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Allocating Copyright Liability to Telecommunications Common Carriers Supplying Cable Systems

Telecommunications common carrier\(^1\) licenses issued by the Federal Communications Commission (FCC) make it possible for an intermediate common carrier\(^2\) to intercept, without permission, the signal of a traditional commercial television broadcasting station and transmit that signal via satellite or ter-

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1. Telecommunications common carriers, regulated by the Federal Communications Commission (FCC) pursuant to 47 U.S.C. §§ 201-224 (1976), are quasi-public entities that must offer their services indiscriminately to the public regardless of who owns the communications facilities involved. See, e.g., American Tel. & Tel. Co. v. F.C.C., 572 F.2d 17, 24 (2d Cir. 1978). There are basically two types of intermediate common carriers that supply television signals to cable systems. A miscellaneous common carrier (MCC) owns microwave relay facilities. Its main service is providing one-way terrestrial transmission of television signals for the benefit of cable television systems, although it may also serve television broadcast stations or business users requiring point-to-point transmissions. MCCs generally are small entities that operate regionally, receiving a television signal from a broadcast station and relaying the signal via microwave relay facilities, spaced at twenty to thirty mile intervals, to a number of smaller, distant communities. See Competitive Carrier Rulemaking, 77 F.C.C.2d 308, 321 (1979).

A resale common carrier is a kind of hybrid common carrier. Rather than owning its communications facilities, a resale carrier leases the communications service and facilities of another entity (the underlying carrier) and then reoffers communications services to the public, with or without “adding value,” for profit. See id. at 320-21; Regulatory Policies Concerning Resale & Shared Use of Common Carrier Serv. & Facilities, 60 F.C.C.2d 261, 271 (1976). The FCC prohibits satellite resale carriers from being “substantially involved in the production of, the writing of, the selection of, or . . . influencing the content of any information to be transmitted over its facilities.” Southern Satellite Systems, Inc., 62 F.C.C.2d 153, 162 (1976). Nor may they transmit to affiliated entities. Id.

Although the customers for resale carrier services may be any unaffiliated entity needing specialized resale carriage, in practice the customers have been almost exclusively cable television systems. For example, Southern Satellite Systems (SSS) became a satellite resale common carrier by leasing transponder facilities on RCA Americom's SATCOM I domestic satellite, the underlying carrier, to provide point to multipoint relay of television broadcast signals to widely dispersed cable television systems that owned or leased satellite receive-only terrestrial stations. Id. at 154.

This Note uses the term “intermediate carriers” to describe the video relay services of both miscellaneous and resale common carriers supplying cable systems.

2. See supra note 1.
terrestrial microwave relay, without alteration, to distant cable systems. By using satellites for multipoint distribution of television signals, certain intermediate carriers enable cable stations to import distant signals at low cost, and thus permit cable stations to receive "superstation" programming that would be unavailable if cable station owners had to rely on costly terrestrial microwave transmissions. The expansion in this distant signal programming has contributed significantly to the current explosive growth of cable television systems.

Although the increase in the supply of distant signals has fueled the expansion of the cable television industry, this expansion has not been without adverse effects. The proliferation of distant signal programming, for example, has altered the competitive positions of program suppliers and local television broadcasters. Distant signal programming depletes local stations' revenues by diverting part of the local audience to cable stations providing distant signal programming comparable to that of local broadcasters. Similarly, program suppliers are

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4. See supra note 1.
5. The term "superstation" refers to a broadcast station whose signal is retransmitted either by microwave transmission or by a satellite resale carrier to viewers beyond that station's normal viewing area. Josiah, The Superstation and the Doctrine of Localism, 3 Com. & L., Fall, 1981, at 3, 3.

The FCC has licensed resale carriers to distribute seven broadcasting stations by satellite. Competitive Carrier Rulemaking, 77 F.C.C.2d 308, 320 n.18 (1979). Of those licensed, not all are in operation. Distribution of KTTV-Los Angeles, for example, has been delayed pending resolution of a petition by Metromedia, Inc., KTTV's owner, for a rehearing of the FCC's grant of authority to ASN, Inc., to act as resale carrier for transmission of KTTV's signal. See Brotman, Cable Television and Copyright: Legislation and the Marketplace Model, 2 Com. Ent. 477, 484 (1980). Not all superstations are pleased with their status, because satellite distribution often runs counter to their interests. For example, the NCAA recently refused to sell WGN-Chicago the rights to cover two college basketball games because WGN's superstation distribution would have undermined the NCAA's ability to sell the games to stations in other markets. Thus, WGN is known as an "unwilling" superstation. Id. at 481-82. Only Ted Turner's station, WTBS-Atlanta, is clearly a willing superstation. Turner actively promotes WTBS's superstation status, airing programs with a broad national appeal and attracting nationwide advertisers. Montgomery, An Atlanta TV Outlet Seeks to Blanket U.S., Get Ad Rates to Match, Wall St. J., Jan. 9, 1979, at 1, col. 1. Turner's practice appears to run afoul of the FCC's "doctrine of localism." See generally Josiah, supra.

6. See infra note 35 and accompanying text.
7. See infra notes 87-98 and accompanying text.
8. "Cable television ('CATV') systems pose a competitive threat to conventional over-the-air stations because their importation of distant signals may divert viewers who otherwise would watch local stations. This danger is particularly great where the imported signals merely duplicate the programming appearing on the local stations . . . ." Kiro, Inc. v. F.C.C., 631 F.2d 900, 901 (D.C. Cir. 1980). See also Note, The Collapse of Consensus: Effects of the Deregulation
undercompensated for their programs' syndication values, because their programs are distributed in unanticipated ways.9

Before the development of satellite technology and the distribution of distant signal programming in the late 1970's, a delicate balance was maintained among the interests of program suppliers, local television broadcasters, and cable stations primarily through two constraints: FCC regulations10 and the 1976 Copyright Act (the Act).11 These administrative and legislative constraints were designed to protect the economic interests of program suppliers and broadcasters, while simultaneously encouraging the dissemination of as many and varied programs as possible through cable systems.12 Because of FCC deregulation and changes in retransmission technology, however, the balance of interests has shifted perceptively in favor of the in-
terests of cable stations at the expense of the interests of pro-
gram suppliers and local broadcasters. Unless changes are
made, this disparity is likely to increase in the near future.
Short of promulgating new FCC regulations, the only way to
correct the current imbalance is to reallocate copyright liability
in the secondary transmissions market.

This Note considers the impact of intermediate telecommu-
nications carriers in the current secondary transmissions mar-
ket and discusses their proper role in a secondary transmis-
sions copyright scheme that advances broad copyright
and communications policies. Part I offers a brief overview of
intermediate carrier technology and a description of adminis-
trative and legislative restrictions affecting secondary transmis-
sions, including those made by cable systems and intermediate
carriers. This discussion is followed by an analysis of how re-
cent administrative changes and application of the new copy-
right law have affected the communications industry. Part II
considers why intermediate carriers have not been subjected to
copyright liability. This Part includes an analysis of two recent
federal appellate court cases and a critical assessment of argu-
ments relating to the applicability of the Copyright Act's pas-
sive carrier exemption to intermediate carriers importing
distant signals. Part III evaluates the effect of imposing copy-
right liability on distant signal retransmissions in the context of
current market and regulatory conditions. This Part concludes
that altering the current copyright scheme to allocate initial
copyright liability to intermediate carriers importing distant
signals advances broad copyright and communications policies.

I. DEVELOPMENT OF DISTANT SIGNAL TECHNOLOGY
AND ADMINISTRATIVE AND LEGISLATIVE
CONTROLS IN THE SECONDARY
TRANSMISSIONS MARKET

A. OVERVIEW OF DISTANT SIGNAL TECHNOLOGY AND ITS ROLE
WITHIN THE CABLE TELEVISION INDUSTRY

Before satellites began supplying cable television systems
with distant programming, the FCC quite properly viewed

13. See infra notes 87-103 and accompanying text.
14. For a discussion of the FCC's inability to solve the problems associated
with cable television, see Note, Regulatory Versus Property Rights Solutions for
15. Secondary transmissions generally are those other than the original
broadcast transmissions. See infra note 62.
cable systems as primarily a supplementary communications service aiding audience reception of local commercial television broadcasts. The first community antenna television stations (CATVs, commonly known as cable television stations) served primarily to extend the range of VHF stations into communities that were situated beyond the normal broadcasting range of such stations, or which, because of their topography, were ill suited for the reception of over-the-air broadcasts. Early cable systems that wished to import distant signals relied on a system of terrestrial microwave repeaters to relay the signals. Because microwaves travel in straight lines and are blocked by solid objects, they must be relayed by line-of-sight repeaters spaced at intervals of about twenty-five miles. Therefore, it would not have been economically feasible for a California cable system, for example, to import the signal of a New York broadcast station by this method.

In contrast, the cost of sending broadcast signals via domestic satellite to scattered cable stations is largely not a function of distance. An antenna situated near the commercial television station picks up the broadcast signal off the air and

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18. "VHF" stands for "very-high frequency." VHF stations occupy channels 2 through 13 on the television dial.
19. "Over-the-air" broadcasting refers to traditional commercial television broadcasting where signals are picked up "off-the-air" by the typical home viewer's roof-top antenna. In contrast, industry linguists describe cable television as "wired TV." See R. Smith, The Wired Nation 1 (1970).
23. Resale carrier licensees do not have to obtain permission to retransmit the signals of commercial broadcasting stations, because § 605 of the Communications Act of 1934 permits "receiving, divulging, publishing, or utilizing the contents of any radio communication which is broadcast or transmitted by amateurs or others for the use of the general public." 47 U.S.C. § 605 (1976). Sec-
sends it to an "uplink," or earth transmitting station,\textsuperscript{24} that transmits the signal to the satellite. The satellites from which cable stations now receive much of their programming are located 22,300 miles above the equator in geosynchronous orbit.\textsuperscript{25} On each satellite, there are from twelve to twenty-four "transponders"\textsuperscript{26} capable of receiving signals from an uplink. The transponders amplify the signals they receive from earth before relaying them to a "downlink."\textsuperscript{27} From the downlink the signals are sent to a cable system headend,\textsuperscript{28} and then on to individual subscribers via coaxial cable.\textsuperscript{29}

\textsuperscript{24} These uplink earth transmitting stations employ large antennas whose aim may be redirected at satellites which stray from their positions. See Note, \textit{supra} note 22, at 809. Uplinks generally use the 6 gigaHertz (GHz) frequency band for transmissions. \textit{Id.} at 809 n.160.

\textsuperscript{25} A "geosynchronous" orbit is one that permits the satellite to remain stationary relative to the earth's surface. \textit{Id.} at 326. There are, however, only a finite number of positions within the 22,300 mile orbit that can cast a "footprint" over all of North America. See Note, \textit{supra} note 22, at 810 & n.168. These positions, therefore, are highly prized. In addition, because all communications satellites use the same frequency, they must be spaced sufficiently far apart to avoid interfering with each other. \textit{Id.} at 810. Communications satellites are now spaced at intervals of from four to five degrees of arc. \textit{Id.} at 810 n.169. Thus, only a finite number of geostationary satellites may cast their "footprints" across all of the continental United States. \textit{Id.} at 810. Because demand is high and the supply finite, competition for access to satellite space has been likened to that of a gold rush. See \textit{How Cable-TV Success Hinges on Satellites}, \textit{Bus. Wk.}, Sept. 14, 1981, at 89.

\textsuperscript{26} Transponders are antennas on the satellite that receive signals from an uplink. See Note, \textit{supra} note 22, at 809. There are from 12 to 24 transponders on a given satellite. Perle, \textit{supra} note 25, at 326.

\textsuperscript{27} A downlink is a receiving antenna situated on the earth. Note, \textit{supra} note 22, at 808.

\textsuperscript{28} Perle, \textit{supra} note 25, at 326. The headend is the central facility from which a cable system distributes all signals to its subscribers. Note, \textit{supra} note 22, at 794 n.43. The signals received by the downlink are at super high frequency and must be converted to very high frequency (VHF) or ultra-high frequency (UHF), before transmission to subscribers. Perle, \textit{supra} note 25, at 326.

\textsuperscript{29} The basic cable system consists of three parts: a set of antennas that receives external signals, a headend that processes and amplifies the received signals, and a distribution network that carries the signals to subscribers. Note, \textit{supra} note 22, at 794. A modern cable system's antennas will receive the signals of all local commercial television stations, because FCC regulations require cable systems located within the 100 largest markets to carry, upon request, the broadcast signals of commercial stations within whose "specified zone" the cable system is situated. 47 C.F.R. § 76.61(a)(1) (1982). In addition,
Those lessees of transponders who originate their own programming, such as Home Box Office (HBO), charge cable stations a copyright royalty fee for the right to receive their signals. Three carriers, Eastern Microwave, Inc. (EMI), United Video, Inc. (UVI), and Southern Satellite Systems, Inc. (SSS), lease transponder space on satellites but do not originate their own programming. Instead, the FCC licenses these carriers to receive and distribute the signals originating from other services. The antennas may receive one or more distant signals distributed by microwave or satellite intermediate carriers. See Ladd, Schrader, Liebowitz & Olev, Copyright, Cable, the Compulsory License: A Second Chance, 3 Com. & L., Summer, 1981, at 3, 24. [hereinafter cited as Ladd].

