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# Cable and Subscription Television

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## VIII. CABLE AND SUBSCRIPTION TELEVISION

### A. *Sellers of Decoder Boxes Enjoined*

Home Box Office, ("HBO") is a Pay-TV service that provides a variety of motion pictures, sporting events and other entertainment programs. Many of these programs are unavailable on commercial television. In addition, HBO's programs do not contain commercial advertisements.[1]

In the New York City area HBO transmits its programs through underground cable and through the air via microwave signal. This case deals with microwave signals. Microwave signals cannot be received on conventional television sets without supplemental equipment. One receives the HBO programming by having a special antenna that picks up the high frequency MDS signal. A down converter changes the frequency into a signal that a conventional television can receive.[2] The antenna and down converter are supplied to HBO and its affiliates for their customers who pay a monthly fee.

The Advanced Consumer Technology, ("ACT") manufactures an antenna and down converter that enables purchasers to receive the MDS signal on conventional television sets. This equipment is technologically simple and can be installed by the purchaser.[3] ACT was selling this equipment throughout the United States, until a California statute outlawed their activities and the District Court for the Southern District of New York granted a temporary injunction. In filing for a permanent injunction HBO alleged defendants activities violated Section 605 of the Communications Act,[4] the federal copyright and trademark acts and various state laws. In *Home Box Office, Inc. v. Advanced Consumer Technology, Movie Antenna, Inc.*,[5] the court granted a permanent injunction against ACT from manufacturing, selling or advertising equipment that was used to intercept HBO's signal without paying the subscription costs.[6] Since the court decided ACT's activities violated Section 605 that court did not address the other claims.[7]

1. Home Box Office, Inc. v. Advanced Consumer Technology, Movie Antenna, Inc., 549 F. Supp. 14, 15 (S.D.N.Y. 1981).
2. *Id.*
3. *Id.* at 15-16.
4. 47 U.S.C.A. § 605 (Supp. 1983).
5. 549 F. Supp. 14.
6. *Id.* at 25.
7. *Id.* at 16.

In deciding to grant a permanent injunction, the court decided ACT's activities violated Section 605 of the Communications Act of 1934.

Section 605 provides in pertinent part that no unauthorized person "shall receive or assist in receiving any interstate or foreign communication . . . for his own benefit or for the benefit of another entitled thereto."[8] ACT undoubtedly assisted others in receiving interstate communication for its benefit. Nevertheless, ACT claimed that the part of the statute that states, "shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication which is broadcast or transmitted by amateur or others for the use of the general public,"[9] removed its conduct from the Section 605 prohibition. ACT, thus alleged that HBO's transmission was broadcast for general consumption.[10]

In light of recent technological advances, the Federal Communications Commission ("FCC") has concluded that the unauthorized interception of MDS's broadcast does violate Section 605.[11] The courts have nevertheless, construed the meaning of Section 605 independent of the FCC's judgment. The court's decisions have been predominantly consistent with the FCC,[12] though the court in *Ortho-O-Vision, Inc. v. Home Box Office*, concluded in dictum that HBO's programs are broadcasting and not protected by Section 605.[13] To decide if HBO's programs were intended for the general public required the *HBO v. Act* court to review the history of Section 605.

Section 605 originated as Regulation 19 of Section 4 of the Radio Act of 1912.[14] The Act was Congress's first major attempt to regulate the radio industry.[15] First, the statute set up the pattern for allocating for radio frequencies. Second, the act required all radio operators to be

8. 47 U.S.C. § 605.

9. 549 F. Supp. at 17. The 1982 Amendments substituted "any station for amateurs or others." Communications Amendments Act of 1982, Pub. L. No. 97-259, § 126, 96 Stat. 1087, 1099 (1982).

10. 549 F. Supp. at 17.

11. *Id.*

12. *See* Nat'l Subscription Television v. S & H TV, 644 F.2d 820 (9th Cir. 1981); Chartwell Communications Group v. Westbrook, 637 F.2d 459 (6th Cir. 1980); Home Box Office, Inc. v. Pay TV of Greater New York, Inc., 467 F. Supp. 525 (E.D.N.Y. 1979).

13. 474 F. Supp. 672, 682 n.10 (S.D.N.Y. 1979). The importance of that dictum is questionable since the court granted the full injunctive relief HBO requested on Copyright Act Grounds. *See* Chartwell Communications Group v. Westbook, 637 F.2d at 466 n.4.

14. Pub. L. No. 62-264 § 4, reg. 19, 37 Stat. 302 (1912).

15. 549 F. Supp. at 17.

licensed by the Department of Commerce and Labor,[16] and placed restrictions on the nature and character of radio transmission. The most important aspect of this act as it applied to this litigation involved confidentiality of communication.[17] Because of the newness of the radio industry and the lack of available equipment, unauthorized interception or reception of radio broadcast was not addressed in this act.[18]

The Radio Act of 1927[19] was designed to remedy many of the problems caused by the rapid expansion of the radio industry. This Act established the Federal Radio Commission (hereinafter "FRC") and gave it broad authority to control almost all aspects of the radio industry, from granting licenses, deciding permissible power levels and operating times to assigning frequencies and determining the nature of services that each class of station would provide.[20]

This new statute incorporated the same provision against disclosure as the previous act. In addition, this new statute added broader provisions regarding authorized interception and reception of radio communication.[21] Because of the rapidly growing radio industry, an exception to the provision was added to "allow transmission, by broadcasters and others who sought to reach the general public, to be intercepted and received without violating federal law."[22]

In 1934, a new comprehensive Communication Act was devised. All of the regulating power that had been granted to many agencies, including the FRC was delegated to the FCC. The stated purpose of the 1934 Act was to regulate radio and wire communication in order to provide the people of the United States with "rapid, efficient, Nationwide wire and radio communication service with adequate facilities at reasonable charges."[23] Section 27 of the Radio Act of 1927 became Section 605 of the 1934 Act.[24] There were minor changes but Section 605 is otherwise the same today.[25]

In response to the numerous requests for frequency assignment for

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16. *Id.* at 17-18.
17. *Id.* at 18.
18. *Id.*
19. Pub. L. No. 69-632, 44 Stat. 1162 (1927).
20. 549 F. Supp. at 18.
21. *Id.*
22. *Id.* at 19. Section 27 of the Radio Act of 1927 also provided "that this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communications broadcasted or transmitted by amateurs or others for the use of the general public. . . ." Pub. L. No. 69-632, *supra*, note 19.
23. 47 U.S.C.A. § 151 (1962).
24. 549 F. Supp. at 19.
25. *Id.* at 20. *Cf.* note 9, *supra*.

closed circuit television service the FCC proposed to establish a new service called Multipoint Distribution Service (MDS) to allow common carriers[26] to make closed circuit television available to their customers. The new MDS rules were finally established January, 1974.[27]

The court in this case stated that "(t)he legislative and regulatory history of Section 605 refutes [ACT's] argument that HBO's transmissions should be seen as intended for the general public within the meaning of the proviso of Section 605."[28] Because HBO's programs can be received by equipment that is readily available to the public does not deprive HBO of Section 605's protection. Since the Radio Act of 1912,[29] until now, Congress has tried to protect transmissions that are easy to intercept. "Section 605 has long been interpreted to prohibit unauthorized interception and disclosure without regard to the technical difficulties involved."[30]

As the court noted, wiretaps were not permitted to be used as evidence in criminal prosecutions because gathering the information was accomplished in violation of Section 605.[31] The availability of inexpensive equipment to accomplish such result did not make the conduct more permissible.[32]

ACT argued that HBO should scramble its signal. Yet, the legislative history of Section 605 does not suggest that Congress meant only to protect persons who took affirmative conduct to keep their signals from being intercepted.[33] Aside from the fact that scrambling a signal would be costly to HBO and consequently its subscribers,[34] scrambling is no guarantee of signal security.[35]

26. The definition of common carrier in the 1934 Act provides, in part, that "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." 47 U.S.C. § 153(h); 549 F. Supp. at 19.

27. *Id.* at 20. *See* Docket No. 19493, F.C.C. 74-34, 45 F.C.C.2d 616.

28. *Id.* at 21.

29. *See* note 14 *supra*.

30. 549 F. Supp. at 21.

31. *Id.*, citing, Weiss v. United States, 308 U.S. 321 (1939) and Nardone v. United States, 302 U.S. 379 (1937).

32. *Id.*

33. *Id.*

34. To keep the high quality reception required by Microband a new transmitter would have to be purchased for $400,000 and a descrambling unit would have to be given to each subscriber at a cost of up to $150 per person. 549 F. Supp. at 22.

35. As suggested in American Television and Communications Corp. v. Western Techtronics, Inc., 529 F. Supp. 617, 621 (D. Colo. 1981) (a similar case). "Adding scramblers to a system would only provide the defendants a new product market, since they could simply begin to sell decoders in addition to antennas and down converters. Scrambling their MDS system would be a futile act." *Id.* at 621.

