against the compulsory license system. Must-carry and the compulsory license have arguably very different historical origins and purposes. Must-carry was one of the FCC's earliest regulatory strategies designed to protect the broadcast industry and to promote localism. The compulsory license is a recent congressional effort to solve the cable copyright problem, coming only after the Supreme Court's Teleprompter holding that passive retransmission of distant signals was not then a copyright offense.

In practice, there is little economic symmetry between must-carry and the compulsory license. Must-carry benefits broadcasters. The compulsory license royalties, on the other hand, go primarily to copyright owners. Only five percent of the total fund has gone to broadcasters. Some broadcasters may benefit from the compulsory license scheme, but it is primarily because the ease and affordability of the license encourages cable operators to carry broadcast signals. If cable operators had to negotiate directly with each copyright owner, it is likely that many operators would not carry less important broadcast signals; it is thus the broadcasters of those signals who would be hardest hit by abolishing the compulsory license.

The arguments against the compulsory copyright license that are harder to deal with are those focusing on the availability and regulatory treatment of new technologies that, like cable, transmit programming into homes. And it is from the comparison of cable to these other technologies that many of the arguments against the compulsory copyrighted license find their greatest support.

First, what are the new transmission technologies in question? Subscription Television ("STV") uses traditional broadcast technology to transmit scrambled programming into the home. Subscribers have a decoder that unscrambles the signal and displays the program on a regular television. Multipoint Distribution Service ("MDS") combines satellite and microwave

rules were eliminated in July 1985. Thirty-three percent of broadcasters that responded claimed that their signals had been repositioned.

161. See supra notes 97-98, 106; 108 and accompanying text.
162. For more detail on these technologies and the FCC's regulatory stance toward each, see generally H. SHOOSHAN, supra note 156, at 35-36 (Table 3).
163. See Hatfield & Garret, supra note 39, at 470 n.129.
transmission to send data and/or programming to customers' homes via either microwave transmissions or through scrambled cable signals.\textsuperscript{164} Low-Power Television ("LPTV") is not a new technology, but has recently received a flurry of attention from potential system offerors.\textsuperscript{165} LPTV operates like conventional television but with lower power and to a smaller audience. Finally, videocassettes and videodiscs ("home video") allow consumers to purchase or rent pre-recorded programming, or to record programming from cable or broadcast signals, that is played back on video players in the customer's home.\textsuperscript{166} Home video may very well be the most prevalent form of program "transmission" to customer homes by the end of the century.\textsuperscript{167}

Under the regulatory structure now in place, operators of any of these video distribution systems are required to negotiate directly with copyright owners for licenses to transmit (or, in the case of video, to produce) the programming. Otherwise, the operator would be subject to full liability for copyright infringement. The same is true of the other transmission system analogous to cable: traditional broadcast television. An independent television station must obtain a license from the owner of the copyright of a given work in order to broadcast that work; failure to do so is a violation of the performance right. In the case of only one video transmission technology other than cable has Congress chosen to employ a compulsory license. Direct Broadcast Satellites ("DBS") transmit programming from satellites directly to receiving disk antennae at consumers' homes.\textsuperscript{168} Congress passed the Satellite Home Viewer Act of 1988\textsuperscript{169} to permit satellite carriers to take advantage of a compulsory copyright license.

The license provision is severely limited. It came into effect on January 1, 1989, and will expire automatically on December

\textsuperscript{164} See D. Brenner & M. Price, supra note 3, § 16.04; Hatfield & Garrett, supra note 39, at 470 n.127.
\textsuperscript{165} Hatfield & Garrett, supra note 39, at 470 n.128.
\textsuperscript{166} Id. at 470 n.131.
\textsuperscript{167} As of 1984, 14 million homes had VCRs, and another 12 million units were expected to be purchased in 1984. Thus, one-third of the U.S. households would own VCRs. Worth, Cable Technology, in Cable Television, Retrospective and Prospective 34 (1985).
\textsuperscript{168} See Brenner & Price, supra note 3, ch. 15; Hatfield & Garrett, supra note 39, at 471 n.130.
The license applies only to satellite retransmission of network programming to "unserved" households—households which cannot receive, either by traditional over-the-air broadcast or via cable, any affiliate of the network whose programming is to be offered by the satellite carrier.\textsuperscript{170} The compulsory license for satellite carriers thus reflects a narrow, short-lived compromise to encourage the distribution of network programming by satellite to persons who would otherwise have no access to that programming.\textsuperscript{171}

With the sole exception of satellite service to "unserved" households, only cable is treated differently than other video distribution technologies; only cable is afforded the opportunity to obtain a license rather than be subject to full copyright liability. And there is no articulated basis for treating cable specially. Cable operators face no higher transaction costs nor occupy weaker bargaining positions than do the operators of these new technology transmission techniques.