The headend functions as the "master control station and nerve center" that processes and amplifies each of the signals the antennas receive. Note, supra note 22, at 794 n.43. The signals received by the headend must be "translated" from the incoming carrier frequency to a standard broadcast frequency corresponding to a channel on a standard television set. *Id.*

After processing and translation, the signal is amplified and allocated to a particular channel corresponding to the channel on the viewer's television dial. *Id.* The signal may be relayed at once for immediate viewing, or it may be taped and stored for later distribution. A modern headend has the capability of deleting selected portions of incoming signals, and substituting material originated in the locale, such as local advertising. This is generally not done, however, especially in the case of incoming signals from commercial television broadcast stations, since a cable system that willfully alters the content of the program is liable for copyright infringement. See 17 U.S.C. § 111(c)(3) (Supp. V 1981).

From the headend, the signal is carried by coaxial cable to the subscriber's television set. A coaxial cable is a metal conductor surrounded by another metal conductor, separated by insulation. Note, supra note 22, at 794 n.44. Unlike signals sent over the air, signals sent by wire are less susceptible to interference from one another, *id.*, even when a cable carries thirty or more signals. See *id.* at 795 n.47.

At the subscriber's reception end is a standard television set, fitted so as to connect with the coaxial cable. *Id.* at 794 n.44. The only extra equipment the subscriber needs is either a small converter box that replaces the standard television channel selector or a transformer that matches the cable signal to the signal receiving capability of the television set. *Id.* at 795 n.45. The subscriber may, if desired, simply disconnect the cable and use the television to receive programs off the air. To acquire cable service, a person pays a one-time installation fee that covers the cost of stringing cable to the home, installing an outlet, and supplying the home with one converter box. Thereafter, the subscriber generally pays a monthly fee to receive the CATV's basic complement of programming. Ladd, *supra*, at 39.


three entities as "resale common carriers." The resale common carrier license permits EMI, UVI and SSS to intercept the broadcast signals of independent television broadcasting stations, WOR-New York, WGN-Chicago, and WTBS-Atlanta, respectively, and to transmit the signal to cable station headends throughout the United States. Rather than charge a copyright royalty, each resale carrier charges the cable system a flat, FCC regulated rate based on the number of subscribers in that system. Satellite resale distribution of programming has thus made it possible for cable stations to import signals from great distances without the use of costly terrestrial microwave relays.

B. ADMINISTRATIVE AND LEGISLATIVE RESTRICTIONS AFFECTING SECONDARY TRANSMISSIONS

Before the enactment of the 1976 Copyright Act, cable systems enjoyed absolute freedom from copyright liability for the retransmission of commercial television broadcasts to their

32. See supra note 1. Originally the FCC licensed only the underlying carriers as common carriers. In a major policy shift, the FCC announced it would consider granting common carrier status to resale carriers, perceiving "no difference between resale and traditional communications common carriage." Regulatory Policies Concerning Resale & Shared Use of Common Carrier Serv. & Facilities, 60 F.C.C.2d 261, 308 (1976). The FCC made resale common carrier licenses contingent upon the carriers' preservation of the "sine qua non" of common carrier status—nondiscriminatory service to the public. Id.

In 1976, the FCC granted resale carrier status to SSS, authorizing it to lease a single transponder aboard RCA Americom's SATCOM I satellite for the purpose of providing the signal of Ted Turner's independent broadcasting station, WTBS-Atlanta, to cable stations throughout the United States. See Southern Satellite Systems, Inc., 62 F.C.C.2d 153, 162 (1976). Ruling on SSS's request for authorization, the FCC perceived satellite resale delivery as a unique and creative use of communications technology that "would also make available a service that cannot be efficiently or economically provided by terrestrial means and would result in an increase in the diversity of cable television programming available to the public." Id. at 159-60. Because the FCC required that SSS not "principally serve . . . its own, or closely affiliated private business interests," id. at 160, Ted Turner, who originally owned SSS, sold the corporation to a business acquaintance for $1. M'Media Shoots at Superstations, VARIETY, April 30, 1980, at 164.


35. Transmission of signals over longer distances by terrestrial microwave is significantly more expensive than by satellite. See Competitive Carrier Rulemaking, 77 F.C.C.2d 308, 327 (1979). A cable system desiring microwave delivery may receive FCC authorization to construct its own microwave service, see 47 C.F.R. §§ 78.1-35 (1982) or may obtain such a service for a fee from one of the intermediate common carrier services licensed by the FCC, see 47 C.F.R. § 21.713 (1992).
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subscribers by virtue of two United States Supreme Court decisions, *Fortnightly Corp. v. United Artists Television, Inc.*, 36 and *Teleprompter Corp. v. Columbia Broadcasting System*. 37 In *Fortnightly*, the Court ruled that cable systems that passively receive and retransmit broadcast signals containing copyrighted works do not perform publicly, and therefore, do not infringe upon copyrights. 38 In *Teleprompter*, the Court removed any lingering doubts as to the copyright liability of cable systems when it held that its *Fortnightly* analysis applied even when cable systems imported signals from great distances. 39

In the absence of cable television copyright liability, the FCC struggled with a regulatory strategy that would act as a substitute for effective copyright legislation and minimize cable's competitive impact on television broadcasting. 40 Uncer-

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36. 392 U.S. 390 (1968). In *Fortnightly*, the plaintiff, United Artists, owned the copyrights to several motion pictures. Five television stations in Pennsylvania, Ohio, and West Virginia received licenses from United Artists to broadcast these motion pictures. *Id.* at 393. The defendant, Fortnightly Corporation, owned and operated a CATV system in two neighboring communities in West Virginia, which, because of their location, had poor television reception. *Id.* at 391. Fortnightly imported signals from the five television stations, at distances ranging from 52 to 82 miles, in order to give the communities improved television service. *Id.* at 392.


38. See 392 U.S. at 396-99. The Court found that the existing copyright statutes offered little guidance as to the meaning of the copyright owner's right to publicly perform a dramatic work. To assist its analysis, the Court instead employed an analogy, and considered whether the cable system functioned more like a passive viewer/antenna than an active performer. *Id.* at 396-97. The Court concluded that the cable systems fell "on the viewer's side of the line," because cable systems function essentially like sophisticated antennas, merely "enhance[ing] the viewer's capacity to receive the broadcaster's signal." *Id.* at 399.

39. The Court stated:

The privilege of receiving the broadcast electronic signals and of converting them into the sights and sounds of the program inheres in all members of the public who have the means of doing so. The reception and rechanneling of these signals for simultaneous viewing is essentially a viewer function, irrespective of the distance between the broadcasting station and the ultimate viewer.

415 U.S. at 408.

40. The FCC later acknowledged that its early regulations had copyright overtones:

During our early regulatory involvement with CATV, the phrase "unfair competition" came to signify a set of issues which sounded principally in copyright but to some extent in less well defined notions that it was inequitable for CATV and commercial broadcasting to compete freely when the former did not pay for the programming it re-transmitted to its subscribers . . . .
tain as to the reach of its authority under the Communications Act of 1934, the FCC adopted a series of short-lived cable signal carriage rules during the 1960's. Following the Supreme Court's decision in *Fortnightly*, the Commission proposed ex-

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42. Initially, the FCC ruled that it had no jurisdiction over the cable television industry because a cable station did not "broadcast" within the meaning of the definition provided in § 153 of the Communications Act, 47 U.S.C. § 153 (1976). *See* Inquiry Into the Impact of Community Antenna Systems, TV Translators, TV "Satellite" Stations, and TV "Repeaters" on the Orderly Development of Television Broadcasting, 26 F.C.C. 403, 428-29 (1959). The Commission changed this position in 1962, however, when it perceived that cable threatened the economic viability of local UHF television broadcasting. *See* Carter Mountain Transmission Corp., 32 F.C.C. 459, 465, *aff'd*, 321 F.2d 359 (D.C. Cir. 1962), *cert. denied*, 375 U.S. 951 (1963). In *Carter Mountain*, the FCC intervened to deny the application of a terrestrial microwave carrier that had petitioned for a license to supply a cable station with a distant signal. The FCC determined that the proposed service would threaten the economic viability of the sole commercial broadcasting station in Riverton, Wyoming, KWRB-TV. *Id.* at 461-64. The FCC believed that the cable station served by the intermediate carrier would duplicate the programming of KWRB-TV, thereby causing audience diversion and a loss of advertising revenue. *Id.* at 463-64.

During the next few years the Commission experimented with several different regulatory schemes, all designed to deal with the increasing competition between the cable and broadcast industries. In 1965, the FCC exerted jurisdiction over "microwave-served" cable systems, mandating that such systems carry all local television stations and prohibiting duplication of local television programming within fifteen days of the local broadcast. *See* Rules re Microwave-Served CATV, 38 F.C.C. 693, 742-43 (1965). To support its exercise of jurisdiction the FCC noted that cable systems fell "outside of the program distribution process" because they were not subject to § 325 of the Communications Act, 47 U.S.C. § 325 (1976), which forbids rebroadcasting of an originating station's signal without consent. 38 F.C.C. at 704. Thus, the FCC pointed out, cable systems were able to use programming without having to bargain for it in the marketplace. *Id.* at 703-05.

A year later, the Commission exerted jurisdiction over all cable systems. *See* CATV, 2 F.C.C.2d 725 (1966). The FCC's jurisdiction over cable was upheld in United States v. Southwestern Cable, 392 U.S. 157 (1968), as "reasonably ancillary to . . . the Commission's . . . regulation of television broadcasting." *Id.* at 178. The rules adopted in 1966 maintained the nonduplication and mandatory carriage of local stations requirements, although they shortened the period of duplication protection. 2 F.C.C.2d at 746-47. In addition, cable systems operating within the top 100 television markets could import distant signals after a hearing before the Commission to establish that such service would be in the public interest and would maintain a healthy UHF television broadcast service. *Id.* at 782. The FCC adopted this case-by-case method of distant signal regulation because of its continuing uncertainty about the economic relationship between commercial and cable television. *Id.* at 788. Experience with the evidentiary hearing method proved it unworkable. Inquiry Into the Economic Relationship Between Television Broadcasting and Cable Television, 71 F.C.C.2d 632, 650 (1979).
experimental rules\footnote{CATV, 15 F.C.C.2d 417 (1968).} that were never formally adopted.\footnote{See Cable Television Report and Order, 36 F.C.C.2d 143, 152-53 (1972).} Under these rules, cable systems in the largest 100 television markets were required to obtain "retransmission consent" from distant broadcasting stations originating signals that the systems wished to carry.\footnote{CATV, 15 F.C.C.2d 417, 432-34 (1968).} Because none of the originating stations gave their consent, distant signal transmission in these markets ceased.\footnote{Inquiry Into the Economic Relationship Between Television Broadcasting and Cable Television, 71 F.C.C.2d 632, 651 (1979). Appropriately, the FCC has characterized this era as the "freeze." \textit{Id.} Under the 1968 rules, CATVs were also prohibited from obtaining such distant signals if they bypassed or "leap-frogged" closer stations in favor of popular distant stations. \textit{Id.} The mandatory carriage and nonduplication rules, \textit{see supra} note 42, remained unchanged.}

While FCC regulation effectively throttled the growth of the cable industry, congressional efforts to revise the copyright laws stalled. An impasse between the cable television interests on one side and the broadcasters and copyright owners on the other had impeded enactment of a new copyright act for years.\footnote{H.R. REP. No. 1476, 94th Cong., 2d Sess. 89, \textit{reprinted in} 1976 U.S. CODE CONG. \& AD. NEWS 5659, 5703 [hereinafter cited as \textit{HOUSE COPYRIGHT REPORT}].} Seeking a way out of this dilemma and eager to free itself from restrictive regulation, the cable industry agreed to the terms of a compromise between the competing interests, known as the "Consensus Agreement."\footnote{See Cable Television Report and Order, 36 F.C.C.2d 143, 165-68 (1972).} Under the terms of this compromise, the cable industry agreed to accept the less restrictive FCC regulations contained within the Consensus Agreement in exchange for being subjected to only partial copyright liability under the proposed Copyright Act.\footnote{\textit{Id.}} The Consensus Agreement and congressional dissatisfaction with the results in \textit{Fortnightly}\footnote{See supra note 36.} and \textit{Teleprompter}\footnote{See supra note 37.} provided the necessary impetus for passage of the Act.\footnote{See Copyright Law Revision: Hearings before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the Comm. on the Judiciary, House of Representatives, on H.R. 2223, Part 3, 94th Cong., 1st Sess. 2063-85 (1975) (Copyright Office Briefing Papers).}

The 1976 Act radically departs from prior law\footnote{Traditionally, the owner of a copyright was said to be the proprietor of a "bundle of rights" consisting of the rights of reproduction, adaptation, publication, performance, and display. \textit{See HOUSE COPYRIGHT REPORT, supra} note 47, at 61, \textit{reprinted in} 1976 U.S. CODE CONG. \& AD. NEWS at 5674. Section 106 of the Copyright Act embodies these rights. Prior to the 1976 Act, ownership of
ment of cable television’s copyright liability. 54 Section 106 of the Act grants the copyright owner of a dramatic work 55 the exclusive right to “perform the . . . work publicly.” 56 Section 101 defines “performing a work” as showing its images or making its sounds audible “by means of any device or process.” 57 Performing “publicly” can be accomplished either by performing the work “at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered” or by transmitting it to such a place “by means of any device or process.” 58


55. The Act does not define the term “dramatic work.” Congress did intend, however, to include television broadcasts within the scope of this term. Television broadcasts clearly come within the definition of “audio visual works,” see 17 U.S.C. § 101 (Supp. V 1981), which Congress included within the recognizable “subject matter” of copyright. See id. § 102.