ACT also contended that HBO is not entitled to protection because its programs are similar to conventional television. However, HBO's programs are provided without commercial advertisements and are often time shows that are not available to commercial channels. More importantly, the statutory language and legislative history of Section 605 does not require transmission to be unique.[36] Although HBO would like to reach as wide an audience as possible, this does not mean that HBO intended its signal for the general public. Therefore, the court reasoned that ACT was not exempt from Section 605's[37] prohibition against unauthorized users.

The court in *KMLA Broadcasting Corp. v. Twentieth Century Cigarette Vendors Corp.*,[38] found that defendants violated Section 605 by distributing equipment that allowed purchasers to receive radio broadcasts that were specially for paid subscribers.[39]

In *Chartwell Communications Group v. Westbrook*,[40] a subscription television service was held not to be broadcasting because it was intended for paying customers. The only contrary authority is *Orth-O-Vision*, where the court found HBO's broadcasts were intended for the general public. This decision was based on the fact that the programming was similar to commercial television.[41] It should be noted though, this was only dicta in the case and unnecessary to the disposition of the case. According to a note in *Chartwell*, the conclusion in *Orth-O-Vision* is undercut by the fact that the court granted the injunction to HBO on copyright grounds.[42]

The FCC stance is that MDS signals are not "broadcast" and are therefore within the protection of Section 605.[43] The history of the FCC regulations of MDS transmission reveal that it "expected and required MDS to be used for restricted access transmission." . . . To allow defendants, or any other person or group, to intercept MDS transmission, would defeat this purpose."[44]

This case is important because it extensively reviews the evolution of Section 605 and how it applies to the interception of television

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36. 549 F. Supp. at 22.
37. *Id.* at 23.
38. 264 F. Supp. 35 (C.D. Cal. 1967).
39. *Id.* at 44.
40. 637 F.2d 459, 465 (6th Cir. 1980).
41. See note 13, *supra*.
42. 637 F.2d at 466, n.4.
43. 549 F. Supp. at 24.
44. *Id.* at 24-25.

waves. Through the court's analysis, the importance of protecting signals is shown. Further, the granting of a permanent injunction reinforces the courts view of putting an end to interception of television signals. This ruling, along with other cases, will aid the Pay-TV industry in protecting itself. Obviously if people are able to intercept and effectively "steal" a signal, they are not going to pay for the Pay-TV service. If this were to continue, Pay-TV would see its demise from an economic standpoint.

Aside from helping the Pay-TV field, these types of decisions protect copyright owners who receive their royalties based on the number of subscribers they have. In turn, if copyright holders are paid what they are owed, they can pay the investors and performers who have "points."

In *American Television & Communications, Corp. v. Western Techtronics, Inc.*,[45] the court continued the trend of enjoining sellers of decoder boxes. The court held the defendant sellers were enjoined from selling any electronic devices which could be used to intercept the plaintiff's programming. The motion for a preliminary injunction was granted and was to continue in full force until a trial on the merits was had.[46]

Plaintiff, American Television (ATC) is the licensed distributor of Home Box Office (HBO) in the Denver, Colorado area. ATC pays HBO a monthly fee for the rights to distribute HBO's programs. HBO transmits its programming by common carrier and satellite to ATC in Denver. After ATC receives the wave it transmits the programs by common carrier microwave to the top of Lookout Mountain, just west of Denver. From Lookout Mountain HBO's programming is distributed to subscribers by Microvision, another common carrier. Microvision in turn is licensed by the FCC to operate a Multipoint Distribution Service (MDS) in Denver.[47]

Standard TV receivers cannot receive the MDS Microwave transmission, so ATC provides its subscribers with a special microwave antenna and a "down converter." This equipment makes the signal available on a standard television. ATC subscribers pay for the equipment, installation and a monthly subscription fee for a HBO programming. ATC only rents the antenna and the down converter to its customers.[48]

45. 529 F. Supp. 617 (1982).
46. *Id.* at 622.
47. *Id.* at 618.
48. *Id.*

ATC claimed that the defendants advertised and sold microwave antennae, down converters and components with instructions on how to intercept the MDS signal without paying the subscription fees. ATC alleged that the sole purpose of the defendants devices was to enable their customers to pirate the HBO programs without paying for them. ATC filed for a preliminary injunction against the defendants to stop them from selling these devices until after a trial on the merits.[49]

The defendants in this case did not dispute that they advertised and sold this type of equipment to intercept ATC's transmissions. Instead, they contended that the interception of ATC's transmission was legal.[50] Defendants argued that (1) the MDS transmissions were intended for public use and consequently could be intercepted; (2) ATC had no standing to sue since they were HBO's licensee and ATC's contract with Microband had expired; (3) ATC did not show defendants actually deprived ATC of customers; (4) ATC has an adequate remedy at law for damages or could provide their own remedy by scrambling their MDS signal; (5) no injunction could be issued since ATC has not established the boundaries of its service area; and (6) an injunction would hurt defendant more than plaintiff—ATC.[51]

In deciding whether to grant a preliminary injunction there were several criteria the court had to consider.[52] The first of these criteria was whether ATC would probably prevail on the merits.[53] ATC based its claim on 47 U.S.C. § 605 which states in part:

> No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefits or for the benefit of another not entitled thereto . . . . This section shall not apply to the 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 . . . .[54]

The court followed the decision by stating that Section 605 did create a private right of action.[55]

49. *Id.* at 619.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. Chartwell Communications Group v. Westbrook, 637 F.2d 459, 466 (6th Cir. 1980).

The court continued by adopting ATC's position that the defendants selling of microwave antennae and down converters together with instructions on how to use this equipment to tune in HBO amounted to actually assisting their customers in unlawfully receiving HBO signals to which the customers were not entitled.[56]

Defendants argued that MDS transmissions were broadcast for the use of the general public and hence their conduct is not prohibited by Section 605.[57] The court in this case considered the split of authority regarding the application of Section 605 to MDS signals[58] and concluded that Section 605 prohibits unauthorized interception of MDS signals.[59]

The next criteria the court had to decide was whether ATC was the proper party to bring this suit and whether the expiration of ATC's contract with Microvision was of any significance. The court concluded neither of these contentions had any merits. "ATC holds the right to distribute HBO programming in the Denver area, and pays HBO for that right. This proprietary interest is sufficient to confer standing on ATC to object to the theft of HBO programming."[60] The court also decided that there was evidence that the contract was still in force. For the above stated reasons the court concluded that ATC demonstrated a substantial likelihood of prevailing on the merits of this case.

In deciding to grant a preliminary injunction the court had to decide that ATC had suffered irreparable harm. The court reasoned that the nature of the receiving equipment along with the size of Denver made it impossible to discover how many unauthorized units existed. Additionally, because of possible criminal charges it was highly unlikely people would come forth to admit they were using these receivers. "For these reasons, compensatory damages attributable to loss of subscription fees cannot be accurately ascertained."[61]

Defendants argued that ATC could scramble their signals. The court responded by suggesting this was not a viable remedy. First, the court reasoned that this would be a considerable expense for ATC and consequently its subscribers; and second, the court reasoned this would provide the defendants with a new product market and ultimately the

56. 529 F. Supp. at 619.
57. *Id.*
58. *Id.* at 620.
59. *Id.*
60. *Id.* at 620-21.
61. *Id.* at 621.

scrambling would be a futile act.[62]

In short, the court concluded without a preliminary injunction, ATC would suffer irreparable harm.

"Obviously each equipment sale by the defendants eliminates a potential paying customer for ATC's service."[63] As a result of this activity the court reasoned that ATC's services would remain higher because of all of the unauthorized receivers who did not pay the fees.

Defendants argued that an injunction would deprive them of their livelihood. While the court acknowledged this fact, the court suggested that "(n)o one, however, has a vested right to earn a living by violating federal law."[64]

Finally, in deciding to grant a motion for preliminary injunction, the court decided that there was a public interest in the survival of MDS programming as an option to commercial television. "Defendant's conduct, in addition to being unlawful, hinders the development of MDS system."[65] The reduction of MDS's costs is essential to make widespread distribution. The court found that an injunction should be granted because it was in the best interest of the public.

The court granted the motion for preliminary injunction and further protected ATC's interest by requiring a total ban on defendant's activities by enjoining them from selling any device or components which could be used to intercept ATC's signals. The injunction was granted until a trial on the merits was held.

This decision reaffirms the courts trend to protect the Pay-TV industry from "pirates." If the courts do not continue to prevent people from selling unauthorized receivers, Pay-TV will lose money and possibly go out of business.

As one author suggested, a parasitic relationship exists between the seller and the manufacturer of decoding devices and down converters. "The courts have recognized that, left unrestrained, these sellers will destroy the very industry upon which they depend."[66]

In addition to cable companies losing money, many other people stand to lose dollars. Copyright owners lose money because the compulsory licensing fees are based on the cable systems receipts from sub-

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 622.

66. Bienstock, *Theft of Service of Over-the-Air Pay TV: Are the Airwaves Free*, 56 Fla. B.J. 240, 244 (1982).

scribers.[67] If there are unauthorized receivers who do not pay subscription fees there are fewer royalties for copyright owners. Often times these copyright owners are studios who are making part of the profits from these royalties. If royalties are not paid, then there are fewer profits for investors who have "points."[68] Though it may appear that unauthorized reception of MDS signals only hurts Pay-TV, it has far reaching effects on producers and performers.

