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CATV: Liability for the Uncompensated Transmission of Television Programs

Community antenna television systems currently transmit television programs to their subscribers without paying compensation either to the program originator or the copyright proprietor. The author of this note examines the legal theses which may require CATV to compensate for the use of television programming. He concludes that while the activities of CATV amount to copyright infringement, a balancing of competing interests requires the substitution of a more flexible device.

INTRODUCTION

The demand for television service in areas with too small a population to support a local television broadcasting station and too remote in distance or isolated by terrain to receive regular off-air reception has led to the development of community antenna television systems (CATV). These consist of tall receiving antennas located on high terrain where usable television signals from distant cities may be received, equipment to amplify these signals (and sometimes to convert them from the channel on which they are received to a different channel), and cables to carry them to individual television receiving sets. Some CATV's utilize microwave common carrier facilities to receive signals from more distant stations, and to improve the quality of the distributed signal. Microwave systems pick up the original signals near their sources and transmit them through the air to the CATV receiving antennas. Assertions have been made that CATV's have originated program material or advertising, or deleted program material or advertising run on the station whose signal is carried, but those practices appear to be rare exceptions. Although there are some co-


2. 1959 Inquiry 407.

3. Only about 250 to 300 of the 1600 CATV's employ microwave facilities. Id. at 409.

4. 1959 Inquiry 407-08. However, a number of CATV's have additional channels on which "closed-circuit" telecasts of programs or advertising, or FM music are presented. Id. at 408.
operatives, most CATV’s are profit seeking organizations, with subscribers paying installation fees and monthly service charges. Although CATV’s were originally developed in areas where satisfactory direct television reception was not possible, they have continued to expand, even where direct reception is available, as a means of providing subscribers with additional channels. In 1969, 750 CATV’s served half a million TV homes; at present 1600 CATV’s serve 1.7 million of the nation’s 52.7 million TV homes.

This rapid growth has triggered controversy and litigation among CATV’s, broadcasting stations, and owners of literary property. Some of this controversy will be reduced by the recent promulgation of rules by the Federal Communications Commission (FCC) governing CATV’s serviced by microwave common carrier facilities. The FCC also declared that it would extend the rules to nonmicrowave CATV’s if Congress does not act; however, there is some doubt if the FCC has this power.


In 1965, TelePrompter Corp. had first quarter profits in excess of $70,000 on gross revenues of $1,167,215. About 70% of TelePrompter’s 1964 business was in CATV’s. Wall Street J., May 5, 1965, p. 10, col. 2.

6. The installation fee ranges from a few dollars to $175.00. Service charges range from $2.75 to $10.00 per month. Some CATV’s assess no installation fees, but charge higher monthly rates. See Senate Comm. on Interstate and Foreign Commerce, supra note 5, at 4.

7. 1959 Inquiry 408. Some CATV’s may soon provide as many as 12 channels. Wall Street J., March 26, 1965, p. 3, col. 4.


11. The microwave linked systems must, 1) carry the signals of the all local television stations without material degradation in technical quality, and 2) abstain from duplicating local commercial programs by use of a source other than the local stations 15 days before and 15 days after they are broadcast locally. FCC, First Report on Microwave Relays, 4 P & F Radio Reg. 2d 1725 (1965) [hereinafter cited as FCC, First Report]. See generally SEIDEN, AN ECONOMIC ANALYSIS OF COMMUNITY ANTENNA TELEVISION SYSTEMS AND THE TELEVISION BROADCASTING INDUSTRY (1965).


13. In 1959 the FCC itself concluded that it did not have the power. 1959 Inquiry 441. See the extensive discussion of the jurisdictional question in FCC, supra note 12 at 1707 (1965).
over, an extension of the present rules to all CATV systems would not affect the right of an originating broadcaster or a copy- right proprietor in a civil suit against a CATV for the unauthorized use of broadcast material.\footnote{14} It shall be the function of this Note first, to evaluate the possible legal liability of CATV's under the current law of unfair competition, tortious interference with contractual relations, and copyright; and second, to propose a solution which will properly balance the rights of broadcasters, copyright proprietors, CATV's, and the viewing public.

I. UNFAIR COMPETITION

The tort of unfair competition arose as an outgrowth of the law of trademark infringement.\footnote{15} The tort was later broadened to forbid "palming off."\footnote{16} So viewed the essence of the wrong was fraud — misrepresentation of the origin of the goods so as to mislead the consuming public as to the identity of the producer. Finally, the Supreme Court in \textit{INS v. AP},\footnote{17} discarded the requirement of "palming off" and adopted a new set of equitable principles designed to elevate the morality of the market place. The unjust enrichment resulting from a competitor's reaping where it had not sown was meant to replace fraud as the gravamen of unfair competition.\footnote{18} However, with few notable exceptions,\footnote{19}

\footnote{14} The rules do not prohibit CATV's from duplicating local commercial programs more than 15 days before or after it is broadcast locally, and do not require CATV's to secure permission to transmit signals. Nor, do they affect the copyright question:

A number of participants in these proceedings urge us to incorporate in our rules an express declaration that nothing in them is intended to affect in any way the copyright or other rights that broadcasters or others may have in television program material. We think incorporation of such a declaration in the rules is unnecessary. . . . We have also noted that such suits fall entirely beyond our jurisdiction. . . . Our determination does not rest, however, on any theory concerning the requirements of copyright or any federal or state law other than the provisions of the Communications Act . . . Nor is anything we have said or done intended to affect the determinations of other federal or state tribunals as to matters within their jurisdiction.

FCC, \textit{First Report} 1787.

\footnote{15} See \textsc{Warner, Radio and Television Rights} 890 (1953); Chafee, \textit{Unfair Competition}, 53 Harv. L. Rev. 1289, 1291–93 (1940).

\footnote{16} See, \textit{e.g.}, Elgin Nat'l Watch Co. v. Illinois Watch Case Co., 179 U.S. 665 (1901).

\footnote{17} 248 U.S. 215 (1918).

\footnote{18} \textit{Id.} at 239.