The concern here is not only with equity in regulatory treatment, but also with the long-term effect of such inequity on the public. The Shooshan & Jackson study concludes that because copyrights are not affected when a work is transmitted through any means other than traditional broadcast, copyright owners will start licensing their works only to nonbroadcast video distributors.

As a result of the compulsory license, producers have an incentive to avoid sale to over-the-air broadcasters, selling instead to distribution systems which will allow them to retain control. This incentive will increase as cable and other alternative distribution systems, such as subscription television (STV) and multipoint distribution service (MDS), reach more and more homes. In effect, the compulsory license, originally created for a fledgling cable industry, now works to the advantage of all systems which compete with traditional broadcasting.\textsuperscript{172}

The ultimate effect of the government permitting cable operators to retransmit programming that is carried by broadcast television stations, without subjecting cable operators to full copyright liability, is to facilitate the erosion of the development and availability of programming available via traditional over-

\textsuperscript{171} See P. Goldstein, Copyright § 5.8.3 (1989).
\textsuperscript{172} H. Shooshan, supra note 156, at 4.
the-air television, arguably in direct contradiction to the FCC's charge to regulate "as public convenience, interest, or necessity requires." 173

C. Politics and the Compulsory License

1. Arguments for Abolition of the Compulsory License

For many of the reasons discussed above, critics argue that the compulsory license system should be eliminated in favor of either ad hoc copyright negotiations or a private licensing agency. These critics have included David Ladd, former Register of Copyrights, Dennis Patrick and Mark Fowler, former Chairmen of the FCC, and even Clarence James, former Chairman of the CRT, among other government spokespersons. 174

Administration criticism began as early as 1979, only one year after the compulsory license system was implemented. Henry Geller, then Assistant Secretary of Commerce for Communications and Information, testified before the House Subcommittee on Communications that cable operators should be subject to full copyright liability. 175 In 1981, following the FCC's repeal of syndicated exclusivity and distant signal rules, the NTIA released a report 176 concluding that "full copyright liability for cable, with marketplace forces determining the royalties, was workable and would be a more efficient system than a compulsory license." 177

Following the release of the 1981 NTIA report, the Administration launched a full-scale attack on the compulsory copyright system. According to the report:

Bernard Wunder, Assistant Secretary for Communications and Information, urged Congress to further the deregulation of cable by repealing the compulsory license and allowing marketplace forces to work. The FCC concurred that cable should have full copyright

177. Id.
liability. The Department of Justice found the compulsory license mechanism to be inefficient and impose unnecessary costs and recommended that it be repealed. The Copyright Office also recommended that the compulsory license be repealed as it is an unnecessary degradation of the copyright owner. Even the Chairman of the CRT agreed that there was no need for the compulsory license.\(^{178}\)

The FCC returned to the compulsory copyright license in 1988\(^{179}\) and 1989\(^{180}\) recommending that the system be abolished. In its 1988 statement, Chairman Patrick voted in favor of repealing the compulsory license; Commissioner Quello concurred, but only with respect to the license for distant signals. Commissioner Dennis, however, withheld her vote until the Commission’s report to Congress recommending repeal of the license was completed. As a result, there was no quorum and no formal action could be taken.