56. 17 U.S.C. § 106 (Supp. V 1981). Section 106 also incorporates the other rights comprising the traditional “bundle of rights” that inhere in the copyright owner. See supra note 53. The pertinent text of § 106 states:

Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly . . . .


57. 17 U.S.C. § 101 (Supp. V 1981). This section defines “performing” a work as: “To recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.” Id.

58. Id. To perform a work “publicly” is defined in § 101 as:
The House Copyright Report\textsuperscript{59} indicates that the public performance right definition is broad enough to cover “any further act by which [the public performance] is transmitted or communicated to the public,”\textsuperscript{60} including retransmissions by cable television systems.\textsuperscript{61} Sections 101 and 106, therefore, overrule \textit{Fortnightly} and \textit{Teleprompter} and, standing alone, would subject both intermediate carriers and cable systems to full copyright liability for retransmissions of commercial television broadcasts.

The broad rights conferred on copyright owners by sections 101 and 106, however, are modified by section 111, which limits copyright liability for certain kinds of “secondary transmissions.”\textsuperscript{62} Section 111(c)\textsuperscript{63} grants cable systems a “compulsory license” for secondary transmissions of signals broadcast by FCC licensed television stations, provided that the cable systems do not alter the signals they transmit.\textsuperscript{64} Instead of paying royalties directly to the copyright owners in the traditional way, cable systems must pay a percentage of their gross receipts\textsuperscript{65} into a copyright pool administered by the Copyright

\begin{itemize}
  \item [(1)] to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
  \item [(2)] to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.
\end{itemize}

\textit{Id.}

\textsuperscript{59} HOUSE COPYRIGHT REPORT, supra note 47, at 63, reprinted in 1976 U.S. CODE CONG. & AD. NEWS at 5676.

\textsuperscript{60} Id.

\textsuperscript{61} Id., reprinted in 1976 U.S. CODE CONG. & AD. NEWS at 5677. The report also points out that a performance does not constitute an infringement unless it is also public. \textit{Id.} Thus, characterization of an action as an infringement requires a two step inquiry.

\textsuperscript{62} 17 U.S.C. § 111(f) (Supp. V 1981) defines a “secondary transmission” with reference to the term “primary transmission.” A primary transmission is defined as “a transmission made to the public by the transmitting facilities whose signals are being received and further transmitted by a secondary transmission service, regardless of where or when the performance or display was first transmitted.” \textit{Id.} A secondary transmission is defined as “the further transmitting of a primary transmission simultaneously with the primary transmission, or nonsimultaneously with the primary transmission if by a cable system not located in whole or in part within the boundary of the forty-eight contiguous States, Hawaii, or Puerto Rico.” \textit{Id.}


\textsuperscript{64} 17 U.S.C. § 111(c)(3) (Supp. V 1981) prohibits cable systems from willfully altering the content, advertising or station announcements embodied in the commercial television station’s transmission. Cable systems must also comply with certain formal notice and filing requirements. \textit{See id.} § 111(d).

\textsuperscript{65} Originally, the percentage varied between 0.2% and 0.675%, depending
Royalty Tribunal (CRT). Periodically, the CRT distributes
the fees among the copyright owners whose works were re-
transmitted. Although the compulsory license fees are set by
statute, the CRT has authority to increase the statutory fee in
the event of inflation, changes in cable system subscription
rates, or modifications in FCC cable regulations. In compari-
son to what broadcasting stations pay for program acquisition,
the compulsory license fee amounts to only partial copyright li-
ability. The compulsory license scheme reflects Congress's

on the number of distant signals the cable system transmitted. See 17 U.S.C.
§ 111(d)(2)(B) (Supp. V 1981). The rate has since been adjusted to account for
inflation. See infra note 68.

66. Congress created the CRT to administer the collection and distribution
of royalty fees generated by the compulsory license scheme. See 17 U.S.C.

nual distribution, id. § 111(d)(5), the CRT did not make its first distribution de-
termination until two years after the Act went into effect. Copyright Royalty
(1980) [hereinafter cited as Cable Royalty Determination], upheld in National
Ass'n of Broadcasters v. Copyright Royalty Tribunal, 675 F.2d 367, 371 (D.C. Cir.
1982). From a total pool of $15,141,141.97, the CRT distributed $14,734,078.30, the
balance of $407,063.67 covering the CRT's administrative costs. 45 Fed. Reg. at
63,042.

The CRT based its allocation scheme on two factors: (1) the harm to copy-
right owners caused by cable secondary transmissions, and (2) the value of the
programming to cable stations. Id. at 63,035. It further determined that it was
the clear intent of Congress in drafting § 111 to reward only program producers
and syndicators. Id. at 63,032-33. Accordingly, the CRT denied a claim by the
National Association of Broadcasters (NAB) on behalf of commercial television
stations which claimed injury on account of cable transmissions of syndicated
programming into the broadcasters' local markets from distant sources which
duplicated programming for which the local broadcasters had acquired the ex-
clusive rights. Id. The CRT allocated the funds according to the following
scheme: (1) program syndicators, 75%; (2) Joint Sports claimants and NCAA,
12%; (3) Public Broadcasting Service, 5.25%; (4) Music Performing Rights Soci-
eties, 4.5%, and (5) U.S. and Canadian Broadcasters, 3.25%. Id. at 63,042.

justed the statutory licensing fee upwards by 21% to account for inflation since
1978. See 37 C.F.R. § 308 (1982). The rates now vary from 0.242% to 0.817% of
gross receipts. Id. § 308.2. The CRT may make such inflation adjustments only
ever, revise rates if requested to do so by any copyright owner within 12
months of amendments to the FCC signal carriage rules. Id. § 804(b). The lat-
ter adjustments must be "reasonable in the light of the changes affected by
the amendment to such rules and regulations." Id. § 801(b)(2)(B). Thus, the Act
does not appear to contemplate drastic adjustments designed to achieve parity
between the program acquisition costs of broadcasters and cable operators.

69. The fee paid by cable systems for compulsory licenses in no case ex-
ceeds a modest 2.390% of gross subscription receipts. See 37 C.F.R. § 308.2
(1982) (computed by totaling the maximum percentage for each distant signal
equivalent). In comparison, broadcasters on the average spent nearly 25% of
revenues for program acquisition in 1977. Cable Television Syndicated Pro-
gram Exclusivity Rules, 71 F.C.C.2d 1004, 1016-17 (1979). Even the CRT admit-
desire to achieve a balance among the competing interests within the broadcasting industry, as well as its belief that it was impractical and burdensome to subject the fledgling cable industry to full copyright liability.\footnote{70} Congress was also eager to encourage the proliferation of cable stations, believing that access to a wider variety of programming would serve the public interest.\footnote{71} Section 111, therefore, incorporates the basic terms of the Consensus Agreement,\footnote{72} balancing the copyright owner's interests in copyright royalties and control over copyrighted works against the cable industry's need to survive in the marketplace. Thus, section 111(c) relieves cable television of the burden and expense of negotiating for permission to transmit commercial television broadcasts, subjecting it instead to only partial copyright liability in the form of a compulsory license.\footnote{73} In exchange, section 111(d) is designed to prevent unfair competition with broadcasting stations by requiring cable systems that wish to be eligible for compulsory licenses to comply with FCC regulations.

Section 111 further modifies the broad rights conferred by sections 101 and 106 by limiting the copyright liability of secondary transmissions made by passive carriers. Section 111(a)(3) provides an outright exemption for secondary transmissions by carriers who have "no direct or indirect control over the content or selection" of the copyrighted works or over their recipients, and whose activities "consist solely of providing wires, cables, or other communications channels for the use of

\footnote{70} See House Copyright Report, supra note 47, at 89, reprinted in 1976 U.S. Code Cong. & Ad. News at 5704; Mitchell, Cable Television Under the 1972 FCC Rules and the Impact of Alternative Copyright Fee Proposals—An Economic Analysis, reprinted in Copyright Law Revision: Hearings before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the Comm. on the Judiciary, House of Representatives, on H.R. 2223, Part I, 94th Cong., 1st Sess. 517, 559-60 (1975). The Mitchell study asserted that cable was a capital intensive industry, with high operating costs and a low return on investment. Id. at 538-40. At that time, even program suppliers agreed with the assertion by cable operators that it would have been impractical to require individual cable systems to bargain with copyright owners for permission to retransmit. Id. at 758 (Testimony of Jack Valenti, President, Motion Picture Association of America).


\footnote{72} See supra note 48 and accompanying text.

\footnote{73} See supra notes 63-67 and accompanying text.
In the years between 1972, when the Consensus Agreement was adopted, and 1978, when the Copyright Act went into effect, the FCC cable regulations contained within the Consensus Agreement remained the only means of regulating the cable industry. Two of these rules, the distant signal carriage and syndicated exclusivity rules, served as the primary substitutes for copyright protection. Under the most recent version of the distant signal rules, a cable station could import only the number of distant signals necessary to fulfill a given complement of signals, depending on the size of the station and the market. For example, a cable system with more than 1000 subscribers located in one of the top fifty markets could import the number of distant signals necessary to provide its viewers with a full complement of three network stations and three independent stations. The most recent syndicated exclusivity rules required a cable system located in the top fifty markets to delete syndicated programming from distant signals for a period of one year from the date the program was first licensed to a television station anywhere in the United States. A cable system situated in the second fifty markets had to delete syndicated programming only if one of the stations in its market owned the exclusive rights to the program. Serving as substitutes for the copyright owners' control over the distribution of their works, these two rules helped minimize the impact of cable on the broadcasting industry. The distant signal rules


(a) The secondary transmission of a primary transmission embodying a performance or a display of a work is not an infringement of copyright if—

(3) The secondary transmission is made by any carrier who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others . . . .

75. 47 C.F.R. §§ 76.57(b)-(d), 76.59(b)-(d), 76.61(b)-(d), 76.63 (1979) (amended 1980).


77. 47 C.F.R. §§ 76.57(b)-(d), 76.59(b)-(d), 76.61(b)-(d), 76.63 (1979) (amended 1980).

78. 47 C.F.R. § 76.61(b) (1979) (repealed 1980).


81. 47 C.F.R. § 76.151(a) (1979) (repealed 1980).

82. Id. § 76.151(b).
limited the number of distant stations with which a local broadcaster would have to compete, and the syndicated exclusivity rules ensured that broadcasters and program suppliers received the exclusivity protection for which they had bargained.

After passage of the 1976 Copyright Act extended copyright liability to cable television, the FCC reevaluated the need for its signal carriage rules.\(^8\) Analyzing the effects of deregulation,\(^8\) the FCC concluded that deletion of the distant signal and syndicated exclusivity rules would not affect broadcaster revenue enough to reduce program supply.\(^8\) In 1980, the Commission repealed the two rules.\(^8\) As a result, cable systems may now import any number of distant signals without regard to the exclusivity protection that the local broadcasters may have purchased in their contracts with program suppliers.

C. RECENT DEVELOPMENTS

The 1976 Copyright Act's compulsory license scheme, reinforced by FCC deregulation of the cable industry, has achieved one of the results Congress intended. Cable television is no longer merely a supplementary service primarily aiding broadcast reception in rural areas, but is a viable communications medium. In recent years, cable television has dramatically increased revenues\(^8\) and its share of the television viewing market.\(^8\) In addition, many consumers are in a position to have

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\(^8\) See Inquiry Into the Economic Relationship Between Television Broadcasting and Cable Television, 71 F.C.C.2d 632 (1979). In its report, the FCC concluded that the cable industry's share of the viewing market (its "penetration") would never exceed 40% in the major urban markets or 48% nationwide. Id. at 669-72. The FCC analysis failed, however, to consider how improved technology might help cable achieve greater penetration.

\(^8\) Cable Television Syndicated Program Exclusivity Rules, 71 F.C.C.2d 1004, 1026 (1979).


\(^8\) Cable advertising revenues jumped from $58.4 million in 1980 to a probable $251.8 million in 1982, while revenues from subscription fees rose from $2.5 billion in 1980 to a probable $4.4 billion in 1982. Holsendolph, *Tougher Times for Cable TV*, N.Y. Times, July 11, 1982, § 3 (Business), at 24. Although Mr. Holsendolph was optimistic about the future growth of cable, he believed that increased competition from other developing communications technologies might slow the rate of growth somewhat. Id.

\(^8\) Between the years 1970 and 1977, cable television increased its share of the television market at the rate of approximately 1% per year. In 1977, the rate doubled. Berkman, *The Video Revolution: Some Counter-Revolutionary
cable installed at low cost because of a high "passby rate." Some industry analysts predict that fifty percent of all television homes will have cable service within ten years.

While the compulsory license scheme and FCC deregulation may account for some of the cable industry expansion, much of the growth is attributable to technological innovation. The average cable network provides only ten channels, but the most modern can now provide fifty or more. In addition, satellite distribution permits cable systems to offer diverse entertainment, sports, and movie programming to their subscribers. Increased channel capacity and program diversity have enabled cable systems to attract paying subscribers and to compete in the larger urban markets where television broadcasting stations already supply the public with several free channels.