\footnote{19} See \textsc{AP v. K vos, Inc.}, 80 F.2d 575 (10th Cir. 1938), \textit{rev'd on jurisdictional grounds}, 299 U.S. 269 (1936); \textit{Pittsburgh Athletic Club v. KQV Broadcasting Co.}, 24 F. Supp. 490 (W.D. Pa. 1938); \textit{Metropolitan Opera Ass'n v.}
the courts have refused to accept the unjust enrichment theory of unfair competition.20

Whatever residual effect the INS rationale may have had appears to have been terminated by the Supreme Court's recent decisions in Sears, Roebuck & Co. v. Stiffel Co.21 and Compco Corp. v. Day-Brite Lighting, Inc.22 The plaintiff in each case sought to prevent a competitor from copying his product by asserting both design patent infringement and unfair competition. The district court in rejecting the first ground declared the patents invalid, but granted relief on the ground of unfair competition. The Seventh Circuit affirmed, holding that under Illinois law no showing of "palming off" need be made. The Supreme Court reversed both decisions, holding that absent a showing of "palming off," a state's unfair competition law cannot impose liability for, or prohibit, the copying of an article unprotected by patent or copyright.23 The Court in broad dictum reaffirmed the strong public policy favoring free access to matter in the public domain:

When an article is unprotected by a patent or a copyright, state law may not forbid others to copy that article. To forbid copying would interfere with the federal policy . . . of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain.24

The reasoning of the Court in Sears and Compco may be reduced to the following syllogism: competition is the first principle of our economic system; only in carefully restricted situations does the patent and copyright law isolate selected creations from competitive copying; a state may not, therefore, use its law of unfair competition to frustrate the federal acts by protecting


24. 376 U.S. at 237.
works in the public domain. Although neither Sears nor Compco involved statutory or common law copyright, the equating of patent with copyright law by the Court cannot be dismissed as mere dictum. Untrammeled access to products of the mind is at least as important to society as is the free use of mechanical devices.\textsuperscript{25}

Several recent New York cases have attempted to distinguish both Sears and Compco, and on cursory analysis it may appear that the New York courts will continue to apply the unjust enrichment theory of INS. However, those decisions may be explained for the most part by the theory of common law copyright. In Columbia Broadcasting Sys., Inc. v. Documentaries Unlimited, Inc.,\textsuperscript{26} the court held that the use of off-air recordings of a news commentator’s announcement concerning the assassination of President Kennedy constituted unfair competition. On application for reargument it was held that the announcement was an unpublished work subject to common law copyright.\textsuperscript{27} A similar reading may be given to the “Beatles” Record Case.\textsuperscript{28} In the New York World’s Fair Case\textsuperscript{29} the Appellate Division enjoined the defendant from selling postcard photographs of the fair buildings. Though the court spoke in terms reminiscent of INS, its result arguably can be reconciled with Sears and Compco on the ground that the novelty of the pavilions gave rise to a common law copyright which survived the erection of the structures. Since the pictures were taken on the plaintiff’s private property, it could also be contended that the defendant’s actions violated an implied condition of his permit to enter the grounds. A narrow reading of the New York cases appears warranted in light of a New York court’s application of Sears and Compco to a case which would previously have been within the INS rationale.\textsuperscript{30}

In Cable Vision, Inc. v. KUTV, Inc.\textsuperscript{31} the Ninth Circuit applied the Sears and Compco rationale to prevent a local station

\textsuperscript{25} INS v. AP, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting).
\textsuperscript{26} 42 Misc. 2d 723, 726, 248 N.Y.S.2d 809 (Sup. Ct. 1964).
\textsuperscript{27} Ibid.
\textsuperscript{31} 335 F.2d 348 (9th Cir. 1964).
from recovering against a CATV operator on the theories of unfair competition and tortious interference with contractual relations. The district court granted relief on the ground that the exclusive "right of first call" was a sufficient "quasi-property" right to be protected under the unjust enrichment analysis of INS. The trial court reached its conclusion without regard to and apart from any question of copyright ownership of particular program content. The appellate court reversed, holding that Sears and Compco prevented application of common law tort theories to protect what are in essence copyright interests:

As we read Sears and Compco, however, only actions for copyright infringement or such common-law actions as are consistent with the primary right of public access to all in the public domain will lie.

To the extent, then, that the District Court holding extended a new protectible interest beyond what the copyright laws confer, it "... interfere[d] with the federal policy ... of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain."

In the absence of "palming off," if the broadcaster cannot establish a valid copyright the programs transmitted fall into the public domain. In Herald Publishing Co. v. Florida Antennavision, Inc. a Florida circuit court followed Cable Vision and held that Sears and Compco prevented recovery based on an unjust enrichment theory of unfair competition in a suit of a local television station against a CATV. A CATV does not "pal off" programs as its own within the meaning of Sears and Compco. On the contrary it never claims to be more than a conduit for programs produced by others and the originating broadcaster receives full credit for his production. Therefore, the television industry cannot invoke the doctrine of unfair competition to prevent CATV systems from retransmitting broadcast signals.

II. TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONS

In both Cable Vision and Herald Publishing the plaintiff also alleged interference with contractual relations, a tort generally

33. Ibid.
34. 335 F.2d at 350.
35. 335 F.2d at 351 (the court quoted from Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234, 237 (1964)).
based on inducing or causing a party to a contract not to perform a contractual obligation. The contract between the originating broadcaster or copyright proprietor and the local station usually gives the latter a temporary exclusive right to broadcast particular programs; arguably CATV transmissions of the same programs interfere with the exclusive rights purchased by the local station. However, as the court in Cable Vision pointed out, parties may not create exclusive rights of use by contract when the subject matter of the contract is in the public domain. To hold that the CATV was exceeding the bounds of legitimate competition would first require a finding that the contracting parties had exclusive property rights in the programs being broadcast. This would not be the case in the absence of a valid copyright. Moreover, the network station does not break its contract with the local station when a program is relayed over a CATV; the only interference with the contractual relation is a lessening of the value of the local station's right of first call by competition.

In summary, the cumulative effect of Sears, Compco, and Cable Vision requires the conclusion that, absent "palming off," a CATV can be prevented from using programs only if they are protected by a valid common law or statutory copyright.

III. COPYRIGHT

In the United States literary property may be protected by either common law or statutory copyright. Common law affords the author of an original, unpublished literary work a perpetual monopoly in his work. If the work is "divestitively published," however, the common law copyright terminates and, unless the work is copyrighted under the Copyright Act, it becomes a part


40. The Copyright Act expressly provides for the continued viability of common law copyright. Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor.


of the public domain. The Copyright Act, upon compliance with certain formalities, protects published and some unpublished works for a maximum duration of 56 years.

The owners of copyrighted literary property are injured economically when the activities of CATV's diminish the income derived from licensing their material to television broadcasting stations. Such licenses usually permit the material to be televised a specified number of times within the station's normal reception areas for free home use only. By so restricting each license, a copyright proprietor can license the identical material to broadcasting stations whose normal reception areas do not overlap. However, when a CATV expands the reception area of a given broadcast, the copyright proprietor's licensing market is thereby diminished.