The strength of this case is reaffirmed by the fact that in a more recent case, *United States v. Stone*,[69] criminal charges were directed at defendants who advertised and sold microwave antennae, down converters and components that allowed for unauthorized reception of MDS signals.[70]

As stated in ATC, it is within the public interest that Pay-TV survive to provide TV viewers with an option.[71]

Underlying all of these decisions is a moral dilemma. If you can get something for free, why pay? Intercepting MDS signals is like using a "black box" to avoid paying telephone bills or lying on your income taxes or not telling a salesclerk they miscalculated your bill. Are any of these occurrences really stealing? Or can you fault a system or a person for not being careful?

We are only deceiving ourselves when we ask ourselves, is it really wrong to intercept TV signals that our neighbors have to pay for? Is it not likely that if these signals were really for everyone, they would be for free and special equipment and charges for the programming would be unnecessary?

*Sindee Levin*

### B. *Effect of FCC's Deregulation of Subscription T.V.*

In 1982 the Federal Communications Commission (FCC) made major changes in the regulations governing the subscription television industry (STV). The FCC deleted four of its rules for over-the-air subscription television. First, the rule restricting STV operation to communities that had four other conventional television stations was

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67. Note, *Receive Only Satellite Earth Stations & Piracy of the Airwaves*, 58 Notre Dame L.R. 84, 93 at n.69 (1982).

68. Points are often given to Producers, Directors or performers in lieu of money or in addition to monies. After the profits are received these points translate into money.

69. 546 F. Supp. 234 (1982).

70. *Id.* at 236.

71. *Id.*

eliminated. Second, the requirement that STV stations broadcast at least 28 hours per week of conventional programming was deleted. Third, the Commission allowed either the purchase or lease of STV decoders by subscribers at the discretion of the STV licensee. Fourth, the requirement that STV applicants ascertain the needs and interests of the community in regard to subscription programming was removed.[1] The deletion of these rules essentially deregulate the subscription television service. According to the Commission these restrictions have inhibited competition and unnecessarily burdened STV licensees while depriving the public of greater diversity in programming.[2]

A brief history of subscription television regulation will place the issues outlined above in perspective. The Commission in 1968 established the basis for nationwide over-the-air STV service. It was concluded that STV could provide a beneficial supplement to conventional television by improving the quality and quantity of overall programming. Until more was known about how STV would develop, the Commission decided it was best to proceed with caution. Thus, regulations were imposed to maintain the availability of conventional programming. STV stations provide both conventional and pay programming. From sign-on to about 7 p.m. they present conventional programming much the same as other non-network affiliated stations. In the pay mode, the signal is scrambled so that only subscribers supplied with a decoder can receive the programming. This pay programming consists of unedited movies, sports and specials.

Several factors have caused the FCC to deregulate the subscription television industry, which are discussed below.

The "complement of four" rule was adopted to ensure at least four conventional signals in a market before STV could be authorized. This rule was originally employed to assure that conventional "free" television would continue to exist. The FCC proposed eliminating this rule because it was a barrier to STV service in small communities which did not have four conventional television stations.[3] There are 139 such communities in the United States comprising 28 percent of all television households.[4] The FCC has determined that deleting this rule will allow STV to operate in these areas without squeezing out or blocking the development of conventional stations. Moreover, many of those

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1. 47 Fed. Reg. 30,069 (1982).
2. *Id.*
3. 88 F.C.C.2d 213 (1981).
4. 1980-1981 Television Markets and Rankings Guide, Arbitron Company, Chicago, Illinois, 1981.

139 markets would obtain STV service by activating unused UHF allocations, thereby providing a new service where no service was previously available.

The growth of pay cable and other pay services was another compelling reason to remove these restrictions.[5] STV stations which operate on a single channel are at a disadvantage compared with cable television which offers multiple channels at a lower cost. It has been found that pay services which enter a market first have a competitive advantage over similar types of services which follow. STV's greatest competitive advantage over cable is the speed with which it can enter and penetrate a market. The Commission decided that the public is best served by allowing persons to establish STV stations wherever they believe a market exist.

Like the "complement of four" rule, the "28 hour" rule was designed to ensure the availability of conventional, free programming by requiring STV stations to broadcast at least 28 hours of such programming a week. The elimination of this requirement permits STV stations to forgo all nonscrambled programming. The Commission ruled that even if STV stations air only subscription programming, there would be adequate conventional programming available from non-STV facilities. The FCC concluded that the "28 hour" rule places an unnecessarily heavy burden on STV stations without concomitant public benefit. The Commission stated that the rule restricts STV licensees from exercising independent programming judgments, and it could prevent efficient programming in response to audience demands.[6] The STV licensee is still required to program in response to community needs and is asked to meet this requirement in either the scrambled or conventional mode. The Commission felt that community needs for conventional and pay programming differ from place to place and those relative needs should be satisfied in the marketplace rather than by governmental rule.[7]

Another regulation adopted to protect consumers was the requirement that STV equipment be leased and not sold to subscribers.[8] It was believed that such a rule was necessary to protect consumers from equipment obsolescence and possible cessation of STV services. Now

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5. By 1985, 17 percent of television homes are expected to have pay cable, *See* Wines, *The Cable Revolution—Touch Choices for the Industry and the Government*, the Nat'l J., October 24, 1981, at 1891.

6. 47 Fed. Reg. 30,069, 30,073 (1982).

7. *Id.*

8. *See* § 73.642(f)(3) of the Commission's Rules.

the FCC is persuaded that the advantage of allowing STV operators to sell decoders outweigh the protection provided by its "lease only" rule. The advantage of selling the decoders are financial, for both STV operators and their subscribers. The cost of purchasing a decoder may be no greater than the rental fees subscribers would pay over a two or three year period. The wholesale cost of decoders range from one hundred to two hundred dollars. Thus, long term subscribers may eventually save the full cost and more by their initial purchase. Furthermore, the revenues received by STV companies from the sale of decoders will provide them with working capital without the interest expense incurred when such capital is borrowed.[9] Hopefully, these savings will trickle down to subscribers in the form of lower subscription fees.

Proponents of the "lease only" rule argue that the sale of the decoders would aggravate an already serious piracy problem. The FCC disagreed, stating that those individuals who are capable of duplicating a decoder may do so by utilizing decoders which were sold or leased to others. Some opposed the sale of decoders on the grounds that decoder obsolescence is still a problem requiring consumer protection. The FCC recognizes that the encoding technology is in a state of flux, however, it stated that it believes the licensee will offer a decoder owner a more favorable price on any new decoder that is developed. The Commission concluded that allowing purchase or lease of decoder equipment at the STV operators' discretion can benefit both the businessman and consumer.[10]

Since 1969, applicants for STV authorization have been required to survey their communities' STV needs and interests and to advise the FCC how they intend to satisfy such needs. When establishing the basis for nationwide STV service, the Commission believed that a substantial amount of STV programming might consist of feature films and sports with lesser amounts devoted to opera, ballet and theatre.[11] Thus, it felt that in ascertaining the community's interest there would be a search principally directed at what sports and entertainment should be marketed. However, after observing several STV services in operation, the FCC decided that the marketplace is the most effective means to ensure that programming meets the community's needs. The Commission believes that if an STV operator fails to offer programming that directs itself to the needs and interests of the community,

9. F.C.C. deregulates over-the-air subscription television, 4 Ent. L. Rptr. 4, Sept. 15, 1982.

10. 47 Fed. Reg. 30,069, 30,074 (1982).

11. *Fifth Report and Order*, 19 F.C.C.2d 559, 566 (1969).

subscriber support will dwindle. Therefore, the basic economic relationship between the STV operator and consumer provides sufficient incentive for that operator to determine its service area's programming desires. The Commission resolved that the ascertainment requirement is unnecessary.[12] It imposes a costly, time consuming burden on the STV applicant with no benefit accruing to the public.[13]

The Commission anticipates that the deregulation of subscription television would increase the utilization of unused channels, allow for additional specialized programming, provide financial support for small markets and offer a unique service that directly responds to consumer interests. It feels that STV could now effectively compete with other pay systems that do not operate under similar regulatory restraints. The consequence of such competition should result in benefits to business as well as consumers in the form of greater diversity in programming.

Presently, the consensus within the subscription television industry and at the FCC is that the deregulatory action has done little to affect the prospects of the industry. Cable penetration, operating expenses and piracy are primary factors hurting the business. Subscription television is apparently losing out to cable since STV offers only one channel at a price that exceeds the price of cable's myriad of services. There are presently 19 STV stations in operation, eight fewer than last year. Not a single new STV station was developed since the "complement of four" rule was relaxed. The national subscriber base has declined from 1,410,000 to 985,000 the year before.[14] Cable subscribers have increased from 27,000,000 to 32,900,000.[15] Because of market influences, several STV operators have ceased their operations. The decision allowing operators to sell decoder boxes to the public has not increased the piracy problem. However, exact piracy figures are difficult to calculate.