The increased concentration of the ownership of cable sys-

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Ideas, TELEVISION Q., Spring 1981, at 77, 78-80. Penetration increased by a phenomenal 7% in 1979-80 alone. MAJORITY STAFF REPORT, supra note 17, at 291. In 1979, the FCC predicted that cable penetration would not exceed 45% in the near future, Inquiry Into the Economic Relationship Between Television Broadcasting and Cable Television, 71 F.C.C.2d 632, 672 (1979), and would never exceed 40% in the major urban markets. Id. at 669. Later projections show that the FCC prediction may have been overly pessimistic. Projections in the MAJORITY STAFF REPORT, supra note 17, predict total cable penetration of 60% by 1990. Id. at 291.

89. "Passby rate" is a trade term defined as the percentage of TV homes in a market area that are passed by a cable system's coaxial lines, just as a phone company's wires pass by nearly every home. MAJORITY STAFF REPORT, supra note 17, at 350.

Approximately 42% of all television households are passed by a cable system's wires. Id. FCC data indicate that about 55% of the homes passed by currently opt for cable television reception. Id.

90. Id. at 349. Cable television delivered programming to 22-27% of American television households as of 1981, id. at 348-49, and to 14% of the households in the nation's ten largest television markets. Id. at 349.

91. MAJORITY STAFF REPORT, supra note 17, at 296.

92. There are approximately 35 pay-cable programming services distributed by satellite, with another 20 expected within the next two years. Cable Programming Catches Up With Demand, Bus. Wk., Feb. 22, 1982, at 130. Cable systems may select from such program possibilities as Home Box Office (HBO), offering primarily sports, entertainment, and movies; Spotlight, The Movie Channel, and Showtime, three competitors to HBO; Entertainment and Sports Programming Network (ESPN); and The Disney Channel, offering family programming. Id. Many cable operators offer a core package of two or three pay-cable services at a combined price. Subscribers then choose from the other services a la carte. Id.

93. See supra notes 88, 90.

94. Besides having to compete with several free broadcast channels, an urban cable operator must also contend with the higher capital costs of constructing its cable network. It is far more expensive to obtain the necessary rights of way in urban areas than in rural areas. See R. SMITH, supra note 19, at 24.
tems in the hands of a few large conglomerates has also
strengthened the bargaining power of cable television interests.
These conglomerates, known as Multiple Systems Operators
(MSOs), are controlled by such corporations as Westinghouse,
Warner, Cox, and Storer.\textsuperscript{95} The twenty largest MSOs currently
serve sixty-five percent of cable viewing households.\textsuperscript{96} Many of
the MSOs are also leading suppliers of cable programming.\textsuperscript{97}
This contrasts with the situation within the commercial broad-
casting industry, in which the FCC prohibits any one entity
from owning more than seven broadcast stations.\textsuperscript{98} Thus, the
potential exists for MSOs to develop market strength in the
cable industry equaling or exceeding that which the networks
presently possess in the commercial broadcasting industry.

Because compulsory licensing, technological advancement,
and increased economic power have enabled cable to compete
successfully, many commentators have argued that the deregu-
lation of cable television provides the industry with an unnec-
essary windfall.\textsuperscript{99} Congress, in enacting section 111 of the
Copyright Act, sought to implement the Consensus Agreement
compromise and to insure a fair balance between the cable and

\textsuperscript{95} Majority Staff Report, supra note 17, at 293.
\textsuperscript{96} Id. at 294. The following chart gives a breakdown of the size of the ten
largest MSOs as of May 31, 1982:

\begin{tabular}{|l|l|}
\hline
MSO & Subscribers \\
& (thousands) \\
\hline
Tele-Communications & 2,200 \\
Time, Inc. & 1,939 \\
Westinghouse (includes Teleprompter) & 1,723 \\
Cox Communications & 1,164 \\
Storer Broadcasting & 1,115 \\
Warner Amex Cable & 943 \\
Times-Mirror & 933 \\
Newhouse Broadcasting & 623 \\
Rogers UA Cablesystem & 611 \\
Viacom Communications & 581 \\
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\end{tabular}

Holsendolph, supra note 87, at 24.

\textsuperscript{97} Majority Staff Report, supra note 17, at 295.
\textsuperscript{98} 47 C.F.R. § 73.636(a)(2) (1982). Of these seven stations, no more than
five may be VHF. Id. Each of the networks owns five VHF outlets. Majority
Staff Report, supra note 17, at 294. Under the “cross-ownership” rules, a
cable system is prohibited from carrying any television broadcast signal if the
cable system has an ownership interest in either a national television network,
a local television station, or a local television translator station whose service
areas overlap with the cable system. 47 C.F.R. § 76.501 (1982).

\textsuperscript{99} See generally Besen, Manning & Mitchell, Copyright Liability for Cable
Television: Compulsory Licensing and the Coase Theorem, 21 J.L. & Econ. 67
(1978); Brotman, Cable Television and Copyright: Legislation and the Market-
place Model, 2 Comm/ENT 477 (1980); Note, Cable Television’s Compulsory Li-
cense: An Idea Whose Time Has Passed?, 25 N.Y.L. Sch. L. Rev. 925 (1979);
Note, supra note 8; Note, supra note 14.
broadcasting interests. Elimination of the distant signal and syndicated exclusivity rules dismantled a major component of this compromise. The balance now tilts decisively in favor of the cable industry. Deregulation, in combination with compulsory licensing, gives cable systems full access to programming while subjecting them to only partial liability.

This combination of factors may, in the long run, adversely affect the supply and diversity of programming available to the public—a result contrary to Congress's original intentions. Permitting cable systems to acquire an ever-increasing volume of distant signal programming at the artificially low prices set by the statutory license fee perpetuates and exaggerates the program acquisition imbalance that now exists between the cable and broadcast industries, and thus undercompenses program syndicators and producers. Some economic theorists have predicted that increased market penetration by cable will produce a "free-rider" problem, preventing program producers from obtaining the market value of their programming because a large portion of the available outlets receive the programming at low cost. If this free-rider problem becomes sufficiently severe, program producers will either produce less expensive programming or withhold their programs from the market, rather than risk taking a loss.

Critics of the compulsory license scheme have already suggested proposals for reform. Some have advocated dispensing with it altogether. Others have urged the CRT to raise the statutory licensing fees. The most comprehensive proposal involves requiring cable systems to obtain "retransmission consent" from broadcasters whose signals they wish to dis-

100. See supra notes 70-73 and accompanying text.
101. See supra note 69 and accompanying text.
102. See Besen, Manning & Mitchell, supra note 99, at 85-90.
103. The FCC predicted that cable penetration and distant signal penetration would never achieve levels significant enough to threaten broadcaster or copyright owner revenues. See Inquiry Into the Economic Relationship Between Television Broadcasting and Cable Television, 71 F.C.C.2d 632, 669 (1979). The FCC analysis thus runs counter to the assumptions underlying the Coase theorem. See Besen, Manning & Mitchell, supra note 99, at 79. The FCC's figures, however, are suspect. The Commission's prediction as to ultimate cable penetration and the effects of distant signal importation on copyright owner revenues did not take into account the increased attractiveness of cable to viewers resulting from cable's use of satellite distributed programming.
104. See Winner, Cutting the Gordion Knot: Compulsory Licensing Under the Cable Portion of the Copyright Act, Antitrust, and Unpredictability, 3 Com. & L. 41, 58 (1981).
105. See Greene, supra note 11, at 303.
No one, however, has yet considered the appropriate role of intermediate telecommunications carriers in any proposed reformation of the current statutory scheme.

II. CURRENT STATUS OF INTERMEDIATE CARRIERS UNDER THE 1976 COPYRIGHT ACT

A. THE PASSIVE CARRIER EXEMPTION

An intermediate common carrier is exempt from copyright liability if its secondary transmission services fall within the passive carrier exemption. A carrier fits within this exemption if it meets the following requirements: (1) it does not control the content or selection of the primary transmission; (2) it exercises no control over the particular recipients of its (secondary) transmission; and (3) its secondary transmission activities consist solely of providing wires, cable, or other communications channels for the use of others. It is clear that an intermediate carrier meets the second requirement. The immediate "particular recipients" of the intermediate carrier's secondary transmissions are the cable systems, which are entitled to receive the carrier's secondary transmission upon reasonable request by virtue of the carrier's status as a "resale common carrier." So long as an intermediate carrier does not refuse a reasonable request for its services, it does not exercise control over the particular recipients of its secondary transmissions.

Whether an intermediate carrier is providing the wires, uplinks, and cables of its relay system solely for the use of "others" is a more problematic question, and is tied to whether an intermediate carrier exercises control over the content or

106. See Brotman, supra note 99, at 486; Note, supra note 8, at 638.  
107. See supra note 62.  
108. 17 U.S.C. § 111(a)(3) (Supp. V 1981). There are four kinds of secondary transmissions which enjoy an outright exemption from copyright infringement. See id. § 111(a)(1)-(4). Only the exemption for passive carriers, id. § 111(a)(3), is relevant to this discussion.  
109. Id. § 111(a)(3).  
110. As noted by the Second Circuit in Eastern Microwave, Inc. v. Doubleday Sports, Inc., 691 F.2d 125 (2d Cir. 1982), cert. denied, 51 U.S.L.W. 3612 (U.S. Feb. 22, 1983), if the phrase "particular recipients" of the secondary transmission is construed as meaning "ultimate" recipients, i.e., cable system viewers, then a resale carrier's activities "are even more divorced from control of those recipients." Id. at 131 n.13.  
selection of the primary transmission. Arguably, if the intermediate carrier "selects" the television station signal it distributes, or controls the content of the copyrighted programming, it is doing more than merely providing wires and cable for the use of others. If the intermediate carrier does not control the content or selection of the signal, however, then it is not distributing a preselected product, but is merely facilitating the distribution of another's product through the intermediate carrier's retransmission service. An intermediate carrier, therefore, will generally fall outside the passive carrier exemption only if its activities amount to control over the content or selection of the television signal.

B. Judicial Treatment of the Passive Carrier Exemption

With numerous factors now favoring cable television interests, local broadcasters and copyright owners have resorted to the federal courts for protection of their interests, seeking to prevent application of the passive carrier exemption to certain resale intermediate carriers. In the only two cases to reach a substantive decision concerning the scope of the passive carrier exemption, WGN Continental Broadcasting Co. v. United Video, Inc. and Eastern Microwave, Inc. v. Doubleday Sports, Inc., the Seventh and Second Circuits, respectively, appear to have interpreted the passive carrier exemption similarly.

112. See supra text accompanying note 109.
113. 523 F. Supp. 403 (N.D. Ill. 1981), rev'd, 693 F.2d 622, reh'g denied, 693 F.2d 628 (7th Cir. 1982).
115. A third case, Hubbard Broadcasting, Inc. v. Southern Satellite Systems, Inc., No. 3-81-330 (D. Minn. April 22, 1982) (order denying defendant's motion for judgment on the pleadings), also placed § 111(a)(3) in issue. Since the dispute has only reached the pretrial motion stage, with Hubbard surviving a motion for judgment on the pleadings, it remains to be seen whether the Eighth Circuit will resolve these issues.

The plaintiff, Hubbard, is an independent commercial television station based in Minneapolis where it broadcasts KSTP-TV. See Plaintiff's Memorandum in Opposition to Defendant's Motion for Judgment on the Pleadings or for Summary Judgment at 2, Hubbard Broadcasting, Inc. v. Southern Satellite Systems, Inc., No. 3-81-330 (D. Minn. April 22, 1982). It also has stations in Tampa, Florida, and Albuquerque, New Mexico. Id. By contract with various copyright owners, Hubbard purchased the exclusive rights to broadcast several television shows and movies in a certain time period within its market areas. Id. at 3. Southern has a satellite resale common carrier license, see Southern Satellite Systems, Inc., 62 F.C.C.2d 153 (1976), allowing it to pick up WTBS-Atlanta, and retransmit it, via satellite, to cable stations located throughout the country, including stations within Hubbard's broadcast areas. Some of the programs aired by WTBS coincided with those for which Hubbard owned the exclusive license. Hubbard claimed the retransmissions infringed upon its copyright interest.
In *WGN*, a Chicago based independent broadcasting station, WGN-TV, brought an action against a satellite resale carrier, United Video (UVI),\(^{116}\) to enjoin the carrier's secondary transmissions of a WGN nine p.m. news program to 1400 CATV stations around the country. WGN claimed that UVI's deletion of the teletext signal contained within the vertical blanking interval (VBI)\(^{117}\) of WGN's signal and substitution of its own Dow Jones News Service in this interval constituted copyright infringement.\(^{118}\) UVI paid nothing for the use of WGN's signal, nor did it seek approval from WGN for its activities.\(^{119}\) On summary judgment motions, the district court ruled that UVI had not infringed upon WGN's copyright. The court held that UVI qualified for the section 111(a)(3) passive carrier exemption,\(^{120}\) and that it had not publicly performed WGN's copyrighted programming when it transmitted the WGN signal to

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117. A picture is reproduced on a television set by an electron gun in the television receiver. This gun scans left to right across lines and down the television screen. The VBI is that period of time when the gun shuts off and travels from the lower right hand corner of the screen to the upper left hand corner. The VBI time period is equivalent to 21 scan lines of a televised picture. Nine lines of the VBI are used to transmit information that is essential to organize the broadcast signal into a coherent picture. WGN used two of the remaining lines to transmit teletext information to a cable station it owns in Albuquerque, New Mexico. See 523 F. Supp. at 405-07.