Although the copyright proprietor clearly suffers an economic loss, it is not clear that copyright infringement has occurred. An inquiry to determine whether a legal remedy exists necessarily involves two questions: first, whether the content of television broadcasting is a proper subject of common law or statutory copyright; and second, whether the retransmission of television signals by a CATV, assuming a valid copyright, is an infringement of any right reserved to the copyright proprietor.

A. THE SUBJECT MATTER OF COPYRIGHT

Both statutory and common law copyright require that a potentially protectible work be an original intellectual product. The requirement of copyright originality entails no more than independent production, i.e., absence of actual copying. Neither original thought nor independent research is required.

43. The initial 28 year term may be renewed for a second 28 year period.
44. FCC, First Report 1747–49.
45. Id. at 1748; 1959 Inquiry 414.
need not be novel nor an accretion to the prior art. The possibility of any qualitative factor in the requirement of copyright originality has apparently been foreclosed by an authoritative Second Circuit case. Copyright protects only modes of expression, as opposed to ideas and underlying concepts; hence, a protectible work must be a specific intellectual production. This requirement demands only that a subject be developed beyond a minimal dramatic core or unembellished plot line. Every television broadcast, by definition, satisfies this requirement of concreteness since every program, regardless of its content, is a specific, detailed expression. Statutory copyright requires in addition that the work be a "writing," whereas common law copyright is not so limited.

When a program is performed pursuant to an "original" script or recorded film, the proprietor thereof may either rest on his common law monopoly in the work or come under the statute by investitively publishing. But whether copyright may extend to

52. The content of television broadcasting may be divided into the following general categories: drama; newscasts and other programs representing nonstaged public occurrences; panel, quiz and game shows; and variety programs composed of separate performances.

Any program telling a connected story or portraying a series of related events, whether serious or comedy, is registerable as a dramatic work under § 5(d) of the statute. If unpublished the script may be the subject either of a § 12 or common law copyright; if published the script qualifies for § 10 protection. As an alternative, the film from which the dramatic work is broadcasted qualifies as a photoplay under § 5(l) of the act and will receive the same protection as the dramatic script.

Programs consisting of nonstaged public occurrences, such as broadcasts of news or sporting events, arguably lack originality since the subject matter of the film does not derive from the broadcaster's creative effort. The underlying event and the creative manner in which the event is represented must be distinguished however. Granting copyright protection in this context amounts to nothing more than prohibiting the blatant copyist from pirating the author's mode of expression. West Publishing Co. v. Edward Thompson Co., 176 Fed. 833 (2d Cir. 1910); Inter-City Press, Inc. v. Siegfried, 172 F. Supp. 37 (W.D. Mo. 1958); Triangle Publications, Inc. v. New England Newspaper Publishing Co., 40 F. Supp. 198, 201 (D. Mass. 1942). No one is thereby prevented from filming the same event or from describing the news. The prevailing view
the act of broadcasting itself so as to protect an evanescent live production of material not reduced to a script or film is unclear.

Since the existence of a tangible subject capable of deposit is a \textit{sine qua non} of statutory copyright, protection must be sought outside of the statute.\textsuperscript{53} Arguably, the elastic concept of common law copyright could afford rights either in the broadcast itself or in the performer's transitory production. There is no clear constitutional requirement that common law protection be limited to the "writings" of an author;\textsuperscript{54} in at least two states—New

\textsuperscript{53} The congress shall have power . . . to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective \textit{writings} and discoveries." U.S. Const. art. I, § 8. (Emphasis added.)


\textsuperscript{54} Prior to \textit{Sears} and \textit{Compco}, the commentators universally agreed that common law copyright extended to nonwritings. See, \textit{e.g.}, \textit{Nimmer, Copyright} § 11.1 (1965); Kalodner & Vance, \textit{supra} note 53, at 1087; Warner, \textit{Protection of the Content of Radio and Television Programs by Common Law Copyright}, 3 Vand. L. Rev. 209, 219 (1950). It is clear, however, that a nonwriting cannot be the subject of statutory copyright. See note 53 supra. If \textit{Sears} and \textit{Compco} prohibit the protection of "works" not susceptible to statutory copyright, there can be no common law copyright in a nonwriting. In a footnote
York\textsuperscript{55} and Pennsylvania\textsuperscript{56} — an intangible performance right has been recognized, and several federal courts, interpreting state law, have reached a similar conclusion.\textsuperscript{57} Public policy would appear to favor recognizing a common law copyright in a live television broadcast both to reward creative effort and to discourage the blatant copyist.\textsuperscript{58} Since most television broadcasts are either based on written scripts or recorded on film, however, the existence of a broadcast right \textit{per se} is not of major significance; the few live programs not based on a script, even if unprotectible by common law or statutory copyright, could not possibly support CATV.

B. COMMON LAW COPYRIGHT — DIVESTITIVE PUBLICATION

Common law copyright grants to an individual a perpetual property right in his unpublished original intellectual production, unimpaired by the Copyright Act;\textsuperscript{59} however, publication of the work terminates this right and, unless a statutory copyright is acquired, the work becomes a part of the public domain.\textsuperscript{60} Hence, if the act of broadcasting constitutes a divestitive publication, CATV operators can transmit programs unprotected by statutory copyright with impunity.

Divestitive publication takes place, with respect to works commercially exploited by a sale of physical copies, when such copies reference to Section 2 of the Copyright Act, Justice Black characterized it as preserving common law copyright in "unpublished writings." Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 231 n.7 (1964). Section 2, however, does not refer to "unpublished writings" but to unpublished works. In Columbia Broadcasting Sys., Inc. v. Documentaries Unlimited, Inc., 42 Misc. 2d 723, 725, 248 N.Y.S.2d 809, 811 (Sup. Ct. 1964), the court found a common law copyright in a nonwriting.

58. The English copyright statute permits a broadcaster to copyright the broadcast per se. Copyright Act, 1956, 3 & 5 Eliz. 20, c. 74.
60. See cases cited note 42 \textit{supra}.
are made available to the general public. Hence the distribution of copies of sheet music or books is a general publication. Public access is determinative of publication, rather than the number of copies sold. Several commentators assert that permitting unrestricted access to even a single copy—for example, a library copy—is sufficient to terminate all common law rights, however, the courts appear to apply a spectrum test. In White v. Kimmel copies of a manuscript were made available to the few persons desiring them for a nominal printing charge. Even though the work had not been commercially exploited in any real sense the court found a divestitive publication. When tangible copies of a work are made available, therefore, either commercial exploitation or dissemination fixes the point of publication.

