THE SOCIALIZATION OF COPYRIGHT: THE INCREASED USE OF COMPULSORY LICENSES*

I. INTRODUCTION

The Constitution of the United States provides that:

> The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.[1]

Five exclusive rights are furnished to copyright owners in section 106[2] of the 1976 Copyright Act.[3] Although these rights of reproduction, adaptation, publication, performance, and display are expressly set forth in the Act, they are severely limited by sections 107 through 118 of the Act entitled "Limitations on exclusive rights."[4]

The two primary limitations on the categories of exclusive

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1 U.S. CONST. art. I, § 8, cl. 8. The first copyright law of the United States was enacted by the first Congress in 1790 to secure to authors the exclusive right to their work. 1 Stat. 124.

2 Section 106 of the 1976 Copyright Act (the Act) 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:
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> (1) to reproduce the copyrighted work in copies or phonorecords;
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> (2) to prepare derivative works based upon the copyrighted work;
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> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
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> (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; and
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> (5) in the case of literary, musical, dramatic, and choreographic works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

17 U.S.C. § 106 (1982). The ownership rights of the copyright owner are further limited by the Act:

> Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.

17 U.S.C. § 202 (1982).

3 17 U.S.C. §§ 101-810 (1982).

4 For purposes of this Note, §§ 107-118 will be deemed to be limitations while in actuality only §§ 107-112 are listed as limitations and §§ 112-118 establish the scope of exclusive rights in such areas as sound recordings (§ 114) and public performances by means of coin-operated phonorecord players (§ 116). 17 U.S.C. §§ 107-118 (1982).

rights are the fair use doctrine[5] and compulsory licensing. The doctrine of fair use, which emerged through the common law[6] and is now codified in section 107,[7] permits, in certain situations,[8] the appropriation of copyrighted work without the consent of the copyright holder.[9] The doctrine creates a "privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner. . . ."[10] This "privilege" is implemented by way of a balancing test. The court will weigh the four factors listed in section 107 of the Act in determining whether the use of a work in any particular case is a "fair use."[11] The factors are:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

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5 *See generally* L. SELTZER, EXEMPTIONS AND FAIR USE IN COPYRIGHT (1978).

6 Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901). This case involved Jared Sparks who published in book form certain official and other papers of George Washington. The factors set forth by Mr. Justice Story in 1841 are still applied:

> [Q]uestion[s] of piracy, often depend upon a nice balance of the comparative use made in one of the materials of the other; the nature, extent, and value of the materials thus used; the objects of each work; and the degree to which each writer may be fairly presumed to have resorted to the same common sources of information, or to have exercised the same common diligence in the selection and arrangement of the materials. . . .

Id. at 344.

Justice Story further elaborated:

> [W]e must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work. Many mixed ingredients enter into the discussion of such questions.

Id. at 348.

7 17 U.S.C. § 107 (1982). "The judicial doctrine of fair use, one of the most important and well established limitations on the exclusive right of copyright owners, would be given express statutory recognition for the first time in section 107." HOUSE COMM. ON THE JUDICIARY, COPYRIGHT LAW REVISION, H.R. REP. No. 1476, 94th Cong., 2d Sess. 65 (1976) [hereinafter cited as H.R. REP. No. 1476].

8 The issue of fair use is one of fact, and for this reason many different situations arise. *See, e.g.*, DC Comics, Inc. v. Reel Fantasy, Inc., 696 F.2d 24 (2d Cir. 1982); MCA, Inc. v. Wilson, 677 F.2d 180 (2d Cir. 1981); Meeropol v. Nizer, 560 F.2d 1061 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978).

9 The copyright holder may be the author or the purchaser of the copyright. *See* 17 U.S.C. §§ 201-205 (1982).

10 Rosemont Enters. v. Random House, Inc., 366 F.2d 303, 306 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967) (citing H. BALL, COPYRIGHT AND LITERARY PROPERTY 260 (1944)). For a description of the interface between copyright and monopoly, see Note, *Copyright Infringement and the First Amendment*, 79 COLUM. L. REV. 320, 321 (1979): "[C]opyright protection results in a partial monopoly over expression."

11 *DC Comics*, 696 F.2d at 28; *MCA*, 677 F.2d at 183.