In his separate statement, Chairman Patrick stressed the structural, technological, and regulatory changes affecting the cable television industry. Consolidation of ownership among cable systems makes negotiations for individual licenses more practical, while the proliferation of cable-originated programming reduces the need for cable to rely on broadcast programming. In addition, the Chairman wrote, “The evidence adduced in the course of this thoroughgoing investigation strongly suggests that the compulsory copyright license impedes the efficient functioning of the market and its ability to make consumers sovereign.”\(^{181}\)

On May 30, 1989, the FCC unanimously recommended the repeal of the compulsory copyright license for all broadcast signals.\(^{182}\) While no report was issued at the time, Chairman Patrick argued in a separate statement that the compulsory license has “disadvantaged competitive alternatives to cable” by provid-

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178. NTIA, CABLE RETRANSMISSION OF BROADCAST TELEVISION PROGRAMS FOLLOWING ELIMINATION OF THE “MUST CARRY” RULES, supra note 70, app. A at 6-7 (citations omitted).
179. Cable Retransmission, supra note 133.
181. Cable Retransmission, supra note 133, at 6597, 66 R.R.2d at 1300 (statement of Chairman Dennis Patrick).
182. Repeal of Compulsory License, supra note 180.
ing cable operators with broadcast programming at "bargain rates." Chairman Patrick also charged that, because of the elimination of must-carry rules, the compulsory copyright license hurts local broadcasters in particular. Finally, the Chairman stressed that "the key point about our recommendation today is that elimination of the compulsory copyright license would benefit consumers."\(^{184}\)

The FCC's Report on the Compulsory Copyright License for Cable Retransmission\(^{185}\) was finally released on August 3, 1989. The report recommends that the compulsory license for all broadcast signals be eliminated, based on the Commission's determination that consumers will be better served under a full copyright liability system. The FCC also found that mechanisms exist to facilitate negotiations between cable operators and copyright owners with only moderate transaction costs.\(^{186}\)

According to the report, the compulsory copyright license fails to achieve market prices in three ways. First, "compulsory license royalty rates are based on the size of cable systems and on the number of signals carried, not on the value of particular programs carried on particular signals."\(^{187}\) As a result, the program suppliers and distributors are denied information about what types of programs viewers want to see.

Second, "logic and evidence suggest that compulsory copyright license rates paid by cable systems and hence the distributions made by the CRT to program suppliers, are below market prices."\(^{188}\) Program suppliers therefore have less incentive to produce programming that cable viewers want to see. Third, the CRT consolidation of claims "inevitably reduce[s] the targeting of compulsory license fees to individual producers based on the value of their individual programs to consumers."\(^{189}\) Again, information about consumer preferences and incentives to program for consumer preferences are eradicated by the system.

The way to avoid the pitfalls of the compulsory copyright

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183. Cable Retransmission, supra note 133, at 6597, 66 R.R.2d at 1300 (statement of Chairman Dennis Patrick).
184. Id.
185. Id.
186. Id. at 6571, 66 R.R.2d at 1274.
187. Id. at 6580, 66 R.R.2d at 1286.
188. Id.
189. Id.
system, the FCC concludes, is to implement full copyright liability for broadcast programming retransmitted by cable systems.\(^{190}\) The arguments against such a system, based largely on transaction costs, are no longer valid (if they ever were) because of consolidation in the cable industry and the development of cable networks which already negotiate for copyright licenses for non-broadcast programming. The Commission noted the existence of dozens of cable networks that—like broadcast networks—acquire rights to individuals programs and then package those programs for sale to individual cable operators. Such cable networks would substantially reduce the transaction costs of negotiating for programming in a full copyright liability system.

In addition, in the absence of the compulsory copyright license, broadcast television stations and networks could obtain retransmission rights to the packages of the programming that they carry. Individual cable operators could then negotiate with a broadcast station or network for permission to carry each package of programming, again, eliminating the transaction costs associated with obtaining programming from numerous suppliers. The Commission concluded, “The ‘networking’ mechanism that is so widely employed in other forms of video distribution appears well-suited to the acquisition of cable retransmission rights for broadcast signals, too”.\(^{191}\)

2. Arguments for Restoring the Balance Between Broadcasters and Cable Operators

A number of leaders in both the broadcast and cable industries have suggested—along the lines of the four CRT Commissioners—that, following the rejection of must-carry rules, a new compromise is necessary. However, as long as compulsory copyright remains, compromise will be difficult without must-carry rules. Some industry leaders may argue that the two are codependent, and are thus conjunctively necessary to restore the balance between broadcast and cable. A compromise between the National Cable Television Association (“NCTA”), Community Antenna Television Association (“CATV”), National As-

\(^{190}\) Id.
\(^{191}\) Id. at 6563, 66 R.R.2d at 1262.
soication of Broadcasters ("NAB"), Association of Independent Television Stations ("INTV") and the Television Operator Caucus ("TOC") was the basis of the FCC's ill-fated second set of must-carry rules.