Several television networks send transcribed copies of some program scripts, after broadcast of the program, to anyone requesting such a transcript. Using the Kimmel rationale such programs would appear to be divestitively published when printed copies are received by members of the viewing audience. CATV’s, however, transmit programs simultaneously with the original broadcast; thus, their potentially infringing activities occur prior to any divestitive publication attributable to dissemination of program transcripts.

Works commercially exploited without the issuance of physical copies have received quite different judicial treatment; exploitation of a work by public performance is not considered a divestitive publication. In Ferris v. Frohman the Supreme Court held that publicly performing a play before a paying audience did not destroy the author’s common law rights in the uncopyrighted

63. See BALL, op. cit. supra note 59, at 473; SPRING, RISKS AND RIGHTS 111 (1952); Nimmer, supra note 61, at 187.
64. 193 F.2d 744 (9th Cir.), cert. denied, 343 U.S. 957 (1952).
65. See, e.g., SPRING, op. cit. supra note 63, at 110–12.
66. Both “Meet the Press” and “The Dan Smoot Report” offer program transcripts to the viewing audience.
67. 223 U.S. 424 (1912).
script. Conceivably, under the Ferris holding a play can be performed in every city in the country and, as long as no copies of the script are sold, the author retains his perpetual common law monopoly in the work.

It might be expected that the Ferris rule would have limited application in cases involving the modern mass media: first, the soundness of the reasons for treating a performance differently from a sale of tangible copies can be questioned; and, second, the operations of the modern mass media result in a broader range of dissemination and commercial exploitation than that resulting from the performance of a play. Nonetheless, Ferris has been followed in mass media cases. In Patterson v. Century Prods., Inc., a motion picture film was held to be unpublished even though it had been distributed to many separate groups and viewed by thousands of people. Since the spectators were allowed to view the film only, and received no tangible copy, the court determined that the common law copyright in the script had not

68. Justice Hughes reasoned that at common law the performance of a play was not an abandonment to public use, and since the copyright statute did not expressly terminate that common law right, it still existed. Since the case arose prior to the 1909 statute the Court probably decided the issue of publication correctly. The pre-1909 statute did not contain any provision for obtaining a statutory copyright for an unpublished work, nor was an unsanctioned public performance by another an explicit statutory infringement. Under those circumstances, if the court had equated performance with general publication, playwrights would have had no remedy at common law and none under the statute. The 1909 act, however, specifically remedied both defects in the previous statute and, hence, any rational basis for Ferris ended with that act.


70. See note 68 supra.

been lost. Similarly, radio broadcasting, by analogy to *Ferris*, has been held to be only a performance resulting in no loss of common law rights in the material broadcast. There is no apparent reason to treat television broadcasting differently from either radio broadcasting or the showing of motion pictures.

However, even if the act of broadcasting, by analogy to *Ferris*, is held not to be a divestitive publication, the methods of distributing programs to local stations may operate as such a publication. Most national networks permit affiliated local broadcasting stations to record “live” broadcasts and replay them at a later time. This practice could be characterized as a performance at which reproduction or copying of the underlying work is expressly permitted by the copyright proprietor. The network may be considered to be the authorized performer, and the local stations to be an audience or group of users who are expressly permitted to copy the performance. It may well be argued that the divestitive publication occurs at the point of recording.

Indirect authority for this argument may be found in *American Tobacco Co. v. Werckmeister*, where the Supreme Court, in holding that the public exhibition of a painting did not result in a divestitive publication, relied heavily on the fact that the exhibitor had expressly prohibited any copying of the work and had taken measures to enforce that restriction. In *Patterson v. Century Prods., Inc.*, the Second Circuit reached a similar result, framing the test of whether performance divestitively publishes a work in terms of the nature of the rights given to a viewing audience. The court stated that divestitive publication does not occur when the sole right granted is one to view or inspect the work. It is not clear that an express prohibition against copying is a sine qua non of that result — at least one case contains dicta to the contrary. However, when a local broadcaster acquires a possessory interest in a tangible copy of the work in question, whatever justification there is for the public performance doctrine vanishes. Hence, it is quite possible that courts, unhappy with

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73. 207 U.S. 284, 300 (1907).
74. 83 F.2d 489 (2d Cir. 1937).
75. Id. at 492.
76. Nutt v. National Institute, 31 F.2d 236 (2d Cir. 1929).
the application of *Ferris* to the mass media, will hold that the acts of broadcasting and copying divestively publish the program.

The leasing or sale of programs to local stations by the copyright proprietor may likewise be deemed a divestive publication. There is no express authority for this position, and one case held that the analogous practice in the motion picture industry of leasing films to theatres for showing, as distinct from exhibiting the films, does not result in a divestive publication. However, the *Patterson* court's failure to distinguish prior commercial leasing of the film from the showing of the film and its equating of both with public performance casts doubt on the correctness of the decision. At any rate it is clear that an absolute sale of prints of the film would be a divestive publication; to allow a perpetual common law monopoly in a film merely because the economics of the industry favor leasing rather than sale of copies is to promote form at the expense of substance. Indeed, the *Patterson* court in failing to find a divestive publication, stressed the fact that the film had never been placed in the regular chain of commercial distribution. The implication is that extensive commercial leasing would be deemed a divestive publication. Other cases, involving the leasing of books, have equated leasing and sale of copies and found divestive publication. Motion pictures are uniformly copyrighted as published works under section 10 of the Copyright Act, indicating at least an industry belief that leasing results in divestive publication. The result of applying the motion picture distribution analogy to television programs, leased in finished print form, is by no means certain. However, the leasing of finished prints of programs provides a point at which a divestive publication test, based upon commercial exploitation, could be employed without completely repudiating *Ferris* and the public performance exception.