Deregulatory efforts have not had any material effect on the industry. The problems that exist today are purely economic due to difficulty in competing with cable and other developing technologies.

*Diane Tasoff*

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12. STV applicants when originally applying for their television licenses or the renewal of them, are obligated to ascertain the community's needs, problems and interest and program in a non-entertainment fashion to meet those problems. Nothing in the instant proposal would affect this basic ascertainment requirement.

13. 47 Fed. Reg. 30,069, 30,075 (1982).

14. Broadcasting, Vol. 105, No. 10, September 1983, p. 35.

15. *Id.*

### C. *Cable T.V. Installation Constitutes a Taking Requiring Just Compensation*

After much litigation involving the cable television market in New York City, apartment building subscribers may in the future be paying much more money for the availability of subscription television. In *Loretto v. Teleprompter Manhattan CATV Corp.* [1], the United States Supreme Court determined that the installation of cable facilities on an apartment owner's property constitutes a *per se* compensable taking[2] requiring just compensation. Although applied in a novel context, that of cable television, the Court affirmed "the traditional rule [in eminent domain law] that a permanent physical occupation of property is a taking."[3]

The plaintiff, Jean Loretto, purchased an apartment building in New York City in 1971.[4] At the time of purchase, the defendant Teleprompter Manhattan CATV Corporation, with the permission of the previous owner,[5] had already installed cable on the roof of the building.[6] At first, the wiring was only a part of the cable "highway" which linked the city's buildings.[7] However, in 1973, Teleprompter dropped lines from the roof of the Loretto building to a first floor tenant.[8] It was at this time that Loretto first discovered that her building was equipped

1. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

2. *Id.* at 434. The fifth amendment of the United States Constitution provides in part: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. A taking, as used in the fifth amendment, has been defined as "entering upon private property for more than a momentary period and, under the warrant or color of legal authority, devoting it to a public use, or otherwise informally appropriating or injuriously affecting it in such a way as substantially to oust the owner and deprive him of all beneficial enjoyment thereof." 26 Am. Jur. 2d § 157 (1966).

3. 458 U.S. at 441.

4. *Id.* at 421.

5. Loretto v. Teleprompter Manhattan CATV Corp., 53 N.Y.2d 124, 135, 423 N.E.2d 320, 324, 440 N.Y.S.2d 843, 847 (1981). In 1968, the previous owner had granted to Teleprompter for fifty dollars the right to lay cable on the building and provide exclusive cable television service to the tenants.

6. Teleprompter placed a cable "slightly less than one-half inch in diameter and of approximately 30 feet in length along the length of the building about 18 inches above the roof top, and directional taps, approximately 4 inches by 4 inches, on the front and rear of the roof. By June 8, 1970 the cable had been extended another 4 to 6 feet and cable had been run from the directional taps to the adjoining building. . . ." 53 N.Y.2d 124, 135, 423 N.E.2d 320, 324 440 N.Y.S.2d 843, 847 (1981).

7. 458 U.S. at 421. The cable network in the City was made possible by "crossover" cable lines which extended from building to building in an effort to reach new groups of subscribers.

8. *Id.* at 423. The cable lines which go from the roof of the building down into the apartments are termed "noncrossover" lines.

with cable.[9]

Before 1973, Teleprompter compensated property owners for the space taken up by the cable at a standard rate of five percent of the gross revenues that the company derived from the particular property.[10] Yet, on January 1, 1973 a new state law—New York Executive Law section 828[11]—went into effect. In order to make cable television more accessible to New York tenants, the law prohibited all landlords from interfering with the installation of cable television facilities upon their premises and made it unlawful for any landlord to demand or accept compensation in excess of the amount which the New York State Cable Television Commission[12] determined by regulation to be "reasonable."[13] After section 828 was enacted, the State Commission authorized a one time, one dollar compensation payment to landlords whose apartment buildings were equipped with cable. Three years after section 828 became operational, Loretto, demanding more than the one dollar compensation, brought a class action against Teleprompter on behalf of all owners of New York State real property on which Teleprompter had placed cable facilities.[14] Loretto, seeking damages for trespass and an injunction against the continued installation of cable facilities, alleged that section 828 "constituted a taking without just compensation in a deprivation of property without due process of law."[15]

Teleprompter brought a motion for summary judgment which was granted by the New York Supreme Court, Special Term,[16] and later affirmed by its appellate division.[17] The New York Court of Appeals also affirmed Special Term's ruling[18] while holding that section 828 was a valid exercise of the state's police power which allowed for the unhindered development of subscription television in it's important educational and community benefits.[19] The New York Court of Appeals rejected Loretto's argument that the physical occupation authorized by

9. 53 N.Y.2d at 135, 423 N.E.2d at 324, 440 N.Y.S.2d at 847.
10. 458 U.S. at 423.
11. N.Y. Exec. Law § 828 (McKinney 1982).
12. N.Y. Exec. Law § 814 (McKinney 1982).
13. N.Y. Exec. Law § 828 1.b.
14. 53 N.Y.2d at 131, 423 N.E.2d at 322, 440 N.Y.S.2d at 845.
15. *Id.*
16. Loretto v. Teleprompter Manhattan CATV Corp., 98 Misc.2d 944, 415 N.Y.S.2d 180 (1979).
17. Loretto v. Teleprompter Manhattan CATV Corp., 73 A.D.2d 849, 422 N.Y.S.2d 550 (1979).
18. 53 N.Y.2d at 131, 423 N.E.2d at 332, 440 N.Y.S.2d at 845.
19. 458 U.S. at 875.

section 828 constituted a taking since the law had no adverse economic impact on landlords in terms of devaluation of their property.[20] Although the majority of the court did not feel that section 828 authorized a taking, the dissent was adament, stating that the case involved a "clear instance of a taking requiring just compensation. . . ."[21] The dissent believed that even a minimal appropriation of private property for public use was a taking entitling the owner to just compensation.[22]

Agreeing with the dissent, the United States Supreme Court reversed New York's highest court concluding that section 828 sanctioned a taking of Loretto's property.[23] The case then was remanded back to the New York Court of Appeals to decide the issue of the amount of compensation that was due Loretto and her fellow property owners.[24]

Justice Marshall, in delivering the opinion of the Court, stated that the issue in the case was whether section 828, which allowed for an allegedly minor but permanent physical appropriation of a landlord's property by a private cable television corporation, constituted a taking for which just compensation was constitutionally required.[25] The Court concluded that "a permanent physical occupation," sanctioned by a government, would constitute a taking "without regard to the public interest that it may serve,"[26] even if it would only have minimal economic impact on the owner,[27] or even if it would only occupy a minimal amount of space.[28] The Court deduced that section 828 authorized such an occupation of the property and thus constituted a taking requiring Teleprompter to pay Loretto just compensation.[29]

The Court was particularly concerned with the serious consequences resulting from the physical intrusion on private property by government.[30] The Court surveyed case law dealing with the Fifth Amendment Takings Clause and classified types of governmental interference with private ownership into three separate categories:[31] 1) per-

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20. *Id.*
21. 53 N.Y.2d at 162, 423 N.E.2d at 340, 440 N.Y.S.2d at 863 (1981) (Cooke C.J., dissenting).
22. *Id.* at 160, 423 N.E.2d at 339, 440 N.Y.S.2d at 862.
23. 458 U.S. at 441.
24. *Id.*
25. *Id.* at 421.
26. *Id.* at 426.
27. *Id.* at 435.
28. *Id.* at 436.
29. *Id.* at 441.
30. *Id.* at 426.
31. *Id.* at 441.

manent physical occupations;[32] 2) temporary physical invasions;[33] and 3) non-physical interferences.[34] If the taking fell within the first category, as it did in the instant case, it was deemed a *per se* compensable taking, while takings falling within the latter two categories invoked an application of a test which balanced several important equitable factors.[35] The majority justified the strict *per se* rule as necessary to protect a property owner's rights when physical property is permanently occupied.[36] In so doing, the Court subscribed to the opinion that "an owner suffers a special kind of injury when a stranger directly invades and occupies the owner's property" because "such an occupation is qualitatively more severe than a regulation of the use of property . . . since the owner may have no control over the timing, extent, or nature of the invasion."[37]

The dissent was troubled with Marshall's strained categories of governmental interference with private ownership and in particular with the rigid construction of the *per se* rule for permanent physical occupation.[38] The minority opinion did not approve of the majority's categories of takings claims, regardless of the type of interference.[39] Thus, the dissent, feeling that the taking in this case was only minimal, rejected the notion that a property owner has the absolute right to prohibit a relatively minor invasion of his property, especially when a state has responded to the needs of a new and growing industry by enacting a statute which attempts to balance the interests of the parties affected.[40]

In reversing the New York court, the Supreme Court did not strike down section 828 as an improper exercise of the state's police power.[41] The Court merely remanded the case to have the state court determine what constitutes just compensation; in so doing, the Court implied that the one dollar compensation was not adequate.[42] On remand, the New

32. *Id.* at 425-38. *See, e.g.*, Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1872).