Although the compromise must-carry rules were struck down in court, their existence, and the court's refusal to declare must-carry rules per se unconstitutional, may signal that the new compromise between broadcasters and cable operators will not be based on the abolition of the compulsory license, but instead on the existence of some form of must-carry rule.

The NAB and the NCTA continue to negotiate for an agreement on some form of must-carry rules. In July, it appeared that the parties had reached an agreement based on the FCC's must-carry rules, which were themselves based on a compromise between broadcast and cable interests. One issue separating the parties was whether the must-carry agreement should hinge on the compulsory copyright license, so that any cable operator "using the compulsory license must comply with the carriage requirements." The July must-carry compromise crumbled, however, when the board of the INTV opposed the deal. The INTV claimed the agreement permitted cable operators to shift independents who broadcast on the UHF band but were currently being carried by the cable system on a VHF channel.

More recently, rumors were circulating in Washington, D.C., that a new must-carry agreement had been reached. Whether consensus has been reached or not, Congress may very well act on must-carry before it recesses at the end of the Second Session. On October 25, 1989, Senator Daniel Inouye, Chairman of the Senate Communications Subcommittee, promised that he would include must-carry rules in the bill currently pending before the Senate to regulate children's television. Senator Inouye said, "I will not wait forever for them [represent-

193. Id.
194. Id. at 27.
atives of broadcast and cable industries] to come to terms."

Senator Inouye's proposal would solve the channel positioning issue which has proved so disturbing to independent television stations by requiring, on a one-or-two year interim basis, that broadcast stations be carried at their broadcast channel location. After the interim period is over, the FCC would be responsible for determining on which channel broadcast stations should be carried by cable operators.

Unfortunately, the current must-carry settlements fail to address the interests of copyright owners. Cable operators are still making their livelihood by using copyrighted works for which the operators do not consistently pay market value. In the case of works not covered by the compulsory license system, such as programming generated specifically for cable, cable operators pay market rate. In the case of programming contained in signals that cable operators would not have been able to import before Malrite, cable operators are now paying near market rate, though not through a market mechanism. For copyright owners, the more troubling category is copyrighted works contained in permitted distant signals, which cable operators retransmit and pay only the minimal statutory fees set out in the Copyright Revision Act. No must-carry compromise addresses this area.

3. Arguments for Regulating Cable

Judging from the number and volume of its critics, the compulsory copyright license for cable television would appear to be doomed. The system seems to have few friends either in places of political power or in the scholarly literature. Only the courts have lent the CRT any assistance since its inception, and their deference is premised entirely on the authority granted to the Tribunal and the Copyright Office by Congress in the 1976 Copyright Revision Act. What Congress has created, Congress can dismantle.

The mood in the 101st Congress seems to be in favor of dismantling anything that helps the cable industry. "Let's face

198. Id. at 2-4.
"it," Senator Albert Gore was quoted as saying, "cable TV is a natural monopoly" with "no regulation and no competition." Since it convened in 1989, more than a dozen bills have been introduced in the 101st Congress which would subject the cable industry to increased government regulation. The bills are designed to regulate cable rates, mandate cable carriage of broadcast signals, force cable program producers to sell programming to other video transmission industries, introduce competition, particularly from telephone companies which are currently prevented from competing because of the AT&T divestiture process, and limit foreign investment.

The likelihood that any one of the bills will become law is difficult to predict, particularly in the face of an already crowded telecommunications agenda in Congress. Moreover, while a number of the bills link the compulsory copyright license with some form of must-carry obligations, the compulsory copyright system has momentum in its favor. It may thus be some time before Congress eliminates the compulsory copyright license outright. If the must-carry provisions currently being considered are not enacted, Congress may be more likely to abolish the compulsory copyright license in response.

Nonetheless, the bills together are an unmistakable indicator that Congress is concerned about developments in the cable industry, e.g., rising prices, vertical integration, and increasingly effective competition with over-the-air broadcasting. They also are a clear signal to the Bush Administration and the FCC of Congress' irritation with powerful and largely unregulated cable interests. John Dingell, chairman of the House Energy and Commerce Committee, called the cable industry "rapacious" and said that there is a growing consensus in Congress that

“cable needs to be reined in.”