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80. See *Universal Film Mfg. Co. v. Copperman*, 212 Fed. 301 (S.D.N.Y. 1914), *aff'd*, 218 Fed. 577 (2d Cir. 1914); cases cited at note 24 supra.
81. Two commentators, relying on the *Patterson* dictum, conclude that film leasing is not a divestive publication; *Rothenberg, Copyright and the Public Performance of Music* 16 (1954); *Tannenbaum, Practical Problems in Copyright*, 7 COPYRIGHT PROBLEMS ANALYZED 10 (1952). Two other commentators, relying on the same dictum, reach the opposite conclusion: *Howell, The Copyright Law* 118 (1952); *Nimmer, Copyright § 56.1* (1965).
Since divestitive publication is generally considered to be a question for local common law, it is quite possible that some state courts will continue to give broad application to the public performance exception while others shift to the suggested test based upon commercial exploitation. States relying upon commercial exploitation may choose any one of three distinct points for its application: the point of initial broadcast; the point of "copying" by the local stations; or the point of leasing prints. Divestitive publication of a single program, therefore, may depend on which state borders are crossed by the television signal. Even if conflicting judicial treatment ultimately proves more hypothetical than real, a federal standard defining the public performance exception would seem to be compelled by the public policy of maximum access to information embodied in the copyright clause of the Constitution. Permitting states to define "publication" broadly could well frustrate the scheme of requiring an author to relinquish his perpetual common law monopoly for a limited one upon publication.

A consistent definition of divestitive publication could be obtained through either judicial or legislative action. Since Congress has given the federal courts exclusive jurisdiction over cases arising under the Copyright Act, and since resolution of the ques-


84. The works of an author are afforded protection not to reward creativity per se, but, through subsidy to encourage their proliferation. See Mazer v. Stein, 347 U.S. 201, 219 (1954); United States v. Paramount Pictures, Inc., 334 U.S. 191, 158 (1948); Washingtonian Publishing Co. v. Pearson, 306 U.S. 30, 36 (1939); Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932). Ultimately, therefore, copyright is bottomed on the public rather than private good, and at some point the public should have unrestricted access to once protected works. Assuming that "unpublished" works do not fall within the stated policy, public interest in informational access ought to require that circulation or commercial exploitation be deemed a divestitive publication so as to force the acceptance of a limited monopoly on pain of forfeiture.

85. In Capitol Records, Inc. v. Mercury Records Corp., 221 F.2d 657, 664 (2d Cir. 1955), Judge Hand, in dissent, provides two reasons for treating divestive publication as a federal question: first, the copyright clause ex proprio vigore prevents unlimited protection by the states, and the terminus of that protection must be a federal constitutional question; and, second, a policy of uniformity is inherent in federal copyright legislation. For a penetrating analysis of this dissenting opinion, see Kalodner & Vance, supra note 53.

tion of divestitive publication determines whether the statute is available as alternative protection, definition of "divestitive publication" should be treated as a federal question. Amendment of section 2 of the act seems preferable, however, for the public performance exception is itself a creature of the judiciary. The amendment should define divestitive publication to include commercial exploitation of a work by the broadcasting mass media.

Until legislative clarification is forthcoming courts will probably hold that televising does not constitute a publication sufficient to foreclose common law copyright. Thus it must be determined whether the activities of CATV amount to copyright infringement.

C. COPYRIGHT INFRINGEMENT

Since the rights granted the author of an unpublished work by common law copyright are at least as extensive as those contained in the copyright statute,1 section 1 of the act provides a convenient framework within which to consider the issue of infringement; only in situations in which a common law copyright affords greater protection than does section 1 will it become necessary to distinguish between the two species of copyright protection. All statutory actions for infringement are based on section 1 of the act which defines the exclusive rights of the copyright proprietor. Though the statute contains no definition of infringement, by necessary implication it occurs when a person other than the copyright proprietor attempts to exercise a right reserved to the proprietor. Most important of these rights for present purposes are the rights to perform the work publicly for profit and to copy and vend the work.

1. Public Performance

An inquiry to establish infringement of a right of public performance by CATV activities is two-fold: first, it must be determined whether this right encompasses material broadcast by network television; and, second, it must be determined whether CATV activities constitute a "performance" which is "public." Section 1(c) grants a public performance right in nondramatic literary scripts,88 section 1(d) in dramatic scripts and photo-
plays, §9 and section 1(e) in broadcasts of musical compositions. §10 It is not clear that there is any exclusive performance right in a motion picture other than a photoplay, §91 and absent such a right, nondramatic television programs not based on an underlying "literary work," could be publicly performed with impunity. However, in light of the public performance right granted to the proprietor of any nondramatic literary work, it is inconceivable that a court would distinguish between a nondramatic script and a nondramatic film; both would probably be protected under section 1(c). §92 Certainly the phrase "nondramatic literary work" is broad enough to encompass nondramatic film. In addition, common law copyright protection clearly extends to the public performance of unpublished films and scripts regardless of their dramatic nature. §93 Thus, the right of exclusive public performance encompasses most, if not all, television broadcast material. Most cases finding infringement of the public performance right involve the performance of musical compositions under section 1(e) of the act. These cases appear to be authority under the similarly worded sections 1(c) and 1(d); in fact, section 1(e) defines infringing activity more narrowly than either 1(c) or 1(d). §94 Hence, acts constituting a performance under 1(e) a fortiori constitute a performance under 1(c) and 1(d).

In the prohibition of unauthorized or unlicensed broadcasting of works protected by 1(c), 1(d), or 1(e), no distinction is made between live performances or broadcasts and those recorded or

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90. 17 U.S.C. § 1(e) (1965). Dramatic films and photoplays registered under § 5(l) have been held to be dramatic works within § 1(d). Metro-Goldwyn-Mayer Distrib. Corp. v. Bijou Theatre Co., 59 F.2d 70 (1st Cir. 1932); Tiffany Prods., Inc. v. Dewing, 50 F.2d 911, 914 (D. Md. 1931).
91. Since § 1(d) refers only to dramatic works, a non-dramatic film registered under § 5(m) as a film other than a photoplay may not be within its provisions. If § 1(c) is construed according to the eiusdem generis canon a film may not qualify as a "nondramatic literary works," since only written works may be protected by that section. Conceivably, therefore, since the nondramatic film cannot be called a "musical composition" under § 1(e), it may not be afforded an exclusive performance right.
93. See NIMMER, COPYRIGHT § 11 (1965); Warner, supra note 54, at 216.
94. Section 1(e) requires that the performance be for profit; neither § 1(c) or § 1(d) contain a similar limitation. Musical compositions are also subject to a compulsory licensing provision when "records" of the composition are produced; no similar limitation is found in either § 1(c) or § 1(d). Also, § 1(d) grants the exclusive right to perform and represent, while § 1(e) only gives the right to perform.
CATV is reproduced by mechanical means. However, a CATV does not originate broadcasts, and the original performances retransmitted by a CATV are authorized by the copyright proprietor. In order to find infringement, therefore, retransmitting by a CATV must be deemed a separate infringing performance.