33. *Id.* *See, e.g.*, Pruneyard Shopping Center v. Robbins, 447 U.S. 74 (1980).

34. *Id.* at 429-31. *See, e.g.*, Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978).

35. Penn Central Transp. Co. v. New York City, 438 U.S. 104, 123-24 (1978).

36. 458 U.S. at 435. The Court recognized that an owner has the right to possess, the power to control the use of and the power to dispose of property.

37. *Id.* at 436.

38. Justice Blackman, writing for the dissent, calls the majority's decision "curiously anachronistic."

39. 458 U.S. at 441-43. (Blackman, J., dissenting).

40. *Id.* at 455-56.

41. *Id.* at 424-25.

42. *Id.*

York Court of Appeals modified the Special Term's decision by making clear that the New York State Cable Television Commission was authorized by section 828 to fix reasonable compensation and that the Commission's regulation 598.3, concerning the limitation period for service of notice on a property owner, was invalid. The court also retained jurisdiction so that it could later review, if needed, a decision by the Commission fixing compensation.[43] Finally, Loretto was allowed to maintain an action in trespass arising from Teleprompter's intruding cable lines, only for the period of time between February 28, 1972, the date on which she took title to the property in question, and January 1, 1973, the effective date of section 828.[44]

The difficult question of how to fix just compensation for a permanent physical invasion was left unanswered by the Supreme Court and was deferred to the State Cable Television Commission by the New York Court of Appeals. Although the Supreme Court did not give explicit guidance to the state courts in how to fix compensation, it indirectly narrowed the means that would be available for measuring compensation.

In remanding the case, the Court implicitly rejected the standard one dollar compensation approach previously adopted by the Commission. The Court, likewise, was not moved by the concurring opinion in the first court of appeals decision which logically suggested that a *per se* nominal compensation be awarded landlords unless they could prove actual damage above the amount of normal compensation.[45] The Court, however, did not dismiss as false the fact that the taking involved in the case was very minimal and not disruptive of Loretto's business. This would tend to suggest that Loretto should only be entitled to nominal compensation. Yet, by rejecting the one dollar compensation approach, the Supreme Court suggests that even when no economic burden is placed on a property owner, minimal compensation would still have to be greater than the previously awarded nominal compensation. Finally, the Court's inattention to the compensation issue lends support for not changing its prior preference for the "market's" approach to valuation[46] which would provide for considerably

43. Loretto v. Teleprompter Manhattan CATV Corp., 58 N.Y.2d 143-147, 446 N.E.2d 428, 431, 459 N.Y.S.2d 743, 746 (1983).

44. *Id.* Loretto's cause of action for trespass subsequent to January 1, 1973 was dismissed since Teleprompter's cable facilities were on Loretto's building in accordance with the law.

45. 53 N.Y.2d at 155, 423 N.E.2d at 336, 440 N.Y.S.2d at 859. (Gabrielli, J., concurring).

46. *See* United States v. 564.54 Acres of Land, 441 U.S. 506 (1979).

more than one dollar compensation as was available prior to the enactment of section 828.

In the end it will be difficult for the lower courts not to use some kind of balancing test in setting the rate of compensation. This type of test, rejected by the Supreme Court for determining a *per se* taking of physical property, remains the most practical means of assuring that the interests of landlords, cable companies and the state as regulator of the public welfare are all protected. It seems that the rate will have to be high enough to minimize the sting caused by the intrusion on a landlord's private property and to uphold the constitutional importance of the Takings Clause, while at the same time reasonable enough so that the cable companies do not have to reduce or over-price the service.

Regardless of what valuation system is adopted, it appears that this series of litigation will ultimately increase the cost of providing cable television service. Whether the increased cost to Teleprompter in compensating landlords for the opportunity to lay cable on their property will be passed on to cable television subscribers is not certain. However, what may be more interesting to watch for is whether New York eventually amends section 828 to require landlords to install cable on their property at the request of tenants.[47] Landlords are presently required to install such things as utility connectors, smoke detectors and fire extinguishers.[48] The Court pointed out that in this situation the landlord would own the cable facilities, thus eliminating the problem of intrusion by a stranger. By empowering the state to compel the installation of cable, the need for compensation would be eliminated.[49] Ironically, landlords would be left with little choice but to lease cable equipment from the cable companies in order to provide service for their tenants. In this situation, after having vindicated their constitutional rights in the *Teleprompter* decision, landlords would be left bearing some of the cost of providing tenants with pay television instead of profiting from this new technology.

*Remy Kessler*

### D. *Cable T.V. Industry Challenges Royalty Rate Structure*

The Copyright Royalty Tribunal was established as a legislative

47. 458 U.S. at 440 n.19.
48. 458 U.S. at 440.
49. *Id.*

force designed to create a system of reasonable royalty payments for the benefit of owners of copyrighted materials which are transmitted through various media to the public.[1] Codified in 17 U.S.C. § 801, the Tribunal's legislative mandate is to promulgate four policies which are fundamental to the protection and encouragement of creative works:[2] maximizing the availability of creative works to the public; reflecting economic conditions while providing copyright owners with a fair return on their investments; maintaining respective roles of owner and user, and minimizing any potential disruptive impact on industry structures and practices.[3] These objectives are an outgrowth of the obvious conflicts and tensions created by competing communications policies that are, themselves, based upon tensions evident within article I, section 8 of the United States Constitution.[4] The national incentive to broaden knowledge, which forms the basis for the Tribunal's mandate, is demonstrated through Congressional power to grant exclusive rights to both creative artists and technicians.[5] However, to carry out this mandate, the Tribunal must also be able to encourage the free flow of information within the cable television industry.

The FCC began directly regulating the cable television industry in the 1960's by promoting policies to protect existing broadcasters and inhibit cable growth in deference to local interests.[6] Broadcasting interests were preferred until 1972 when restrictive regulations were repealed and distant signal carriage and syndicated program exclusivity restrictions on retransmission via cable were eliminated.[7]

The fundamental issue which has spawned great controversy

1. Recording Indus. Ass'n of America v. Copyright Royalty Tribunal, 662 F.2d 1 (D.C. Cir. 1981). For general background on the Copyright Royalty Tribunal, *see also Copyright Royalty Tribunal: Achieving Equilibrium Between Cable and Copyright Interests*, 1 Loy. Ent. L.J. 147 (1981).

2. 17 U.S.C. § 801(b)(1)(A)-(D) (1977).

3. *Id.*; *see also Recording Indus.*, 662 F.2d at 8-9 (discussion of statutory factors considered by the Tribunal, noting their tension-producing "pull in opposite directions").

4. National Cable Television Ass'n v. Copyright Royalty Tribunal, 689 F.2d 1077, 1078-79 n.6 (D.C. Cir. 1982). The court recognized a "tension" between the Constitutional grant of exclusivity to creators and the desire to develop generalized knowledge. *See also* U.S. Const. art. I, § 8 (Congress is empowered to "promote the Progress of Science and useful Arts by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.")

5. *Id.*

6. Malrite T.V. of New York v. FCC, 652 F.2d 1140, 1143-44 (2d Cir. 1981); *see also The Copyright Royalty Tribunal: Achieving Equilibrium Between Cable and Copyright Interests*, *supra* note 1, at 151-54; *see also* Green, *The Cable Television Provisions of the Revised Copyright Act*, 27 Cath. U.L. Rev. 263 (1978).

7. *See generally Malrite*, 652 F.2d at 1144.

within both the legal community and the cable industry is whether cable operators should be able to retransmit billion dollar programs without paying royalties to the underlying copyright owners.[8] Until Congress revised the copyright laws in 1976, the prevalent view was one of non-liability for cable operators.[9] In 1974, when producers and creators of copyrighted television programs brought an action against subscription television service operators for copyright infringement through the interception and relaying of televised materials, the United States Supreme Court held that the cable operators were not liable for royalty payments.[10] The Court based its decision, in part, on an economic analysis which viewed market dilution as having little direct impact on the advertising revenues recouped by copyright owners.[11] Yet, the Court recognized that turn-of-the-century legislation could no longer be adequately applied to changing economic and technological situations.[12]

The current legislation, as embodied in the Copyright Act of 1976, grants secondary transmissions operators[13] a compulsory license to relay copyrighted materials carried on broadcast stations to subscribing viewers.[14] Congress provided the compulsory license because it perceived negotiations between each cable television (CATV) system and the vast number of individual copyright holders as logistically impossible.[15] However, in exchange for not being forced to obtain the individual consent of each copyright holder whose rights are exploited, cable operators must, in turn, remit to copyright owners royalty fees based on

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8. 652 F.2d at 1145-46; *see also* Green, *supra* Note 6, at 263.

9. *Id.*

10. Teleprompter Corp. v. Columbia Broadcasting System, Inc., 415 U.S. 394 (1974).

11. *Id.* at 410-14.