118. Id. at 408.

119. Although no decision has so held, it appears that 47 U.S.C. § 605 (1976) relieves UVI of the obligation to obtain such permission. See supra note 23. In fact, evidence produced at trial showed that UVI did its best to keep its operations hidden from WGN. UVI gave WGN no notice of its petition before the FCC seeking authorization to offer the Dow Jones News Service piggy-backed on WGN's signal. 523 F. Supp. at 407. Further, documents produced showed that UVI was rushing to establish "squatters rights" on the VBI. Id.

120. 523 F. Supp. at 410-11. The Court reasoned that the term "primary transmission" as defined by § 111 must have copyright significance and, therefore, must refer to the copyrighted work rather than the signal itself. Id. at 411.

The Court concluded that, because 17 U.S.C. § 101 defines "audio-visual works" as "works that consist of a series of related images," the nine p.m. news program and the teletext information were not a single audiovisual work properly the subject of a single copyright. 523 F. Supp. at 412. UVI's deletion of the teletext information thus was not the deletion of a part of a copyrighted program. Id. Citing the Supreme Court's decisions in *Fortnightly*, see supra note 38, and *Teleprompter*, see supra note 37, the district court held that UVI was entitled to the § 111(a)(3) passive carrier exemption with respect to its secondary transmission of the nine p.m. news program because merely receiving and retransmitting the program to its customers without editing was a "passive" function. 523 F. Supp. at 411-12. Although the district court realized that Congress had rejected the results in *Fortnightly* and *Teleprompter*, it believed that Con-
the cable stations.\textsuperscript{121} On appeal, the Seventh Circuit Court of Appeals reversed.\textsuperscript{122}

Despite reversing the district court, the Seventh Circuit agreed with the lower court's determination that "purely passive" satellite carriers that retransmit broadcast signals without alterations are entitled to claim exemptions under section 111(a)(3).\textsuperscript{123} UVI's fault lay in deleting a copyrighted portion of that signal, the vertical blanking interval.\textsuperscript{124} Had the district court concluded that the VBI was a copyrighted work, it too would have ruled that UVI was not entitled to the passive carrier exemption.\textsuperscript{125} In addition, the court rejected UVI's argument that it had not publicly performed when it transmitted

\textsuperscript{121} 523 F. Supp. at 415. In the court's view, the transmissions were not "to the public," as required by § 101, because the cable stations' subscribers, rather than the stations, comprise the public. \textit{Id}. The district court's distinction lacks support, however, since Congress gave no reason to believe that it intended "public" to be defined so narrowly. On the contrary, the \textit{House Copyright Report}, supra note 47, indicates that the definition of "transmission" is broad enough to include all conceivable forms and combinations of wired or wireless communications media, and that a public performance occurs each and every time a "transmission reaches the public in any form." \textit{Id}. at 64, \textit{reprinted in U.S. Code Cong. & Ad. News} at 5678.

\textsuperscript{122} \textit{WGN Continental Broadcasting Co. v. United Video, Inc.}, 693 F.2d 622 (7th Cir. 1982).

\textsuperscript{123} \textit{Id}. at 624. Judge Posner intimated that the parties did not contest the scope of the common carrier exemption on appeal, stating: "What we have explained so far is common ground between the parties . . . ." \textit{Id}. In their briefs, however, the parties did not clearly address whether UVI would have been liable had it not altered the WGN signal. \textit{See Brief for Plaintiffs-Appellants; Brief for Defendant-Appellee; Reply Brief, WGN Continental Broadcasting Co. v. United Video, Inc.}, 693 F.2d 622 (7th Cir. 1982). Because that question was not in issue, the court's discussion of the point is dicta.

\textsuperscript{124} 693 F.2d at 626. The district court held that the VBI and the nine p.m. news program could not be the subject of a single copyright. \textit{See supra} note 120.

\textsuperscript{125} \textit{See} 534 F. Supp. at 412.
the WGN signal to 1400 cable systems because cable systems are not "the public." The court found that such a narrow construction of the public performance criterion would render the common carrier exemption superfluous.

In Eastern Microwave, Inc. v. Doubleday Sports, Inc., a satellite resale carrier, Eastern Microwave (EMI) brought a declaratory judgment action against Doubleday, the owner of the New York Mets professional baseball club, seeking a ruling that EMI's retransmission of Mets games without Doubleday's consent did not infringe upon Doubleday's copyright of Mets broadcasts. EMI supplied its customers with a choice of sixteen different television signals. One of those signals, WOR-TV, carried Mets games which EMI retransmitted without alteration to 600 cable stations throughout the country and two hotels in Las Vegas. Prior to selecting WOR-TV for satellite retransmission, EMI had conducted a marketing survey among cable television systems to determine which broadcasting station the cable systems would most like to receive. The district court held that EMI's transmission to cable systems constituted a public performance and that EMI was not entitled to the passive carrier exemption. On appeal, the Second

126. 693 F.2d at 624.
127. Id. The court stated: "The passive carrier exemption would be superfluous if intermediate carriers such as United Video could never be infringers anyway because they do not transmit directly to the public." Id.
130. 534 F. Supp. at 535.
131. Id. at 537.
132. Id.
133. Id. at 538. In ruling on the public performance question, the court considered and rejected the analysis used by the district court in WGN. Agreeing instead with the Seventh Circuit, the EMI court found no evidence that Congress "intended the word 'public' to be construed so narrowly." Id. at 536. Therefore, the court held that EMI's retransmissions of WOR Mets broadcasts constituted a public performance within the meaning of § 101. Id.

Turning to the carrier exemption issue, the court ruled in favor of Doubleday on the basis of three factors. First, the court pointed out that EMI selected the WOR signal for retransmissions to the public. Id. at 537-38. EMI had argued that it had selected WOR because of EMI's inability to retransmit every other broadcast signal in the country. Id. at 537. The district court found this argument unpersuasive since EMI had specially conducted a viewer survey to determine the marketability of WOR before it made its selection. Id. Second, the court noted that EMI exerted control over the recipients of the secondary transmission, because "it is EMI which chooses the customers with which it will deal." Id. at 538. Third, EMI's activities, in the court's view, did not consist solely of providing wires, cables, and communications channels for the use of others. Id. at 538. The court reasoned that EMI's activities were as
Circuit Court of Appeals reversed. While expressly declining to rule whether EMI had publicly performed, the Second Circuit nevertheless held that EMI was entitled to the passive carrier exemption.

Construing the language of section 111(a)(3), the Second Circuit held that EMI was entitled to the passive carrier exemption because it had not exercised sufficient control over or selection of either the content of the programming or the recipient.

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134. 691 F.2d 125 (2d Cir. 1982).
135. id. at 132 n.16.
136. id. at 133-34.

Determining whether a satellite resale carrier is liable for copyright infringement more properly involves two distinct inquiries. The court should first have considered whether the carrier had "publicly performed" within the meaning of § 106, and second, whether the carrier qualified for the passive carrier exemption. Only if the court had resolved the first question affirmatively should it have considered the second. Of course, once the court determined that EMI was entitled to the passive carrier exemption, the question of whether it had publicly performed became moot. Although the court's approach did not affect the outcome in this case, it sets a poor precedent for future interpretations of the public performance right.

The court missed an opportunity to define the scope of the copyright owner's exclusive right to publicly perform a copyrighted work in the manner in which Congress intended. Congress began the process of revising the copyright laws partly because it perceived that technological advancements had outstripped the language of the 1909 Copyright Act. See SUPPLEMENTARY REPORT, supra note 20, at xv. In so doing, it desired to draft legislation that would withstand future technological change. Thus, the HOUSE COPYRIGHT REPORT, supra note 47, states: "[T]he concepts of public performance and public display cover not only the initial rendition or showing, but also any further act by which that rendition or showing is transmitted or communicated to the public." Id. at 63, reprinted in 1976 U.S. CODE CONG. & AD. NEWS at 5676. Later in the report Congress reemphasized this point:

The definition of "transmit"—to communicate a performance or display "by any device or process whereby images or sound are received beyond the place from which they are sent"—is broad enough to include all conceivable forms and combinations of wired or wireless communications media, including but by no means limited to radio and television broadcasting as we know them. Each and every method by which the images or sounds comprising a performance or display are picked up and conveyed is a "transmission," and if the transmission reaches the public in [any] form, the case comes within the scope of clauses (4) or (5) of section 106. Id. at 64, reprinted in 1976 U.S. CODE CONG. & AD. NEWS at 5678.

The quoted passages leave little doubt that retransmissions by superstation resale carriers constitute a public performance within the meaning of § 106. Unfortunately, the Second Circuit's indecisiveness may allow future courts, when faced with the task of deciding whether some presently unknown form of communications media has publicly performed, to repeat the mistake made by the Supreme Court in the Fortnightly and Teleprompter cases. See generally Puffer, supra note 37.
lients of EMI's secondary transmissions,137 and had merely provided communications facilities for the use of others.138 The court pointed out that EMI retransmitted, without alteration, all that it received from WOR-TV,139 and that EMI had refused "no reasonable request for its services" by a cable system.140 On the question of whether EMI had "selected" the WOR signal, the Second Circuit, unlike the district court,141 found no significance in EMI's marketing survey to determine which television station its potential customers most desired.142 In the court's view, because EMI had leased only one transponder aboard RCA Americom's SATCOM I satellite, technical necessity compelled its one time determination to retransmit the station most preferred by its customers.143 Conceding that EMI's activities differed from those typical of a conventional common carrier because it served the receivers rather than the senders of communications signals,144 the court nevertheless held that, so long as neither EMI nor its customers altered the original signal, the distinction was "insufficient to deny EMI the statutory carrier exemption on the ground that it is controlling the content or selection of that set of signals."145 Finally, the court held that EMI could comply with the requirement that its activities "consist solely of providing wires, cables, or other communications channels for the use of others"146 so long as it "transmitt[ed] nothing of its own creation."147

The court rejected Doubleday's argument that EMI's advertising and marketing efforts were self-serving activities directed toward marketing a product, rather than providing a service for the use of others.148 In the court's view, EMI could comply with section 111(a)(3) if it did "no more than provide wires, etc., 'with respect to the secondary transmission.'"149 In other words, the court saw no inconsistency between EMI's obliga-

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137. 691 F.2d at 130-31.
138. Id. at 131.
139. Id. at 130.
140. Id. at 131. The court attached importance to this fact because of the requirement that common carriers serve the public indiscriminately. See supra note 1.
141. See supra note 133.
142. 691 F.2d at 131 n.15.
143. Id. at 130.
144. Id. at 128.
145. Id. at 131.
147. 691 F.2d at 131.
148. Id. at 131-32.
149. Id. at 131 n.15 (quoting 17 U.S.C. § 111(a)(3)).
tion as a common carrier to provide a service for the use of others and its aggressive marketing effort so long as it did not alter the WOR signal.

C. Evaluation of Arguments Relating to the Exemption

Both the Seventh and Second Circuits narrowly construed the passive carrier exemption to determine what constitutes "control over the content or selection" of copyrighted programming. Even under this narrow approach, the facts in WGN presented the Seventh Circuit with a rather straightforward case of statutory interpretation. By deleting a portion of the WGN signal and superimposing the Dow Jones News Service on the VBI, UVI had clearly exercised "control over the content" of the primary transmission within the meaning of section 111(a)(3).\(^{150}\) UVI could not claim to be a mere passive intermediary, because its cable customers received a different program from the one WGN had originally broadcast. For this reason, the court's decision, though perhaps cursory,\(^{151}\) is unassailable.

The facts in Eastern Microwave, however, present a more difficult test of the "content and selection" language. EMI's interception and retransmission of WOR broadcasts seems less culpable than UVI's alteration of the copyrighted program. EMI's customers at least received programs identical to those which WOR had broadcast. Still, while EMI did not control the content of its retransmission, it did in some sense "select" which signal it was going to transmit. Neither WOR-TV nor the cable stations EMI supplied initially requested that the WOR signal be retransmitted. EMI distributed a preselected product.

The key to the problem, of course, is determining what Congress meant by "selection" when it enacted the passive carrier exemption. Because the exemption's language is ambiguous, the Second Circuit attempted to read the wording in a manner consistent with "the 'common sense' of the statute."\(^{152}\)

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151. Because the facts presented such an easy case for decision, the Seventh Circuit disposed of the passive carrier issue with very little discussion. In its only attempt to clarify the scope of the exemption, the court employed an analogy to define a "purely passive" carrier, suggesting it is "like a telephone company." \(WGN, 693 F.2d\) at 624. While the analogy is obviously a casual reference to the legislative history of § 111(a)(3), see infra notes 156-66 and accompanying text, the court failed to describe the differences between the activities of UVI and those of AT&T, thus forgoing an opportunity to give the analogy meaning.
152. \(Eastern Microwave, 691 F.2d\) at 127 (quoting New York State Commis-
It concluded that when an intermediate carrier is able to retransmit only one primary transmission, no true "selection" takes place when it chooses the signal it will provide. To hold otherwise, the court reasoned, "would be to require that exemption be denied to any carrier that did not retransmit every television broadcast of every television station in the country." This conclusion, however, makes sense only if one assumes that the intermediate carrier must be the entity making the retransmission decision. Cable stations, however, can, and do, just as easily decide which stations the intermediate carrier should transmit, in which case the intermediate carrier exercises no control over the selection process.