In *Buck v. Jewell-LaSalle Realty Co.*, a hotel proprietor made available to his guests, through the instrumentality of a radio receiving set and loudspeakers installed in his hotel, copyrighted music being broadcast from a radio station. The Supreme Court held that the hotel's activities constituted a performance distinct from the original broadcast, rejecting the defendant's argument that the music was abandoned when broadcast and therefore subject to capture. Under this "multiple performance" theory a single broadcast may give rise to three infringing "performances": that of the performing artist before his immediate audience; that of the broadcaster or rebroadcaster; and that of the ultimate recipient of the broadcast. A secondary user is deemed to infringe, under this theory, by virtue of a separate infringing performance, not by virtue of contributory infringement — causing a separate, unsanctioned performance infringes even though the original broadcast occurs with the consent of the copyright proprietor. Thus, in *Society of European Stage Authors & Composers, Inc. v. New York Hotel Statler Co.*, a secondary user was held to have infringed even though both the performing artist and the initial broadcaster were licensed to perform the work. The fact that CATV systems only retransmit authorized broadcasts, therefore, in no way affects their potential liability as unlicensed secondary users.

CATV owners have argued that as mere conduits their reception service "reproduces" nothing. However, the receiving mechanism employed by the hotel owners in *Buck* and *Statler* is not significantly different from the reception facilities possessed by a CATV station; if anything, the latter are more extensive and

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96. 283 U.S. 191 (1931).


Moreover, a CATV system not only transmits signals received, but also refines and amplifies them, and, in some cases, converts them from the channel on which they are received to another for home reception.

On behalf of CATV systems it also could be argued that they do not perform since they do not control the ultimate performing device — the individual television set. However, in both Buck and Statler this was also the case; hotel guests controlled the receiving sets in rented rooms. At any rate, the fact that activating switches for reception are in the hands of others ought not to be determinative in light of the elaborate reception devices which are owned and controlled by CATV systems. Courts have protected copyright regardless of the novelty or the technology employed by the infringing party.

Assuming that the activities of CATV amount to a separate performance, such performances must also be “public” within the meaning of sections 1(c), 1(d), and 1(e) to be infringing. Cases have uniformly held that an originating broadcaster who performs a copyrighted work does so publicly; with respect to the radio

99. In Statler the hotel had two master receiving sets. The master sets received and converted radio signals into audio-frequencies required by the individual sets. The signal thereby obtained was first fed into several stages of amplifying equipment, then into a master cable, and finally into distribution wires having termination in nineteen hundred individual guest rooms. 19 F. Supp. at 2, 3.

100. See note 2 supra and accompanying text.

101. In Buck the hotel offered only one station and the broadcast was carried to public as well as private rooms. The hotel selected the station and controlled the transmissions into public rooms. In Statler, however, two stations were available and the transmissions were carried only to private rooms. The guest, therefore, had to both select a station and activate the mechanism. Despite the difference in both the amount of the control over selection of programs and the identity of the “switchpresser,” Statler followed Buck.


103. A literal reading of the third clause of section 1(d), which prohibits an unauthorized party from conveying the essence of a copyrighted dramatic work to others “by any method whatsoever,” could obviate the requirement that an infringing performance of a dramatic work be public. See Tiffany Prods., Inc. v. Dewing, 50 F.2d 911, 915, (D. Md. 1931) (dictum). A preferable reading of the clause, however, would incorporate the requirement of the first clause that the exhibition or performance be public. Metro-Goldwyn-Mayer Distrib. Co. v. Wyatt & Maryland Yacht Club, 21 Co. Bull. 203 (1932). The literal interpretation would render the first clause nugatory.

broadcast of a copyrighted work, one court stated: "Nor can a performance . . . be deemed private because each listener may enjoy it alone in the privacy of his home." However, there is no direct holding that rebroadcasting to private homes would likewise be held a public performance, although the Statler case, read in conjunction with Jewell-LaSalle, would seem to suggest this result. In Statler the broadcast reception was confined to private bedrooms, whereas in Jewell-LaSalle the reproduction was heard in the public rooms of the hotel as well. Nevertheless, the Statler court, found that the hotel's performance was public on the ground that the performance was directed to a substantial portion of the public. The court saw no reason why the members of the public must be gathered together so as to be able to communicate with each other. Thus it is sufficient that the performance be directed to the public; it is not necessary that a public gathering witness the performance. At any rate, insofar as a CATV services restaurants, bars, and other public places at which a public gathering will view its rebroadcasts, there can be no doubt that the performances are public.

However, there may be an additional requirement that a performance be directed to the general public. The unlicensed exhibition of copyrighted motion picture photo plays at a yacht club, though given before a substantial audience, has been held not to be a public performance of the photoplays within section 1(d) where only members of the club and their guests could view the performance. The test applied was whether the performance was open to the general public on the same terms as the original performance. Since anyone can receive CATV transmissions merely by paying the subscription fee, the performances are public even under this permissive test.

Finally, it might be suggested that CATV service is the mere


106. "[W]hen the owner of an hotel does as much as is done in the Hotel Pennsylvania to promote the reproduction and transmission within its walls of a broadcast program received by it, it must be considered as giving a performance thereof . . . ." 19 F. Supp. at 4. (Emphasis added.)

107. "[T]he defendant's hypothesis that individual reception is an alibi to a claim that its performance was public seems to me to be entirely destroyed." 19 F. Supp. at 5.

equivalent of a private antenna. Every television set requires some type of antenna to "pull in" television signals, and a CATV merely provides an extremely efficient one. Since the antenna manufacturer also expands the range of television reception for profit, arguably he should receive the same copyright treatment as a CATV. However, such manufacturers expand the range of reception without performing anything. Moreover, at the time of reception of the television signals, the antennae are the property of the individual homeowners and, hence, any resultant performance would be private rather than public. A CATV, on the other hand, offers sustained reception for profit through an antenna which it owns and controls and a network of cables running to subscribers. This makes individual subscribers part of a unitary system closely analogous to a paying audience. Apart

2. Copy and Vend

In addition to the right of public performance, the copyright proprietor has the exclusive right, under section 1(a), to copy and vend his work. Arguably CATV activities infringe this right; however, although direct authority is lacking, several considerations point to a contrary conclusion.