The FCC and its new, more conciliatory chairman, Alfred Sikes, have not failed to appreciate Congress’ concerns. On December 12, 1989, the Commission launched a “comprehensive” inquiry into the cable industry’s “market power in the video services marketplace.” While the Commission’s inquiry, which is on a “fast track” and is expected to result in legislative recommendations by July 1990, is not expected to deal directly with the compulsory copyright license, it is sure to treat cable’s competitive relationships with broadcast television and other video distribution technologies. The inquiry is almost certain to have the effect of staying Congress’ hand until the summer, but it is equally likely to provide the foundation for future Congressional action. That action seems certain to either abolish the compulsory copyright license, or retain it only in exchange for significant regulation of the cable industry.

CONCLUSION

The compulsory copyright license system is fundamentally flawed. As applied to permitted signals, the system substantially undercharges cable operators for the use of copyrighted works, and correspondingly undercompensates copyright owners. As applied to not-permitted signals, while the fees charged are closer to market rate, the compulsory license system interferes with market operation without apparent benefit to either the industries involved or the public.

The compulsory license subsidizes an industry that is no longer in its infancy, and no longer warrants subsidies. Cable systems today have been installed in 49.5 million homes, i.e., almost 55 percent of U.S. homes that have televisions. The compulsory copyright license rates do not equal, nor in the case of rates for permitted signals do they near, the real market value of the cable operators’ uses of the copyrighted works. If the rates do reflect market value, then there is no need for the CRT. If they do not, then the CRT is blocking market equilibrium, to the unfair advantage of cable operators and the disadvantage of

203. Cable Television Developments, supra note 1, at 1.
The compulsory license system is also inefficient. On average, distributions have been delayed almost three years by stacks of petitions, days of hearings, countless studies, and relentless appeals. Moreover, there is no valid reason for treating cable differently than other users of copyrighted works. The allegation that cable would be crippled by the transaction costs of negotiating for copyright licenses is negated by the fact that broadcasters have been negotiating for licenses for copyrighted programs without a legislative scheme for more than two decades. Cable operators already negotiate for three out of four programs their systems carry with producers of cable programming.

The compulsory license threatens to cripple broadcasters. While the compulsory license has no inherent relationship with must-carry and syndicated exclusivity rules, it is fundamentally inequitable to allow cable operators the freedom to pick and choose which broadcast signals they carry, while forbidding broadcasters from charging cable operators for the value of that programming. The FCC's new syndex rules face an uncertain fate before the D.C. Circuit Court of Appeals; the likelihood of must-carry rules being passed by Congress and upheld by courts is even less certain. Rather than hope for the eventual operation of these rules and engage in further regulation of the video transmission industries, Congress should abolish the compulsory license and allow the market to regulate dealings between cable operators and broadcasters.

The impact of the compulsory license on broadcasters is exacerbated because the license system exposes broadcast programming to undercompensated retransmission by cable operators. The compulsory license gives copyright owners a significant incentive to distribute their works through other means, such as STV and video, which allows the copyright owners to obtain as much value as possible for their works. Copyright owners can thus require cable operators, in addition to STV operators and video producers, to purchase licenses to show the copyrighted works.

The ultimate effect of the compulsory copyright license is to diminish the value of broadcast television as an outlet for new
programming. As a result, program producers have less incentive to produce quality programming that responds to consumer preferences. The quantity and quality of the programming that is available to the public at no direct cost is decreased.

The cable industry has demonstrated its ability and willingness to compete in a substantially unregulated market. There is no longer any justification for subsidizing cable, for penalizing broadcasters and copyright owners, or for limiting the programming available to the public via over-the-air television.

Congress should abolish the compulsory license in favor of full copyright liability for all "public performances" of a copyrighted work. Cable operators would thus be required to negotiate with the copyright owners whose works are broadcast over-the-air and then retransmitted by cable, just as cable operators already do for the bulk of their programming which is either not broadcast first or the broadcast of which is not covered by the compulsory license. In the alternative, if ad hoc negotiations prove unworkable, cable operators can negotiate directly with copyright owners for a second "Great Compromise"—some form of private licensing system that will accurately reflect market value of the copyrighted works.