The conclusion that intermediate carriers like EMI, which actually select the signal they will transmit, do not fall within the exemption is arguably supported by the legislative history and is consistent with the statutory scheme. The idea of the passive carrier exemption originated in a forerunner of the 1976 Copyright Act. The 1964 Copyright Revision Bill defined "performing publicly" as "to broadcast a performance . . . to the public, or to transmit to the public a broadcast of any performance . . . other than as a common carrier." By this language, the drafters of that bill intended to exempt existing passive common carriers like AT&T and terrestrial microwave relays. The subsequent 1965 Revision Bill, however, contained no reference to this phrase because of concern that the courts might unjustifiably extend the concept of a common carrier.

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153. 691 F.2d at 130.
154. Id.
155. For example, FCC regulations clearly contemplate that terrestrial microwave carriers seeking to render transmission service must establish that such service will serve "the public interest, convenience or necessity." 47 C.F.R. § 21.700 (1981). Unless cable systems actually request such service, the requisite public necessity would be lacking. Therefore, microwave carrier petitions for authorization are responsive to the needs and requests of their cable customers. See, e.g., Eastern Microwave Inc., 55 F.C.C.2d 766, 766 n.2 (1975).
157. Id. § 5(b)(3)(B) (emphasis added).
rier to include some commercial transmitters to the public.\textsuperscript{160}

Despite the deletion of the common carrier language from the 1965 Revision Bill, the Register of Copyrights stated his belief that "purely intermediate transmissions should be exempt, but that an express exemption is not necessary to exclude them."\textsuperscript{161} AT&T, however, feared that at least two of the services it offered might not be considered "purely intermediate." Specifically, AT&T noted that when it leased wires and other communications facilities for the use of others its action did not constitute a transmission interposed between two other transmissions, and was thus not "intermediate."\textsuperscript{162} Similarly, AT&T pointed out that there was little to distinguish the activities of a cable system from those of AT&T, which typically owned and controlled the entire cable network linking the headend with the television sets of viewers, since both were, in some sense, transmitting "to the public."\textsuperscript{163} In order to distinguish purely intermediate, passive carriers like AT&T from more active performers like cable systems, AT&T urged adoption of a provision to exempt common carriers "having no control over the selection of the works to be transmitted or communicated."\textsuperscript{164} As a result,\textsuperscript{165} subsequent revision bills included provisions exempt-

\textsuperscript{160} See \textit{Supplementary Report}, \textit{supra} note 20, at 25. This fear may not have been warranted. The definition of to "perform publicly" in the 1964 Revision Bill was far broader than the 1909 Act definition interpreted by the Supreme Court in \textit{Fortnightly}. The Court acknowledged that the existing statute provided little guidance in interpreting a technology which the drafters obviously had not envisioned. 392 U.S. at 395-96. The extensive legislative materials accompanying the 1964 and 1965 Revision Bills, however, should have left no doubt as to Congress's intent concerning the copyright liability of cable systems.

\textsuperscript{161} \textit{Supplementary Report}, \textit{supra} note 20, at 25.

\textsuperscript{162} Letter from Walter Derenberg, Counsel for AT&T, to Herbert Fuchs, Counsel for Subcomm. No. 3 of the House Judiciary Comm. 3-4 (January 27, 1966) (on file at the \textit{Minnesota Law Review}); Letter from Walter Derenberg to Thomas C. Brennan, Counsel for the Senate Committee on the Judiciary (April 25, 1967), reprinted in 10 Omnis Hercules Copyright Revision Legislative History 1143, 1144 (G. Grossman ed. 1976). Mr. Derenberg likened this service to a situation in which a customer's request, installs an organ in a theater for the customer to use. He argued that the company that owned the organ should not be liable because it exercised no control over the works played, not because its actions were intermediate. Letter to Fuchs, at 4-5; Letter to Brennan, at 1144.

\textsuperscript{163} Letter to Fuchs, \textit{supra} note 162, at 6.

\textsuperscript{164} \textit{See id.} at 7.

\textsuperscript{165} The legislative history is perhaps too confusing to accurately ascribe precise cause and effect at this point. Derenberg's original proposal was included in the letter to Herbert Fuchs. This letter remains unpublished, however. Nevertheless, subsequent bills reinstated the passive carrier exemption. \textit{See, e.g.}, H.R. 4347, 89th Cong., 2d Sess. § 111(a)(1)(C) (1966). Another participant in the revision process, Barbara Ringer, Register of Copyrights, recalled
ing common carriers in language similar to the language proposed by AT&T.166

The exemption as first introduced in a 1966 bill167 was retained in the 1976 Act with only one modification. In 1975, the National Cable Television Association (NCTA) suggested substituting the phrase “any carrier” for “common carrier,”168 the phrase used in the 1966 bill. The NCTA noted that, in certain situations, the services offered by a cable system are like those offered by a traditional common carrier, such as when a cable station leases channel space to others over whom the station has no control.169 But because cable systems technically are not common carriers,170 the NCTA argued that without the amendment, cable systems that leased channels would never be exempt even though their activities might be indistinguishable from those of AT&T.171

The statutory scheme also supports the suggestion that the control test was intended to distinguish the activities of traditional intermediate carriers from those of cable systems. Cable systems, as defined in section 111(f) of the Copyright Act,172 are required to pay a fixed copyright royalty under section 111(d),173 and thus are clearly intended to fall outside the scope of the passive carrier exemption. The control over “selection” of primary transmissions contemplated in the exemption, therefore, must be analogous to the kind of “selection” exercised by cable systems. Consequently, if intermediate carriers

that Congress included the provision primarily to benefit AT&T. See Copyright Issues: Cable Television and Performance Rights, Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. of the Judiciary, 96th Cong., 1st Sess. 32 (1979) (statement of Barbara Ringer) [hereinafter cited as Hearings on Copyright Issues].

166. For example, the 1966 Revision Bill exempted secondary transmissions made by a common carrier who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others. H.R. 4347, 89th Cong., 2d Sess. § 111(a)(1)(C) (1966).


169. Id.


171. See NCTA Amendments, supra note 168, at 489.


173. Id. § 111(d).
"select" in the same manner as cable stations or are otherwise distinguishable from traditional common carriers, they must be ineligible for the exemption if the statutory scheme is to remain consistent. Because carriers such as EMI generally operate as intermediate services like traditional common carriers, the question presented by Eastern Microwave was whether EMI's decision to select the WOR signal for retransmission is the same kind of decision a cable system makes when it selects a particular signal to show on one of its channels.

When the question is posed in this manner, a good argument can be made that some intermediate carriers, like EMI, fall outside the passive carrier exemption. By conducting a market survey to determine the television station most preferred by its potential customers, EMI acted in a manner not unlike a cable station selecting a program that would attract the largest audience, or a television network analyzing its Nielsen ratings, deciding which shows to eliminate in the next television season. The court's statement that technical necessity compelled EMI's selection provides no answer. All media are in some sense bound by such limitations. A cable system may have only ten channels available. A television station may broadcast on only one frequency band. How many transponders would EMI have to lease before the court would conclude that technical necessity no longer compelled its selection?

 Construing the exemption to exclude intermediate carriers like EMI from its coverage, however, produces some anomalous results. The copyright costs incurred by these intermediate carriers would be passed on to cable systems, subjecting the cable systems to royalties considerably greater than the limited compulsory royalty Congress intended. Furthermore, the statute does not explicitly address what would happen should cable systems attempt to avoid these passed-along costs by performing the satellite carrier function themselves and then arguing that the entire secondary transmission is all part of one

174. In considering one resale carrier license application, the FCC warned that a resale common carrier "[m]ust principally serve the public rather than its own, or closely affiliated private business interests, and must operate subject to the same common carrier restrictions concerning affiliated service, program content origination or control, and other unlawful activities." Southern Satellite Systems, Inc., 62 F.C.C.2d 153, 160 (1976).
175. See supra note 1.
176. See Eastern Microwave, 691 F.2d at 131 n.15; supra text accompanying note 131.
177. 691 F.2d at 130.
"cable system" so as to limit copyright liability to the amount required by the compulsory license fee. After considering this possibility, the Second Circuit decided that such a combined carrier and cable system would be liable only for a single compulsory royalty. Consequently, it concluded, subjecting a distant signal resale carrier like EMI to copyright liability was inconsistent with the compulsory license scheme, because the same activities would not result in copyright liability if carried out by a cable system.

Statutory arguments, however, ultimately appear ill-suited to the task of determining whether the passive carrier exemption should apply to carriers like EMI. The statute was enacted before satellite distribution of superstation programming was contemplated, and its drafters were concerned with striking a balance in a market influenced by factors peculiar to that time. Given the current imbalance, it seems senseless to ar-

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178. Id. at 133.
179. Id. at 132 n.18. The court's conclusion that a combined carrier and cable system would be subject only to the limited compulsory license royalty, however, is open to question. Although it is clear that when cable systems perform their own terrestrial microwave relay service they need pay only the compulsory license fee, this conclusion cannot be drawn so easily when satellite relays are implicated. Terrestrial microwave transmissions over limited distances have traditionally been considered within the scope of the function of a "cable system," and when Congress passed the 1976 Copyright Act it expected cable systems to procure nonlocal signals via terrestrial microwave. The view that terrestrial microwave transmissions are within the ambit of permissible cable functions is reflected in the FCC's Cable Antenna Relay Service (CARS) regulations which permit cable systems to own and operate their own microwave transmission facilities. See 47 C.F.R. §§ 78.1-35 (1982). No similar provisions exist for satellite transmissions. How the FCC would react to cable system ownership of transponder space is unclear. The Commission has previously conditioned its approval of resale carrier service upon there being no affiliation between the carrier and the recipient. See Southern Satellite Systems, Inc., 62 F.C.C.2d 153, 162-63 (1976).

Other barriers make it unlikely that cable systems could ever avoid liability in this way. The cost of leasing a transponder is probably beyond the financial capability of any single cable franchise. See supra note 25. Furthermore, if an MSO were to lease a transponder and provide distribution to all of its subsidiary cable systems, it would merely stand in the place of a carrier like EMI. In other words, the MSO would operate as an intermediary performing a "secondary transmission" within the meaning of the Act. See supra note 62 and accompanying text. In that case, an even stronger argument could be made that the MSO exercised control over the selection of the transmission.

Thus, the court's conclusion is arguably correct only if a single local franchise were to perform the entire function itself and only then if this imagined entity could be considered a "cable system" within the meaning of 17 U.S.C. § 111(f) (Supp. V 1981).

180. In recent testimony, Barbara Ringer, Register of Copyrights and a major participant in the copyright revision effort, stated:

When the new copyright law was enacted, most cable systems received their distant signals through over-the-air reception by means of a large
gue over the significance of who is selecting the distant signal, when it is the importation of the signal that gives rise to the distributive inequities in the communications market. Part III, therefore, looks at the broad policies underlying copyright and communications formulations to determine whether these policies support the imposition of copyright liability on distant signals in light of the current disequilibrium, and whether such liability can justifiably be allocated to intermediate carriers in a comprehensive secondary transmissions copyright scheme.

III. ALLOCATING COPYRIGHT LIABILITY TO INTERMEDIATE TELECOMMUNICATIONS CARRIERS

A. COPYRIGHT AND COMMUNICATIONS POLICIES AFFECTING DISTANT SIGNALS

Although the legislative record of the 1976 Copyright Act reveals a concern for balancing the interests of program suppliers, local television broadcasters, cable system owners, and the viewing public, the ultimate form of that balance was shaped by the technological and regulatory factors existing at that time. In 1976, cable television was still a fledgling industry requiring subsidized treatment to further its development. Congress could rely on the Consensus Agreement, which it incorporated in the Act, and assume that the FCC regulations would adequately protect program suppliers and local broadcasters despite the imposition of only limited copyright liability.

central antenna or via microwave relay. Because of the natural limitations inherent in over-the-air reception and the high transmission costs accompanying the use of microwave, distant signal carriage was limited to those distant stations within close proximity to the cable system. These factors ensured against the oversaturation of any particular signal’s programming on a nationwide basis.

In enacting section 111(a)(3), Congress certainly did not consider the then unanticipated activities of superstations and satellite relay services when it exempted traditional common carriers from copyright liability. In fact, the underlying policy reasons for compulsory licensing may well be inapplicable here, since the carrier may be in the position to act as a central agent in obtaining retransmission rights in the relayed programming. For this reason, your subcommittee may wish to consider an amendment limiting the scope of section 111(a)(3) to exclude transmissions made to, by means of, or from a communications satellite system.

Hearings on Copyright Issues, supra note 165, at 23.
181. See supra notes 70-73 and accompanying text.
182. See supra note 180.
183. See supra notes 16-22, 40-52 and accompanying text.
184. See supra note 72 and accompanying text.
on cable systems. Because these conditions have changed, however, specific formulations of administrative and legislative policies may be inappropriate guides to devising solutions to current problems regarding secondary transmissions. Still, there are a number of discernible and more general copyright and communications policies that underlie the specific formulations.

The prevailing policy consideration—one which underlies fundamental copyright doctrine—is to maximize the public's access to intellectual property while simultaneously expanding the pool of intellectual works. This result is achieved by giving creators of intellectual works a limited monopoly over their works, allowing them to extract a financial reward that ensures that the motivation to create will be sustained. Communications policies have traditionally reflected this objective. Regulations relating to television broadcasters, program suppliers, and cable systems that protect the economic interests of each are generally promulgated with a view toward maximizing the range of programming. In nurturing this goal, the FCC has demonstrated a preference for universal, free, local programming, believing that these factors maximize viewer access and ensure programming geared to the specific needs of the community.