First, a "copy" ordinarily denotes a tangible object that is a reproduction of the original work. Adhering to this formula with a vengeance, the Supreme Court held, in White-Smith Music Publishing Co. v. Apollo Co., that a player piano roll was not a copy of the sheet music which it reproduced when played. In the opinion of the Court, "copy" implied a visual reproduction from which the work could be read, and hence the making of a mechanical sound recording could not constitute copying. The soundness of the Apollo rationale may be questioned in light of the wide range of modern techniques for reproducing a work without visual duplications; however, there is no apparent basis for questioning the authority of the decision. The test of whether a "copy" has been made, then, appears to be whether a visually

112. 209 U.S. 1 (1908).
perceptible image has been reproduced from the copyrighted object. 113

Under this test the activities of a CATV would not seem to infringe rights under section 1(a). When a CATV receives a television signal it amplifies and refines the signal. It is not clear whether the signal thereby created and relayed is something separate and distinct from the original signal, or a duplication of either the original signal or the underlying script; at any rate under Apollo it is a "copy" of neither since it is intangible and not subject to visual perception.

Arguably the visual image projected on a home television screen is the infringing copy. However, if that is true there is good reason to consider the home television set to be the copying device rather than the CATV system. 114 Even if joint responsibility for producing the copy be conceded, a court would be unlikely to hold that the owner of the set engages in illicit copying merely to charge CATV systems with illicit copying under section 1(a).

Second, any visual image passing the Apollo test, the production of which could be attributed to a CATV, is only temporary, and thus lacks one of the attributes commonly associated with a copy. One case indicates that the concept of permanence is not incorporated in section 1(a) so as to exclude the production of evanescent copies; however, that case demands closer analysis. In Patterson v. Century Prods., Inc., 115 the defendants made a duplicate of plaintiff's nondramatic film and projected it before an audience. The duplicate clearly was an infringing copy of the original; however, the court went further in considering the projection of the film: "[W]hen the film was shown the defendants who did that made an enlarged copy of the picture. It was to be sure temporary but still a copy while it lasted." 116 In evaluating the precedent value of this statement, it should be noted that the court probably was aware that a contrary statement, under the then existing copyright statute, would have negated an exclusive

113. Thus a public performance would not constitute copying under § 1(a) since it does not involve the production of a separate "copy." See Tiffany Prods., Inc. v. Dewing, 50 F.2d 911, 913 (D. Md. 1931); Ball, Law of Copyright 334 (1944); Spring, Risks and Rights 111 (1952); Warner, Radio and Television Rights § 154(a) (1953).


115. 93 F.2d 489 (2d Cir. 1937), cert. denied, 303 U.S. 655 (1938).

116. 93 F.2d at 493.
public performance right in nondramatic films. Another case has rejected the Patterson dictum, and commentators have been generally critical of it. Thus, there is no strong authority for finding television screen images to be infringing copies under section 1(a); in the absence of such authority CATVs are likely to be shielded by a permanence requirement as well as by the visible reproduction requirement of Apollo. A common law copyright, on the other hand, may be infringed by an evanescent, nonintelligible copy. At least one commentator concludes that it would be; however, no case has decided the question.

The copyright proprietor also has the exclusive right under section 1(a) to vend his work. Since the rights granted in section 1(a) are cumulative, arguably a second product, though not a "copy" of the copyrighted work, may yet infringe the exclusive vending right. It has been held, however, that this right to vend may be exercised only with respect to copies of the work. Since a CATV will not infringe section 1(a) unless its product is a "copy" of the protected work, nothing is gained by relying on the vending subsection of section 1(a).

In conclusion, a CATV probably does not infringe section 1(a) of the act, but probably does perform publicly within the meaning of the prohibition contained in sections 1(c), 1(d) and 1(e). Although a copyright violation probably can be established on the basis of the multiple performance doctrine, the interests of the viewing public ought not to be overlooked. Copyright itself is merely an accommodation between the rights of "artists" and the public. The prime objective of any television policy ought to

117. The film in Patterson was a film other than a photoplay and as such not literally within the public performance protection of § 1(d); § 1(c) had not yet been amended to include performance protection for any "nondramatic literary work."


119. BALL, LAW OF COPYRIGHT § 190 (1944); NIMMER, COPYRIGHT § 101.6 (1965); WARNER, RADIO AND TELEVISION RIGHTS § 154a (1953); WELT, COPYRIGHT LAW 406 (1917).

120. See NIMMER, COPYRIGHT § 111 (1965).


122. See Corcoran v. Montgomery Ward & Co., 121 F.2d 572, 573 (9th Cir. 1941); NIMMER, COPYRIGHT § 103.2 (1965).
be broad television coverage at low prices to the viewing public. To the extent that CATV systems operate in areas that regular broadcasting stations either cannot or will not service, CATV provides a needed service. It may not be desirable to require, under the copyright law, that such rebroadcasters obtain a license from the originating station for the use of the programs. The originating station may well refuse such a license to its competitor, a CATV, and, even if one is given, the cost will be directly transferred to the viewing subscribers. It may be argued on the contrary, however, that to exempt CATV from the multiple performance doctrine would ultimately run counter to the interests of the viewing public. As long as a CATV can make use of programs without compensating the originating station for their use it has a competitive advantage over any station that may wish to locate in an area serviced by a CATV. Given such a competitive disadvantage, a station which could offer free programming to the area viewers would probably never locate in a CATV-serviced area. The result could be a frustration of the policy of broad free television coverage and a deprivation of television service to the extent that potential viewers cannot afford to meet the subscription rates which a CATV charges.

IV. COPYRIGHT REVISION BILL

Congress currently has before it a bill designed to revise the Copyright Act, several sections of which would affect the copyright status of CATV. Section 106 of the bill gives the copyright proprietor exclusive transmission rights in his work subject to the exceptions embodied in section 109. Section 101 broadly defines "transmission" to include the use of any device or means whereby images or sounds are received beyond the initial place of sending. CATV is definitely engaged in transmission under that definition and will infringe the public performance right granted by section 106, unless it may be brought within the exception embodied in section 109(5). Section 109 provides:

124. Id. § 101.
125. The preliminary draft predecessor of §§ 109(5) and 101, § 18, applied to CATV without question:

§ 18 Scope of Exclusive Right With Respect to Broadcasting and Diffusion:

(b) The exclusive rights specified in subsection (a) shall not include the right to prevent:

. . . .
... the following are not infringements of copyright:

(5) the further transmitting to the public of a transmission embodying a performance or exhibition of a work, if the further transmission is made without altering or adding to the content of the original transmission, without any purpose of direct or indirect commercial advantage, and without charge to the recipients of the further transmission.¹²⁶

Commercial CATV operates for profit, and hence is not saved from copyright infringement by section 109(5).