12. *Id.* at 414; *see also* Eastern Microwave Inc. v. Doubleday Sports, Inc., 691 F.2d 125, 127 (2d Cir. 1982), *cert. denied*, 103 S. Ct. 1232 (1983) where the court notes that it must "divine and apply the intent of Congress" while confronted with "a statute enacted in the technological milieu of an earlier time" in order to reflect the "burgeoning technological advances of the communications industry."

13. A secondary transmission is defined in 17 U.S.C. § 111(f) (1976) as the simultaneous or nonsimultaneous further transmission by a cable system of programming concurrently or previously conveyed in a primary transmission. Congress additionally asserts through the Code's circular definition that a primary transmission is one made by a transmitting facility whose signals are intercepted by a secondary transmission service. Put more succinctly by Judge Posner of the Seventh Circuit, a " 'primary transmission' is the initial broadcast; a 'secondary transmission' is the 'further transmitting' of a primary transmission." WGN Continental Broadcasting Co. v. United Video, Inc., 693 F.2d 622, 624 (7th Cir. 1982).

14. *See generally Nat'l Cable*, 689 F.2d at 1079; *see also Eastern Microwave, Inc.*, 691 F.2d at 128, where the transmission procedure is described.

15. *See* 17 U.S.C. § 111(c)(1) (1977); *see Nat'l Cable* at 1079-80; *and* Nat'l Ass'n of Broadcasters v. Copyright Royalty Tribunal, 675 F.2d 367, 371 (D.C. Cir. 1982).

gross revenues and the number of distant signal equivalents[16] carried by the system.[17] These fees are paid into a "royalty pool" which the Tribunal controls, and out of which it pays appropriate shares to the various classifications of copyright owners who file claims with the Tribunal.[18]

Recognizing that economic factors and industry changes would necessitate timely modifications of this rate structure, Congress required, through the Copyright Act, that the Tribunal review rates at five year intervals beginning on January 1, 1980 at the request of interested parties.[19] Clearly, Congress was aware that such an inflexible timetable could result in unfair royalty rates which could not be rectified until the next rate proceeding.[20] The Copyright Act failed to grant the Tribunal continuous jurisdiction to monitor royalty rates; rather the Tribunal is required by the Copyright Act to adhere to a precise and unwavering schedule.[21] Thus, it would appear that changes in cable subscription rates and inflation may be reflected only through these periodic adjustment proceedings.[22] However, this potential for unfair royalty rates is perhaps counteracted by the Administrative Procedure Act, permitting agency actions to be set aside if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[23] Thus, Tribunal decisions may be overturned if they are found to have been clearly unreasonable.[24] Accordingly, the Tribunal arguably has the discretion to create a rate schedule linked to a flexible standard which would permit automatic adjustments, throughout each five

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16. Section 111(f) of the Copyright Act defines a distant signal equivalent (DSE) as the following:

> [t]he value assigned to the secondary transmission of any nonnetwork television programming carried by a cable system in whole or in part beyond the local service area of the primary transmitter of such programming. It is computed by assigning a value of one to each independent station and a value of one-quarter to each network station . . . .

17 U.S.C. § 111(f) (1976). Thus, the fee generated reflects the presence and value of copyrighted materials within varying markets. *Id. See also Nat'l Cable*, 689 F.2d at 1079-80.

17. *Id. See also Malrite* 652 F.2d at 1144 [cable systems are limited in the transmission of signals from distant stations according to market size and over-the-air signal availability].

18. *Id.* at 1080; *see also* 17 U.S.C. § 111(d)(2)-(5) (1976).

19. 17 U.S.C. § 801(b)(2)(A); *see also Nat'l Cable*, 689 F.2d at 1080.

20. *Recording Indus.*, 662 F.2d at 15.

21. *Id.*; *see also* 17 U.S.C. § 804 (1976).

22. *Id.* However, certain rate adjustments mandated by changes in applicable Federal Communications Commission rules are permitted.

23. 5 U.S.C. § 706(2)(A) (1976); *see also Recording Indus.*, 662 F.2d at 8. The opportunity for judicial review of the Tribunal's decisions by appeal to the United States Court of Appeals is codified in 17 U.S.C. § 810 (1976).

24. *Id.*

year hiatus, tied to changes in fixed economic indicators such as the Consumer Price Index.

The Tribunal's first cable television rate adjustment proceeding was for the royalty fees rate structure for cable operators benefitting copyright owners as established by the Copyright Royalty Tribunal.[25] The Copyright Owners, represented by the American Society of Composers, Authors and Publishers (ASCAP), requested the Tribunal adopt a six month review mechanism rather than the five year review provided for in the Act.[26] ASCAP argued that a six month review would permit semi-annual fluctuations in the Consumer Price Index[27] to be reflected in the royalty schedule.[28] ASCAP's authority for this proposed procedure was the Act's requirement that a real constant dollar level be maintained with respect to the royalty fee per subscriber.[29] The Tribunal, however, failed to adopt this inflationary adjustment mechanism.[30]

Although the National Cable Television Association claimed rates were too high and ASCAP asserted that, as a result of the Tribunal's action, the rates were too low, both raising numerous related issues, the court of appeals chose to limit its discussion primarily to the Tribunal's failure to adopt a procedure for semi-annual inflation adjustments.[31] In applying the "arbitrary [and] capricious" standard imposed by the Administrative Procedure Act,[32] the court found the Tribunal's determination of the issues to be reasonable and thus sustained its rulings.[33]

The court drew an analogy to the Tribunal's decisions regarding the royalty rates for phonorecords[34] as discussed in *Recording Industry*.[35] There, the Tribunal attempted to create a complex rate adjustment system which would necessitate yearly modifications to reflect changes in the average retail prices of record albums.[36] The court held

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25. 689 F.2d 1077.

26. *Id.* at 1081.

27. The Tribunal relied upon the Consumer Price Index to establish the difference between inflationary increases and the increases in cable subscriber charges, thus forming the criteria for royalty increases. *Id.* at 1081.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id* at 1091; *see also supra* note 23.

33. *See generally Nat'l Cable*, 689 F.2d at 1081. The court held that the Tribunal's interpretation "of its rate-setting authority [was] reasonable and therefore sustain[ed] its refusal to adopt an inflation adjustment mechanism." *Id.* at 1081.

34. 17 U.S.C. § 101 (1976) ("phonorecord" defined).

35. Nat'l Cable, 689 F.2d at 1081.

36. *Id.* at 1081-82; *see also Recording Indus.*, 662 F.2d at 2 *passim*.

that although a periodic exercise of discretion was deliberately limited by Congress, reasonable *automatic* mechanisms to reflect rate changes would be permissible.[37] The court also referred to the Seventh Circuit's analysis of a similar problem regarding royalty rates for jukeboxes in *Amusement and Music Operators Association v. Copyright Royalty Tribunal*.[38] There, the court held that "a cost of living, or other inflation adjustment designed to maintain the real value of the fee set by the Tribunal is not prohibited but is instead affirmatively supported by the language of the Act."[39] However, the Seventh Circuit emphasized that the jukebox adjustment procedure was automatic in nature, and hence beyond the Tribunal's discretion and could thus be viewed differently than the unfixed, discretionary procedure rejected by the court in *Recording Industry*.[40]

In the instant case, ASCAP asserted that their adjustment proposal would require only semi-annual exercises in arithmetic, and that mechanical rather than discretionary adjustments would be made.[41] The Tribunal's view that its powers were limited by Congress, and that an adoption of the Owner's proposal would exceed the boundaries outlined by Congressional policy, was found to be reasonable.[42] The court concluded, however, that the Tribunal was free to treat each industry on an individual basis[43] since the Tribunal's rate making authority differs with respect to the various industries covered by the Act.[44] Thus, with respect to cable rates, the Tribunal is free to simply monitor fees at five year intervals.[45] The court reasoned that since Congress could have but did not require the Tribunal to undertake this task yearly to account for changes in subscriber charges and inflation rates, it could be inferred that monitoring sooner than the express five year intervals would be contrary to Congressional intent.[46]

The court postulated that a decrease in the efficacy of business planning might plague the cable industry if forced to speculate on

37. *Id.* at 16-17; *see generally Nat'l Cable*, 689 F.2d at 1081-82.

38. *Nat'l Cable*, 689 F.2d at 1082; *see also* Amusement and Music Operators Ass'n v. Copyright Royalty Tribunal, 679 F.2d 1144 (7th Cir. 1982).

39. *Id.* at 1155.

40. *Id.* at n.9.

41. *See generally Nat'l Cable*, 689 F.2d at 1082-83.

42. *Id.* at 1083.

43. *Id.* at 1084 (*e.g.*, phonorecord and jukebox rates are adjusted according to a ten year, rather than a five year schedule).