Absent copyright liability, the proliferation of distant signal intermediate carriers runs contrary to various tenets of these broad copyright and communications policies. Unfettered distant signal retransmissions deprive program suppliers and local broadcasting stations of the monetary incentive and control over their product necessary to ensure an efficient allocation of resources. Already the compulsory license scheme, with its

185. See Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975); Mazer v. Stein, 347 U.S. 201, 219 (1954).

186. The purpose of the Communications Act of 1934, broadly stated, is "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151 (1976).

187. See generally Josiah, supra note 5, at 17-23.

188. Congress imposed copyright liability on cable television partially because it recognized that distant signal transmission causes injury to the copyright owner. According to the HOUSE COPYRIGHT REPORT, supra note 47, "retransmission of distant non-network programming by cable systems causes damage to the copyright owner by distributing the program in an area beyond which it has been licensed. Such retransmission adversely affects the ability of the copyright owner to exploit the work in the distant market." Id. at 90, reprinted in 1976 U.S. CODE CONG. & AD. NEWS at 5704-05.
attendant artificially low cost of program acquisition,\textsuperscript{189} threatens to create a free-rider problem\textsuperscript{190} severe enough to affect program supplier revenues and the long-term supply and diversity of programming.\textsuperscript{191} Liability-free distant signal retransmissions only exacerbate this tendency. Forcing cable systems to internalize the costs of paying copyright royalties, on the other hand, will produce a better relationship between the supply of and demand for programming. A cable system will choose to carry only those distant signals for which its subscribers are willing to pay.

The free-rider problem is not as remote as it might seem. Already suppliers are reluctant to license broadcasting stations that are known to be superstations.\textsuperscript{192} In one instance, the National Collegiate Athletic Association (NCAA) refused to sell WGN-Chicago the rights to cover two college basketball games, because satellite distribution of WGN would have undermined the NCAA's ability to sell the games to stations in other markets.\textsuperscript{193} Besides hindering the superstations' ability to compete for revenues in their own marketing area, such lost purchases could make it more difficult for the superstations to supply their free televisions viewers with popular programming. Rather than withhold the program from WGN, the NCAA might simply have charged the station enough to make up for the audience diversion in distant cable markets. Whether such a practice would achieve the intended result is uncertain, however. In order to cover the increased cost, WGN would have to increase its advertising rates. Local advertisers, indifferent to exposure in distant markets, might not wish to pay these higher rates. Even Ted Turner, the owner of WTBS-Atlanta, the only superstation that actively promotes its superstation status,\textsuperscript{194} claims that WTBS's revenues have declined since Southern Satellite began satellite distribution of the station.\textsuperscript{195}

Besides ensuring that suppliers receive the full value of their programming, subjecting distant signals to copyright liability injects a measure of fair competition into the industry, helping to restore the balance that existed in 1976.\textsuperscript{196} If cable

\textsuperscript{189} See supra note 69 and accompanying text.
\textsuperscript{190} See supra notes 101-03 and accompanying text.
\textsuperscript{191} See supra notes 101-03 and accompanying text.
\textsuperscript{192} See supra note 5.
\textsuperscript{193} See supra note 5.
\textsuperscript{194} See supra note 5.
\textsuperscript{195} See supra note 25, at 330-31.
\textsuperscript{196} See supra notes 70-73 and accompanying text.
systems are forced to acquire superstation programming at prices approaching fair market value, local broadcasters, exposed to increased audience fragmentation,\textsuperscript{197} will at least be able to compete with cable stations on a more equal footing.

The establishment of a competitive programming balance is consistent not only with the policy of encouraging viewer access to a greater variety of programming, but also with providing access to programming that reflects local needs. Some audience diversion, of course, is desirable. Additional programming satisfies the public's demand for a greater variety of information and entertainment. By enacting the compulsory license scheme, Congress demonstrated its willingness to allow the broadcast industry, in effect, to subsidize the growth of the cable industry in order to serve the public interest.\textsuperscript{198} Given the state of the cable industry in 1976, this course seemed wise. Because of technical and economic limitations, terrestrial microwave transmissions could feasibly supply cable systems only with programming from not so distant television stations.\textsuperscript{199} Thus, terrestrial transmissions allow rural television viewers who, before the inception of cable, might have received only one or two poor-quality over-the-air signals, to receive a full complement of good quality signals from more distant but still regional television stations. Similarly, terrestrial microwave transmissions allow urban cable viewers to pick up the signals of additional regional stations. Albany cable subscribers, for example, might typically receive Buffalo, Syracuse, or New York City stations via terrestrial microwave relay. This kind of regional signal importation forces local television stations, whether urban or rural, to compete only with those distant stations situated within their own regions. Such competition is consistent with the FCC's long established "doc-

\textsuperscript{197}. Additional programming from distant sources inevitably lures at least some fraction of the television viewing audience away from local channels. Even the FCC, during the cable deregulation proceedings, conceded that elimination of the distant signal and syndicated exclusivity rules would result in audience losses of up to 20\% for local broadcasters. Inquiry Into the Economic Relationships Between Television Broadcasting and Cable Television, 71 F.C.C.2d 632, 660-61 (1979). The A.C. Nielsen Company Home Video Index Report indicates that viewers who subscribe to cable television view local television stations less frequently. The report states: "[T]he availability via cable of distant signals including 'superstations' may have the greatest impact on viewing patterns." \textsc{Broadcasting}, Nov. 24, 1980, at 46.

\textsuperscript{198}. When cable systems retransmit broadcast signals, they do not incur the costs associated with program origination and acquisition that their broadcasting counterparts do. Thus broadcasting stations, in effect, "subsidize" cable systems whenever their signals are retransmitted.

\textsuperscript{199}. \textit{See supra} note 35.
trine of localism,"200 which conceives of a broadcast station as a "mouthpiece" for the community, reporting events of public interest, such as election results or athletic events, and stimulating discussion of local affairs.201 Distant signal retransmission, however, goes one step farther. It subjects broadcasting stations to competition with distant stations situated far beyond their local areas. As a mouthpiece for the community, WGN-Chicago offers little to its Albuquerque viewers. Therefore, distant signal retransmissions seem entirely inconsistent with the doctrine of localism.202

The conclusion that emerges from the foregoing is that imposing copyright liability on distant signals conforms to broad copyright and communications policies. Any particular scheme for implementing copyright liability, however, must be fashioned to ensure that these policies are advanced to their fullest extent. The proposal outlined in the next section offers a formulation for allocating copyright liability for secondary transmissions consistent with this approach.

B. ALLOCATING COPYRIGHT LIABILITY TO INTERMEDIATE TELECOMMUNICATIONS CARRIERS IN A SECONDARY TRANSMISSIONS COPYRIGHT SCHEME

Any copyright scheme involving secondary transmissions should allocate copyright liability in a manner that promotes broad copyright and communications policies. In the secondary transmissions context, these policies require advancement of the following interests: (1) the interests of program suppliers in receiving compensation for their programs' full syndication values;203 (2) the interests of viewers in receiving as many and varied programs as possible, with a special emphasis on programs responsive to local and regional needs;204 (3) the interests of television broadcasters in having cable stations pay for programming at competitive prices.205 The following proposal attempts to define a role for intermediate telecommunications carriers in a secondary transmissions copyright scheme that allocates liability in a manner that promotes the interests described above.

200. See generally Josiah, supra note 5, at 17-23.
201. See id. at 17.
202. See generally Josiah, supra note 5.
203. See Besen, Manning & Mitchell, supra note 99, at 92.
204. See Josiah, supra note 5, at 17-23.
205. See Note, supra note 8, at 627.
1. Secondary Transmissions Within the Primary Transmitter's Normal Broadcast Area

Current communications and copyright approaches to the local secondary transmissions market, which require cable stations to carry local television signals and which impose no liability on these retransmissions, are consistent with promoting the interests described earlier. Because television viewers may receive a local television signal with a standard home antenna, there is no market for miscellaneous or resale intermediate telecommunications carriers within the local broadcast market. Cable systems, however, by filling in gaps or improving reception, provide a valuable service for viewers who would otherwise be unable to receive a local television signal. The local broadcaster's potential audience thus is not fragmented, but is actually enhanced, by cable system transmissions within the broadcaster's local service area. The broadcaster suffers no competitive disadvantage.

Likewise, copyright royalties extracted by program suppliers from local broadcasters will accurately reflect the market value of the programming as enhanced by local cable retransmissions, because the programming is received only by viewers clearly within the contemplation of the negotiating parties. The current approach of not imposing any copyright liability on local market secondary transmissions, therefore, is desirable.

2. Secondary Transmissions of Regional Signals

Importation of television signals from beyond the local television market, yet not from truly distant sources, requires more complex treatment. Intermediate carriers will likely use terrestrial microwave relays to transmit these signals to a limited number of cable stations. Unlike importing more distant signals, importing these signals is likely to be consistent with the

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209. Before Eastern Microwave became licensed as a resale common carrier, it transmitted regional signals by microwave to 200 cable system customers throughout the northeastern United States. See Eastern Microwave, Inc., 70 F.C.C.2d 2195, 2197 (1979).
doctrine of localism, since the programming carried on these signals will often be responsive to regional needs. Certainly signals imported from another city within the same state will fit this description, as will signals drawn from cities in adjoining states proximate to the importing city.

Importation of regional signals would also enable audiences in rural areas, where broadcast signals may be weak or nonexistent, to receive programming through a cable system. Filling in these gaps in coverage generally will not be detrimental to program suppliers, because there is no competing syndication outlet for their programs in these rural areas, and to the extent that advertisers are willing to pay more to the imported television station for the value of the extra viewers, suppliers can command higher fees. Similarly, other television stations cannot complain about this gap filling, because the cable systems supplying coverage in these areas do not compete with them.

Even importing regional signals into areas served by local broadcasters will not harm program suppliers substantially. Although, absent some copyright liability on secondary transmissions, program suppliers will be undercompensated for the syndication value of their programs because of their distribution into new markets, this loss is unlikely to be great with a regional signal. Program suppliers selling programs to a television station that is imported into regional markets presumably can extract higher syndication fees, because a regional station should be able to charge advertisers somewhat more as a result of the increased exposure. Although certain strictly local advertisers may be unwilling to pay increased advertising costs, most advertisers would benefit from an expanded, regional audience. A ski lodge in Stowe, Vermont advertising on a Burlington station, for example, would presumably be willing to pay more for advertising time that will reach Boston cable viewers via a microwave relay. The same cannot be said, however, if the Burlington station is imported via satellite to cable viewers in Denver. The likelihood of regional stations being able to derive some increased revenues from local advertisers is thus greater than in the case of national superstations. Therefore, program suppliers to these regional stations should be able to demand additional compensation.

Local television broadcasters competing with cable stations carrying regional stations, however, are unlikely to derive any

210. See supra text accompanying notes 200-02.
benefit from the importation of a regional station signal into their market unless they, in turn, are imported into other regional markets and draw increased advertising revenues. In the usual situation, local broadcasters' audiences will be diverted to the cable station's regional programming, for which the cable station pays nothing, absent copyright liability. In sum, local television broadcasters, who bear full copyright liability, will be at a competitive disadvantage vis-à-vis cable stations, while program suppliers will be somewhat undercompensated for the syndication value of their programs. Some limited copyright liability on regional secondary transmissions thus seems appropriate.

Limited copyright royalties imposed on the intermediate carrier and passed on to the cable station, or imposed directly on the cable station, would alleviate the economic harm to program suppliers and the artificial competitive disadvantage to local television broadcasters. At the same time, limited liability would grant a partial subsidy to cable stations that would encourage distribution of a greater range of programming, consistent with the doctrine of localism, and provide rural areas with television service drawn from the region. For limited liability to be workable, however, transaction costs\(^\text{211}\) would have to be minimized. High transaction costs, coupled with partial copyright royalties, could make it uneconomical for cable stations to import any regional signals. Limited copyright liability, therefore, should be designed and allocated so as to minimize transaction costs.

A compulsory license copyright scheme has the advantage of practically eliminating transaction costs.\(^\text{212}\) The copyright licensor and licensee do not negotiate over the copyrighted work's syndication value; the licensee is automatically given the right to use the copyrighted work, and, in return, pays a fixed, regulated charge for this benefit.\(^\text{213}\) Because setting the compulsory fee below the fair market price for use of the copyrighted work creates a limited copyright liability consistent with the desired balancing of interests in the regional signal

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\(^{211}\) "Transaction costs" in this context are the costs of negotiating the right to retransmit signals carrying the copyright owner's programs. See generally Besen, Manning & Mitchell, supra note 99, at 87 n.53.

\(^{212}\) See id. at 87. Proponents of the compulsory license system frequently point to the reduced transaction costs as a major reason for perpetuating the current scheme. See, e.g., Note, supra note 99, at 950-51. The costs of transacting under compulsory licensing chiefly relate to the CRT's periodic cable royalty distribution determinations. See supra notes 65-68 and accompanying text.

\(^{213}\) See supra notes 65-67 and accompanying text.
market described above, this form of copyright liability appears well-suited to the retransmission of regional television signals.