Whether nonprofit cooperative CATV's would also infringe the public performance right is less clear; although a commercial purpose is lacking, the ultimate recipient is still charged for program reception. Hence, sections 106 and 109(5), if read literally, would render both commercial and nonprofit CATV's liable for infringement. However, in the comments appended to the predecessor¹²⁷ of section 109(5) of the final bill, a spokesman for the Copyright Office, which drafted that provision, stated that it was meant to allow "relays, boosters, master antennas . . . and the like," but to forbid unauthorized CATV broadcasts where "people are really operating for profit."¹²⁸ Thus, it is not clear that the drafters of the predecessor of section 109(5) ever distinguished between commercial and nonprofit cooperative CATV's. By negative implication, however, when a CATV is not "really operating for profit" it could be considered to be merely a noninfringing "booster" or "master antenna." Section 109(5) is open to a similar reading.

(2) Rebroadcasting or rediffusion of the program, over wires or otherwise, for reception on ordinary home receiving sets, where the broadcast signals are merely being strengthened in power without being altered in wave length or content, and where the program is not being retransmitted to the subscribers to a rediffusion service. (Emphasis added.)

. . . .

(c) As the terms are used in this section:

. . . .

(4) 'Rediffusing' is the simultaneous retransmission, as part of a rediffusion service such as a community antenna system . . . to subscribers who require special apparatus to receive them, and who pay for reception of the signals. (Emphasis added.)


Though the present bill does not specifically mention CATV, the official comments to § 106 clearly include unauthorized CATV transmissions within the acts prohibited by § 106. Register of Copyrights Supplementary Report on the General Revision of the U.S. Copyright Law 42 (1965).

128. Id. at 240.
When a CATV is operated on a cooperative basis, the monthly service charge could be considered a payment for the cooperatively owned facility rather than a recompense for the transmission. The Copyright Office, however, appears to have rejected such an interpretation of section 109(5). No system serving a limited class of subscribers may qualify for exemption under section 109(5) irrespective of the lack of profit motive.129

Apart from the ambiguities inherent in section 109(5), that section of the revision bill fails to resolve problems central to the entire CATV problem. For, neither a blanket inclusion of profit and nonprofit CATV’s within the protection of the copyright act, nor the total exclusion of nonprofit CATV’s will necessarily harmonize with the policy of eventual universal free television coverage. In isolated areas profit community antennas may provide the sole means of reception, while in areas already serviced adequately by free stations, even cooperative antenna systems may prove a crushing competitive burden to local broadcasters. Copyright, with its rigid test of infringement, does not seem to be the proper vehicle for striking the necessarily delicate balance among the interests of the original broadcaster, the local stations, the copyright proprietor, and the viewing public. It is suggested that a more flexible device is required.

V. PROPOSED SOLUTION

It is apparent from the foregoing discussion that the copyright liability of a CATV for the use of programming should be determined by a standard more flexible than the mechanical test of copyright infringement. While the copyright proprietor should be compensated for the use of his product, the public interest in the availability of television service requires the use of a “balancing of interests” approach. A CATV which provides the only television coverage in a given area, even if operated for profit, ought to be exempted from the Copyright Act. In markets currently serviced by free stations, however, no public interest over-rides the copyright proprietor’s right to compensation.

Unfortunately, both the prior bills130 and the current FCC

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129. “On the other hand, we do not believe that the same considerations apply to the activities of those who install or operate a nonprofit ‘translator,’ ‘booster,’ or similar equipment which merely amplifies broadcast signals and retransmits them to everyone in an area for free reception.” SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 42–43 (1965). (Emphasis added.)

regulations are aimed solely at correcting a competitive situation within the communications industry; the FCC has repeatedly recognized that it has no power to consider the copyright question. Hence, the following impasse results: the FCC in formulating CATV regulations cannot consider the interests of the copyright proprietor; the courts in applying the copyright law cannot vary the infringement standard to meet disparate coverage conditions. It would appear that a hybrid device is needed to accommodate both areas of legitimate concern.

Initially, all CATV systems should be brought within the Copyright Act. Next the copyright statute should provide a method of selective exclusion contingent upon the granting of an FCC certificate. The FCC could be empowered to issue a certificate of exemption only after an affirmative showing that the presence of a CATV would be in the public interest. Prime consideration ought to be given to the existing free television coverage. An analogous public interest standard is currently used to license new television stations and CATV microwave facilities. In the past the FCC has opposed a mandatory CATV license requirement, arguing such a system would be burdensome and ineffectual. An optional copyright exemption certificate, however, is not open to similar criticism. Since few CATV's could prove public convenience, any increase in administrative burden would be slight. Nor would the optional certificate interfere with either the present FCC regulations, or any future regulations designed to protect local stations from the competition of a CATV. The proposed device will incorporate a proper concern for the public interest into the copyright infringement standard, yet reserve to the agency charged with the administration of communication policy a matter within its particular expertise.

VI. CONCLUSION

At the present time network broadcasters rely almost exclusively on common law copyright to protect rights in their programs. This practice is likely to continue as long as broadcasting is not held to constitute a divestitive publication. There appears to be no justification, however, for the current public performance exception to the concept of divestitive publication; there is no reason for allowing broadcasters and others who publicly perform a work to exploit fully such works and yet retain their perpetual common law monopoly. It has been suggested that the

exploitation test of publication should be legislatively incorporated into section 2 of the current act so that all authors will receive equal treatment under the copyright law.

Whether CATV’s infringe rights reserved to authors or their successors in interest is unclear. Under present case law, rebroadcasting by a CATV probably would be held to be a public performance under section 1(c), (d) and (e), although that result is by no means certain. CATV does not appear to infringe section 1(a) rights to copy and vend the copyrighted work.

The legal concept of copyright infringement does not provide the best vehicle for adjusting the delicate balance between conflicting interests which the problem of CATV requires. In areas where CATV offers the only feasible means of television reception, the interests of the viewers ought to take precedence over those of the broadcaster. But in areas already receiving adequate service from existing free stations, a CATV ought to be held a public performer within sections 1(c), (d) and (e). There are two means of effecting such a balance of interests. First, CATV’s which are nonprofit in nature could be specifically exempted from the provisions of the act; there is some evidence that the copyright revision bill takes this approach. This solution, while uncomplicated, would not prevent nonprofit CATV’s from operating in areas already properly serviced by free stations. An alternative would be to bring CATV’s under the control of the FCC and then exempt them from the Copyright Act on an individual basis if the FCC so directs. The FCC could be empowered to issue the certificate only after a showing that the presence of a CATV in the given area would be in the best interests of the viewing audience, and that its presence would not duplicate free coverage.