44. *Id.*

45. *Id.*

46. *Id.*

semi-annual rate adjustments as they are potentially uncertain.[47] The court concluded that because of this danger, heightened by the relative youth of the cable industry, the Congressional plan should be followed until further knowledge is provided by legal and cable industry development.[48] This knowledge, once gained, can form the basis for change in the rate structure.[49] Additionally, the court pointed out that to some extent inflationary increases in cable subscriber charges will be passed to copyright owners although at a less precise rate.[50]

The Tribunal measured the increase in subscription rates since 1976 in relation to the Consumer Price Index.[51] Based upon service charge reports supplied by CATV operators, the Tribunal found that between 1976 and 1980 subscription rates had lagged behind inflation considerably.[52] The NCTA contended that 1976 figures should be used, asserting that royalty fees had, in fact, increased at the same rate as inflation since that time.[53] However, the court held that the Tribunal's estimate, which was based on actual subscriber charges for 1976, was both reasonable and reliable, and was therefore to be upheld.[54]

The Copyright Owners also argued that certain tiering practices utilized by cable operators to manipulate rates charged for cable subscription would deprive them of fees earned on secondary transmissions and thus should be reflected in the rate schedule.[55] They argued that cable operators might lower the charge for basic service as an inducement to customers, understating the revenues gained from basic subscription services and thereby deprive the Owners of higher royalty

47. *Id.* at 1085-86.

48. *Id.*

49. *Id.*

50. *Id.* at n.66, at 1090-91. For this reason, a portion of the case was remanded with the desire that the Tribunal explain or correct the absence of a mathematical adjustment to compensate for the difference between 1976 dollars used in calculations and the 1980 dollars upon which the rate structure was applied. The court asserted that "[r]oyalty fees will retain their dollar value precisely to the extent that subscriber charges rise with inflation." Both the NCTA and ASCAP suggested that the percentage difference between the 1976 and 1980 figures be converted to reflect 1980 dollars.

51. *Id.* at 1088.

52. *Id.*

53. *Id.* at 1088-89 nn.85, 86. The NCTA relied on the House Judiciary Committee's report that stated rates would approximate 81 cents per subscriber per year. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 175 (1976). The NCTA contended that the 1980 fee per subscriber was approximately $1.10, thus reflecting the same approximate 33 percent increase in inflation during that same period.

54. *Id.* at 1089.

55. *Id.* at 1086-88. Tiering occurs where cable operators offer one rate for basic distant signal importation services and a higher rate for "pay" services such as sports and movie channels in the hope of attracting customers with the initial charge for basic service.

fees.[56] The Tribunal, however, accepted the NCTA's evidence that tiering "was virtually non-existent during the 1976-1980 time period under review."[57] They also accepted the NCTA's contention that, since pay television services attract new basic subscribers and make the introduction of cable systems into new markets economically feasible, tiering actually augmented rather than undercut Owners' royalty base by tiering.[58] The court accepted the Tribunal's findings, stating that it had acted reasonably within its discretionary range and that a reflection of tiering practices was unnecessary.[59]

The court recognized that although even fractional percentage shifts in the rate schedule could result in the gain or loss of millions of dollars to either party, it must view the Tribunal's rate-setting and disbursement efforts with deference.[60] The court suggested that the assessment of technical developments and the formulation of legislative policy are beyond the scope of its authority and competence where such judgments have been "entrusted to politically-accountable institutions."[61] Although the court admonished the Tribunal for its partial failure to set out its findings clearly, it held the Tribunal's conclusions to be reasonable.[62]

Subsequent to the FCC's repeal of restrictive rules regarding distant signal carriage and syndicated program exclusivity,[63] the Copyright Royalty Tribunal amended its rule establishing royalty rates for secondary transmissions and established an additional royalty fee schedule for secondary transmissions programming and signals that were not carried prior to June 24, 1981.[64] This occurred in response to the NCTA's filing of a petition on behalf of cable operators to initiate such a fee adjustment proceeding with the Tribunal.[65] The NCTA's petition, filed on August 11, 1981, caused the Tribunal to direct those parties interested to submit comments for the Tribunal's consideration at the proceeding herein discussed.[66] A petition for the commencement

56. *Id.* at 1087 n.77.
57. *Id.* at 1088.
58. *Id.* at 1088 n.81.
59. *Id.*
60. *Id.* at 1091.
61. *Id.*
62. *Id.*
63. *See generally Malrite*, 652 F.2d 1140; *see also supra* note 6 and accompanying text.
64. Adjustments of the Royalty Rate for Cable Systems; Federal Communications Commission's Deregulation of the Cable Industry, 47 Fed. Reg. 52, 146 (1982) (codified at 37 C.F.R. §§ 308.1-308.2 (1983)).
65. *Id.*
66. *Id.*

of proceedings to adjust compulsory license fees was also filed by ASCAP on September 24, 1981.[67] The Motion Picture Association of America (MPAA) subsequently filed with the Tribunal a request for a ruling on the effective date of liability for rate adjustments.[68] From June 15 to July 22 of 1982, the Tribunal conducted hearings allowing the NCTA and the copyright owners to present their cases through various witnesses.[69]

Responding to the Tribunal's initial request for comments on the NCTA petition, comments were filed by the MPAA, the National Association of Broadcasters (NAB), ASCAP, Broadcast Music, Inc. (BMI), and the NCTA. Additionally, remarks were filed by Major League Baseball, the National Basketball Association (NBA), the National Collegiate Athletic Association (NCAA), the National Hockey League, and the North American Soccer League, these parties being referred to as "Joint Sports Claimants."[70] Arguments presented by the various parties were centered primarily on the three issues: 1) the precise percentage demarcations to be utilized in the royalty rate schedule; 2) the possibility of periodic inflation adjustments in the determined rates; and 3) the date at which any rate increases should become effective.[71] The evidentiary positions of the parties with respect to these issues were summarized by the Tribunal prior to its discussion and determinations.[72]

The MPAA submitted a rate schedule proposing fees equal to five percent of gross cable receipts for each distant signal equivalent on new signals plus an additional fractionalized percentage based on the size of a CATV's market resulting from the FCC's deregulation of distant signals and the repeal of syndicated exclusivity rules.[73] The MPAA also proposed that the Tribunal provide for periodic inflation adjustments, and that the operative date of any rate increases be July 1, 1981.[74] The testimony of ten witnesses was presented to the Tribunal for its consideration.[75]

The testimony of Dr. Bridger Mitchell, an independent economic consultant and senior research economist for Rand Corporation, as-

67. *Id.*
68. *Id.* at 52,147 (the MPAA's request was filed on October 19 of the same year).
69. *Id.*
70. *Id.* at 52,146.
71. *Id.*
72. *Id.* at 52,147-52.
73. *Id.* at 52,147.
74. *Id.*
75. *Id.*

serted that increased cable profits in urban markets were caused by the FCC's elimination of restrictive regulations, the advent of new satellite technology reducing signal transmission costs, and the increased numbers of available programming sources.[76] Dr. Mitchell maintained that CATV systems were thereby able to profitably retain subscribers and save blackout and substitution expenses.[77]

ASCAP and BMI, referred to as "Joint Music" by the Tribunal, had requested that a periodic rate adjustment be adopted to reflect inflation, and that any rate increases become effective on July 1, 1981.[78] The Managing Director of ASCAP, Ms. Gloria Messinger, testified that license fees received by Joint Music for the performance of music were based on the gross revenues of the local television stations which use the material.[79] Ms. Messinger further testified that, assuming that viewing audience diversion occurs because of distant signal competition with local stations local gross revenues are therefore reduced ultimately harming copyright holders.[80] Additional testimony supplied by Dr. David E. Black, Associate Chairman of the Department of Economics at the University of Delaware, suggested that the compulsory license royalty fees should be 10.8 times higher to reflect the value placed on music by broadcasters.[81]

It was proposed by NAB that a rate of five percent of gross receipts for basic service on each distant signal equivalent added in response to FCC deregulation be assessed.[82] The testimony of Dr. Lawrence Patrick, NAB's Vice President for Research, suggested that local station revenue losses were not offset by the gain of new distant audiences.[83] He also testified that to reasonably compensate broadcast stations for these revenue losses, rates would have to be increased between 16.5 and 22.5 times.[84]

Joint Sports' proposal mirrored that of the NAB, requesting a rate of five percent of cable's gross receipts per distant signal equivalent.[85] The Executive Director of Marketing and Broadcasting in the Office of the Commissioner of Baseball, Mr. Thomas Villante, testified that in a

76. *Id.* at 52,148.
77. *Id.*
78. *Id.* at 52,149.
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*

free marketplace, copyright payments sought and obtained for professional sports programming would be no lower than those received from the USA Network, and no higher than those received from local cable systems. He also asserted that, absent compulsory licenses, CATV payments for baseball programming would be approximately .5 cents per subscriber per game at a minimum, with the maximum payment being twenty to twenty-five cents per subscriber per game.[86] Further, he asserted that copyright holders' current revenues for similar programming are "substantially lower" than CATV's revenues.[87]

This assertion was reiterated by Dr. Yale Braunstein, Director of the Senior Research Association at Kalbas Bowen Associates, who said that increasing distant signal rates by fifteen times would be necessary to compensate copyright owners to the same extent they would be compensated in a free marketplace.[88] He also felt that a royalty rate based on five percent of gross receipts for each additional distant signal equivalent would be reasonable.[89]