Limited copyright royalties would be equally effective if assigned initially to intermediate carriers and then passed on to cable stations, or if imposed directly on cable stations. Given a compulsory license fee arrangement, however, allocating the liability to cable stations appears to be preferable for two reasons. First, directly imposing liability on cable operators would result in slightly fewer transaction costs than would imposing liability on intermediate carriers who would in turn pass on the royalty costs. While cable operators would merely pay the fee to an administrative agency such as the CRT, an intermediate carrier, in addition to paying the agency, would have to allocate this fee proportionately among the cable stations it supplied, thus incurring the costs of another transaction. Second, the compulsory royalty would reflect partial syndication value more precisely if computed on the basis of cable revenues derived from subscribers, rather than on the basis of intermediate carriers' retransmission tariffs.\(^\text{214}\) Cable revenues, because they vary directly with the size of the cable audience, give a more accurate picture of the lost value to program suppliers of the preempted syndication market.

The current statutory compulsory license scheme could serve as a model for establishing an appropriate fee computation mechanism. In considering how to define the limits of a "regional" area for the purposes of fee computation, Congress should consult with the FCC and others possessing expertise in the area of communications policy.\(^\text{215}\) However defined, the term should allow for the peculiarities of the regional markets in various sections of the country. This approach is preferable to setting a fixed radius beyond which signals are considered "distant" rather than "regional," because it allows for consider-


\(^{215}\) In the 1976 Act Congress defined the "local service area" of a primary transmitter with reference to the definition of that term contained within FCC rules and regulations existing on April 15, 1976. See 17 U.S.C. § 111(f) (Supp. V 1981). Thus, Congress deferred to the FCC's special knowledge in the technical area of television signal transmission and degradation. Similarly, the FCC also appears to possess the expertise necessary to determine what constitutes a broadcaster's and intermediate carrier's "regional" area. Congress may also wish to follow the example of the 1976 Act, which prevents subsequent changes in FCC regulations from affecting the definition for copyright purposes. See HOUSE COPYRIGHT REPORT, supra note 47, at 99, reprinted in 1976 U.S. CODE CONG. & AD. NEWS at 5714.
3. Secondary Transmissions of Distant Signals

Imposing full copyright liability on distant signal secondary transmissions conforms to the general copyright policy of ensuring a fair return to creators for their efforts, because full copyright liability involves negotiations that are completely responsive to market forces. In addition, the royalty costs, whether incurred by distant signal intermediate carriers and passed on to cable stations or borne directly by cable stations, would eliminate the programming subsidy cable systems now receive through the artificially low fixed compulsory royalty fees. Full copyright liability would thus encourage programming distributional equity. Finally, unlike regional programming, superstation programming is not responsive to local community needs. Subsidizing this programming therefore cannot be justified on the ground that it promotes localism.

A compulsory license scheme would be a poor substitute for full copyright liability in this situation. Although a compulsory scheme has the advantage of minimizing transaction costs, these costs will not be great under a full liability approach if liability is initially allocated to intermediate carriers.

216. For example, what is "regional" in terms of distance to a Boise, Idaho television broadcaster may not be "regional" to a Philadelphia, Pennsylvania broadcaster. In the latter example, the markets clearly are more densely compacted.
218. Although full copyright liability would eliminate the free-rider problem whereby cable systems pay artificially low rents for programming and program suppliers are undercompensated for the full economic value of the copyrighted programs they control, see supra notes 101-03 and accompanying text, it would not entirely resolve cable television's competitive effects on local broadcasters' audiences. The importation of any signal contributes to the diversion of viewers from local stations. But fragmentation occurs to some extent with any increase in the supply of programming in a given market, be it through new local broadcasters or new cable stations, and communications policy should not be designed to protect the profitability of any single group. Moreover, cable stations' diversion of audiences away from local broadcasters is desirable to the extent that such fragmentation reflects a greater variety of programming available to viewers. The real problem has not been audience diversion per se, but rather that diversion has occurred under artificial conditions. Unlike local broadcasters, cable stations have not had to pay the full costs of programming. See Note, supra note 14, at 530-31. Imposing full copyright liability on distant signal secondary transmissions alleviates this disparity and establishes distributive equity by restoring the competitive balance with respect to distant signal programming that merely duplicates, for the most part, the programming supplied by local broadcasters.
219. See generally Josiah, supra note 5.
220. See supra note 212.
rather than cable stations. By performing as a single entity broker, the costs incurred by the intermediate carrier in negotiating with individual program producers over rights to the programs carried on the imported television station's signal would be far less than if each cable station operator had to negotiate separately. Moreover, the total amount of the intermediate carrier's transaction costs is unlikely to be substantial. Home Box Office (HBO) and other pay-cable programmers, for example, have become efficient "brokers," even though they must negotiate for a copyright license from the copyright owner of each motion picture or program they carry. Likewise, local independent television stations perform such negotiations routinely. In fact, an intermediate carrier may be able to work with an amiable superstation to reduce transaction costs for both of them. The distant signal intermediate carrier could arrange for the superstation to act as its broker and secure a copyright license from the program supplier that would cover both of them. The two acting together would enjoy greater leverage over the program supplier than each could wield individually, resulting in savings for both.

In addition, compulsory license royalties bear little or no relationship to the fees that open negotiations would produce. Even if one attempted to peg fees at levels commensurate with full liability, such fees would never accurately reflect market conditions. Regulatory mechanisms can never account for the variety of factors that enter into economic valuation in a given instance. Furthermore, there is often a substantial lag time before the regulatory agency can respond with necessary adjustments. Consequently, any marginal benefit received from compulsory licensing's low transaction costs would be

221. See infra note 226.

222. The fear of high transaction costs for cable operators was one of the reasons Congress adopted the compulsory license scheme. See supra note 70 and accompanying text. Critics of the compulsory scheme have pointed out that the transaction costs under full copyright are largely unknown. See, e.g., Besen, Manning & Mitchell, supra note 99, at 86 n.52. However large such costs may be, the contracting parties can employ standardized contracts and common purchasing agents to streamline negotiations. Id. at 87.


224. A recent congressional attempt to modify the compulsory license scheme would have changed the rate structure of cable system royalty payments by empowering the Copyright Royalty Tribunal to establish "a just and reasonable royalty fee." H.R. 3559, 97th Cong., 1st Sess. §§ 1(c), 3 (1981). It would appear, however, that only the marketplace can dictate what is "just and reasonable" compensation.

225. See Note, supra note 14, at 546-47.
more than offset by the losses to program suppliers and local broadcasters that would result from compulsory licensing's inability to reflect the true market value of program acquisition costs.

Initially allocating full copyright liability for distant signal retransmissions to intermediate carriers would force the carrier to negotiate with program suppliers for the right to retransmit signals carrying those producers' programs to distant cable stations. Under this scheme, the cable stations that received such distant signals would not be subject to liability, but they would ultimately bear the copyright costs when the intermediate carrier included these costs in its retransmission charges to the cable stations. A potential problem with imposing full copyright liability on distant signal intermediate carriers is that program acquisition costs may prove too great to be absorbed entirely by cable systems. If costs are too substantial to be allocated entirely to cable systems, several situations may develop. First, the distant signal intermediate carrier may decide to share some of the royalty costs with the cable systems, forcing the intermediate carrier to operate at a lower profit margin if it wishes to remain in the distant signal retransmission market. In addition, the superstation itself may be willing to subsidize some of the intermediate carrier's copyright royalties. This would occur, however, only if the television station were actively pursuing superstation status and had decided

226. In the current industry structure, the intermediate carriers that would likely be affected under the full copyright liability scheme are the approximately half dozen satellite resale carriers. See Competitive Carrier Rulemaking, 77 F.C.C.2d 308, 320-21 & n.18 (1979); supra note 1. These entities lease satellite transponder facilities and transmit distant television signals to as many as 1400 cable stations nationwide. See, e.g., WGN Continental Broadcasting Co. v. United Video, Inc., 523 F. Supp. 403, 405 (N.D. Ill. 1981), rev'd, 693 F.2d 622 (7th Cir. 1982). Owners of terrestrial microwave facilities would typically not fall into the distant signal group, because they tend to operate only regionally. See Competitive Carrier Rulemaking, 77 F.C.C.2d at 321. Some intermediate carriers, such as Eastern Microwave, Inc. (EMI), transmit both regional and distant signals. See supra note 209. Under the proposed copyright scheme, a carrier like EMI that supplied a signal such as WOR-New York, to both regional and distant cable stations would negotiate with WOR-TV's program suppliers only for the right to retransmit the programs to distant cable stations.

227. See Note, supra note 99, at 950.

228. Of the television stations now being transmitted by satellite resale carriers, only WTBS-Atlanta is a willing participant. See supra note 5.

In the usual contract between a program supplier and the broadcasting station, the station purchases the exclusive license to broadcast the supplier's programming for a specified time period within a certain geographic area. See, e.g., Rules re Microwave-Served CATV, 38 F.C.C. 683, 703 (1965). If full copyright liability were imposed on intermediate carriers, the carriers would have to purchase clearance from the entity owning the rights to grant or deny permis-
that increased revenues from nonlocal advertisers would more than offset the cost of underwriting the secondary transmission and would enable it to develop its own "network" programming.

Of course, if the costs of full copyright liability proved to be too great even after an attempt at negotiated allocation among the parties, then the distribution of distant signal programming would cease. With willing participants, however, total costs are unlikely ever to reach this level. First, program suppliers are unlikely to demand copyright royalties at prices that would foreclose them from such potentially lucrative markets. Since the suppliers' costs are fixed once programs have been produced, any additional revenue will increase the profitability of their investment. Only the availability of a better return from a competitor in the markets in which the superstation is to be transmitted would prevent suppliers from syndicating their programs through distant signal intermediate carriers. The transaction costs involved in negotiating with television stations in the local broadcast markets that compete with the intermediate carrier-supplied cable stations, however, would almost always be prohibitive. For example, when the intermediate carrier negotiates with the producers of a program carried on the superstation, a single negotiation takes place for the right to distribute the program to each of the cable stations it supplies. If the syndicators of the program attempted to negoti-
ate with competitors of the intermediate carrier-supplied cable stations in each of these markets for local exclusive rights, however, the transaction costs would be extremely high. Thus, it is unlikely that program suppliers would ever charge royalties that would foreclose them from the intermediate carrier market.

At the worst, excessive charges or wholesale denials of consent by program suppliers would eliminate the distribution of superstation programming. This result, however, in the long run would not significantly hamper either the growth of the cable industry or its ability to meet the public demand for programming. Apart from a heavy dose of sports events, the kinds of programming that WTBS, WGN and WOR carry do not differ from what is already available to cable subscribers on other independent stations. Furthermore, pay-cable provides an ample supply and variety of offerings. Cable growth will slacken, if at all, only because of increased competition from even newer, more revolutionary media, such as subscription television (STV), multipoint distribution service (MDS), low-power television (LPTV), and direct broadcast satellites (DBS), all of which function within the traditional program acquisition mar-

229. Although massive denials of consent are unlikely for the reasons set out in the text, there are a few situations in which a program supplier might wish to restrict access to a particular copyrighted work. Promoters of heavy-weight boxing title bouts or other special sporting events, for example, have frequently limited access to coverage of these events to a few, select media outlets. See Ladd, supra note 29, at 35-37. Presumably, sports promoters will restrict access if they can obtain a greater profit by charging higher royalty fees to a few outlets than by charging the usual lower fee to many commercial television outlets. Even in this situation, however, secondary transmissions by intermediate carriers to cable systems may actually further the goals of profit-minded program suppliers. Cable systems served by intermediate carriers can easily make especially attractive programming available to only those subscribers willing to pay an additional one-time surcharge beyond the subscribers’ basic monthly service fee. See id. at 33. Since some or all of the enhanced cable revenues would be extracted by sports promoters in the retransmission consent negotiations, sports promoters would still accomplish their goal of restricting access while increasing revenues. Therefore, sports promoters might actually seek out superstation transmissions.

If, for some unforeseen reason, a program supplier actually withholds retransmission consent for a particular program, the intermediate carrier would either have to find substitute programming or leave a gap in its retransmission of the superstation signal. This problem is not insurmountable, however. The carrier could simply contract in advance for the rights to another program owned by the broadcasting station or a different program supplier, and show that program in place of the deleted one. At worst, the carrier might have to leave a gap in its service.

230. See supra note 92.
Finally, recent data suggest that cable systems no longer rely as heavily as they once did on distant broadcast signals to attract cable subscribers.  

IV. CONCLUSION

The proliferation of distant signal television programming via intermediate telecommunications carriers is one of several factors that has contributed to the current imbalance among the interests of program suppliers, local television broadcasters, and cable systems in the telecommunications market. The present copyright statute is ill-equipped to respond to this problem, however, because it was designed and has been interpreted to establish an equilibrium in the broadcasting industry based on conditions that existed in 1976. This Note has considered the appropriate role for intermediate telecommunications carriers in the secondary transmissions market and has concluded that initially assigning intermediate carriers full copyright liability for importing distant signals conforms to broad copyright and communications policies. Initially allocating full copyright liability to distant signal intermediate carriers minimizes transaction costs, while partially redressing the current market imbalance by forcing cable systems ultimately to bear the cost of distant signal programming at levels commensurate with its fair market value. Although some dislocation in the supply of distant signal programming might result, imposing full copyright liability on distant signal intermediate carriers would effect a more equitable distribution of programming and allocation of its costs.

231. For a description of these new media, see generally Holsendolph, supra note 87.