The NCTA submitted to the Tribunal an adjusted fee schedule reflecting the view that no periodic inflation adjustment should be adopted.[90] The Executive Vice President and Treasurer of Liberty Communications, Inc., Ms. Carolyn Chambers, testified that comparisons between broadcast and cable television for rate determination would prove misleading due to the functional differences between the two types of services.[91] Ms. Michelle Minarcin, NCTA's Director of Research, attempted to show that only a small number of previously prohibited signals have been added by cable systems subsequent to deregulation, and that those signals which were added failed to contribute significantly to increased penetration or rate growth.[92] She also noted that despite greater cable penetration, broadcast revenues have continued to enjoy dramatic growth.[93]

86. *Id.* at 52,150.
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.* According to the NCTA, where statutory DSE rates within the tiered rate structure prior to deregulation by the FCC were 0.675 of 1 percent, and the rates within the top fifty television markets were 0.872 of 1 percent, the comparable rate for new distant signals should now be 1 percent. Similarly, where the pre-deregulation rates were 0.485 and 0.432 of 1 percent respectively, the suggested rate for new distant signals is 0.550 of 1 percent. *Id.*
91. *Id.* Ms. Chambers asserted that the narrow casting capability of cable, as well as its multichannel retransmission capacity and two way technology make it markedly different from broadcast television. Non-entertainment and non-broadcast cable services and capabilities also make comparisons between cable and broadcast television invalid.
92. *Id.* at 52,150-51.
93. *Id.*

Additionally, the testimony of the NCTA's Vice President for Media Services and Research, Ms. Char Beales, attempted to show that the marginal value of each additional programming channel declines, as distant signal market shares attracts a diminishing.[94] She also asserted that audiences of both advertiser supported and pay programming are projected to grow dramatically, and that expanded cable audiences generate supplemental advertiser revenues.[95]

Dr. Rolla E. Park, Senior Economist at Rand Corporation, offered testimony that the only relevant marketplace in which to approximate the effect of a free market place on cable rates is one for distant signals bought by CATV systems. Sports programming purchased by both the USA Network and broadcast stations, in Dr. Park's view, created invalid market place analogies.[96] It was Dr. Park's analysis and resulting fee schedule which was ultimately submitted by the NCTA to the Tribunal as a suggested rate adjustment format.[97]

The Tribunal adopted a motion which stated that it has both the authority and jurisdiction to consider and set royalty fees for additional programming and signals.[98] It further asserted that it was not constrained to follow the original statutory rates suggested by the Copyright Act, although it would, where relevant, analyze the relationship between the statutory schedule and newly adopted rates.[99] Thus, the Tribunal considered the economic impact on both owners and users of copyrighted materials in an effort to make necessary rate adjustments

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94. *Id.* It was also noted that where CATV systems have twelve or more channel capacity, the impact of additional signals on gaining new subscribers is minimal. Further, the prices paid by local broadcasters for syndicated programming are insignificantly effected cable penetration, Ms. Beales asserted.

95. *Id.*

96. *Id.* Dr. Park identified significant market place differences between the products being purchased and the uses to which they were put, as well as in the sources of generated revenue, which make cable and broadcast markets incomparable. Although no free market for distant signals exists, he felt that a model of such a market could be constructed for purpose of analogy.

97. *Id. See also supra* n.90 and accompanying text.

98. *Id.* at 52,152 (the motion was adopted on March 31, 1982). The Tribunal also noted that the legal analysis and jurisdictional stance herein largely resemble those which it took in *Nat'l Cable*; the court of appeals fully affirmed the Tribunal's conclusions in that case. *See Nat'l Cable*, 689 F.2d 1077 (1982).

99. *See* Adjustments of the Royalty Rate, 47 Fed. Reg. 2, 152 (1982). The Tribunal stated that "[n]either the rates in copyright law nor the legislative history limit our adjustment of the rates for those signals and programs within the scope of this proceeding," and that such conclusions have been uniformly upheld on judicial review. *Id. See, e.g.*, *Nat'l Cable*, 689 F.2d 1077 (D.C. Cir. 1982); Amusement and Music Operators Ass'n v. Copyright Royalty Tribunal, 676 F.2d 1144 (7th Cir. 1982).

that reflected alterations in FCC restrictions.[100]

The Tribunal noted that, according to members of the cable industry, CATV systems would probably refrain from distant signal carriage rather than pay copyright royalty fees thereby effectively reinvoking original FCC restrictions on distant signals.[101] The Tribunal disagreed, reasoning that it would be up to each cable operator to make a "business judgment" within "the reasonable marketplace" regarding the potential benefits of distant signal carriage. The Tribunal found that fears that CATV systems would refuse to pay royalties were unsupported. Thus, the "reasonable" value of copyrighted programming should be reflected in royalty fees.[102] Further, any programming lost to the public would be insignificant since, although much programming is presently duplicated, a wealth of alternative programming is readily available.[103]

In an effort to "strike a balance between copyright owner and user," the Tribunal set rates "while also remembering that only the cable operator has freedom of choice in this congressional mandated marriage."[104] The Tribunal further asserted that the development of the cable industry should not be subsidized by copyright owners; instead, the new rates will decrease CATV profitability levels.[105] Rejecting the NCTA's argument that subscribers would not willingly pay added costs for distant signals, the Tribunal found that the marketplace alone, rather than these "speculations," held the final answer.[106]

The Tribunal clearly acknowledged the inaccuracy, inconsistency and unreliability of much of the data upon which it was to base its rulings.[107] However, it concluded that the fee imposed was not burdensome, and that other past cost increases have been absorbed by the cable industry without any "disruptive impact."[108] The Tribunal ac-

100. The Tribunal also found it noteworthy that complete elimination of FCC distant signal carriage and syndicated program exclusivity restrictions were previously unanticipated. *See* Adjustment of the Royalty Rate at 47 Fed. Reg. 52,152.

101. *Id.* at 52,153.

102. *Id.* The Tribunal felt that the limited public harm caused by cable operators dropping programming should not stand in the way of their adopting a reasonable marketplace valuation scheme.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 52,154.

107. *Id.* The Tribunal noted that out-dated data, studies which partially relied upon intuition and speculative conclusions, and comparisons between dissimilar distant signal cable markets and broadcast sports network markets in which programmer control varies made decision-making on their part more difficult.

108. *Id.* at 52,157.

knowledged that " [c]able systems will reap some benefits and the copyright owners will suffer some harm as a result" of their actions, but to a lesser extent than that anticipated by the copyright owners.[109] Thus, rates requested by the copyright owners were revised downward by the Tribunal.[110] A tiered fee system was created with staggered rates reflecting market share, signal age and signal availability. No mechanism was provided for cost of living adjustments.[111] An effective date of January 1, 1983 was established by the Tribunal, having found that business decisions regarding signal carriage in light of rate changes should be informed ones, and thus should not be imposed for periods preceding their decision.[112]

Faced with the job of resolving contradictory evidence while keeping in mind equally elusive goals, the Tribunal's task was assuredly a difficult one. With the ultimate ideal of ensuring "a continuing supply of varied programming to viewers," the Tribunal must use "the real world of telecommunications" as a backdrop for decision-making.[113] If diversity of programming is indeed an important regulatory desire, perhaps the potential inadequacies and inequalities of a cable pricing system may be ultimately overshadowed.[114]

Clearly, the same programming limitations imposed directly and indirectly on "free" television have the potential of similarly affecting the cable market. As audience size and advertising revenues begin to gain importance in a realm which is presently characterized by narrow casting and audience segmentation, cable must ultimately take on many of the programming attributes of free television in order to prosper. The interplay of new technological advances and economic constraints will surely result in a continuous shifting of costs and benefits among the parties involved. The rates set by the Tribunal must therefore be closely monitored and modified to reflect these fluctuations, for technologies are rapidly developing which go far beyond mere imagination, and thus surpass present regulatory insights; the delicate balance between copyright owners and cable interests is easily shifted.[115]

109. *Id.* at 52,158.

110. *Id.*

111. *Id.* at 52,158-59 for text of the rates.

112. *Id.*

113. *See Eastern Microwave, Inc.*, 691 F.2d at 132.

114. *See Malrite*, 652 F.2d at 1151.

115. *E.g.*, the present availability of satellite dishes for individual consumers enabling them to receive and view virtually any signal sent from a broadcast satellite free of charge, and direct broadcast satellites which can bypass cable systems and transmit signals directly to individual homes are just two such technological advances which, although "futuristic" in nature, are here today.

But market stability must not be sacrificed in an effort to keep royalty schedules up to date, for this could result in making business planning for CATV operation next to impossible. The only certainty in the industry is that "as the size of the [royalty] Fund grows, the dispute over how to slice the pie may be[come] more vigorous . . . ."[116] Indeed, "[r]atemaking is an art, not a science";[117] the adjusted rates established by the Tribunal are at present neither arbitrary or unreasonable, and will no doubt serve adequately until future rate adjustment proceedings.

*Lynda Goldman*

116. Nat'l Ass'n of Broadcasters v. Copyright Royalty Tribunal, 675 F.2d 367, 385 (D.C. Cir. 1982).

117. *Amusement and Music Operators*, 679 F.2d at 1159.