(4) the effect of the use upon the potential market for or value of the copyrighted work.[12]

Fair use is an equitable principle and an issue of fact.[13]

In comparison, a compulsory license scheme[14] does not utilize a balancing test to weigh the concerns of the copyright holder against the concerns of the public user. Instead, it resembles an unwritten contract which gives the user unlimited use of the work or product in return for the promise that he will pay a fee or royalty at some later date. In general, a compulsory license is a license which the holder of a copyright in a work must grant to one who uses the work in any of the ways specified in the Copyright Law.[15]

Although the potential or would-be infringer can use the copyrighted material without the owner's consent in both situations, the doctrine of fair use affords more protection to the copyright owner than do the provisions establishing compulsory licensing. For example, if author A, writing an article, uses a part of author B's work and if the part taken is found to be a small amount and unsubstantial as to B's work, then the use may be deemed to be fair. If, however, the section used is large and very substantial, then the use may not be deemed to be fair and it may constitute an infringement. Imagine, though, that a compulsory license was provided for in this situation. No longer would the court be asked to examine how much material was used, nor would it be required to look to the substantiality of the use because author A would have access to the entire work subject to payment of a royalty to author B.[16] The compulsory license is more limiting to author B in that in addition to being denied any right of refusal, he has absolutely no say as to the extent of the work which will be taken.

With the adoption of the Copyright Act of 1976, the use of the compulsory licensing mechanism was greatly expanded.[17] Under

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[12] 17 U.S.C. § 107 (1982). In making a factual determination when balancing all four factors, no one factor should prevail. The fourth factor, though, has come to be the most influential factor, as harm to even a potential market of a copyrighted work has yielded a rejection of a fair use defense. *See, e.g.*, Iowa State Univ. Research Found., Inc. v. American Broadcasting Cos., 463 F. Supp. 902 (S.D.N.Y. 1978) (Lumbard, J., sitting by designation), *aff'd*, 621 F.2d 57 (2d Cir. 1980).

[13] *DC Comics*, 696 F.2d at 28; *MCA*, 677 F.2d at 183.

[14] *See* 17 U.S.C. §§ 111, 115, 116, 118 (1982).

[15] Schaffer, *Are the Compulsory License Provisions of the Copyright Law Unconstitutional?*, 2 COMS. & L. 1 (1980).

[16] The provisions of the Act "not only deny creators the exclusive right to use their work as they wish, but also require them to do business with persons not of their own choosing and to accept statutorily established rates at statutorily mandated intervals for the use of their works." Lee, *An Economic Analysis of Compulsory Licensing, in Copyright Law*, 5 W. NEW ENG. L. REV. 203, 204-05 (1982) (citations omitted).

[17] *See* 17 U.S.C. §§ 111, 116, 118 (1982).

the 1909 Act only one provision had existed, that for mechanical reproductions;[18] today, four different licensing provisions exist and several others are under consideration.[19] The 1976 Act created compulsory licenses for jukeboxes,[20] public broadcasting,[21] and

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[18] Ch. 320, §(e), 35 Stat. 1075 (1909), *superseded by* 17 U.S.C. § 115 (1982). The use of a compulsory license first originated in response to the manufacture of piano rolls capable of mechanically reproducing two copyrighted songs, "Little Cotton Dolly" and "Kentucky Bake Schottische." The problems created by this new technology eventually reached the Supreme Court in White-Smith Music Publishing Co. v. Apollo Co., 209 U.S. 1 (1908). "However, it is clear from the language of the 1976 Act and its legislative history that it was intended to obliterate distinctions engendered by *White-Smith*." Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1248 (3rd Cir. 1983) (citations omitted) (1984); *see also* H.R. REP. No. 1476, *supra* note 7, at 52.

> The White-Smith Court . . . held that the piano rolls were not copies of copyrighted music under the then existing federal copyright law, but merely components of a machine that played the musical works. As a result, Congress was confronted with a dilemma. Congress either could give exclusive rights to musical copyright owners for the mechanical reproduction of their works, thereby allowing the creation of what was referred to as a great music trust, or it could withhold these rights, causing great injustice to creators. Despite these fears of monopolization, the 1909 Act, for the first time, recognized recording and mechanical reproduction rights as part of the bundle of exclusive rights secured by copyright law. The 1909 Act, however, did not ignore the potential for monopoly in the event that the Aeolian Company's contracts became effective. It resolved this problem by devising a special provision to allow any manufacturer of recordings or mechanical reproductions to use a musical composition as long as the manufacturer paid a royalty to the copyright owner for the use of the work.

Lee, *supra* note 17, at 206-07 (footnotes omitted).

[19] "This type of provision, known as the compulsory license, is relatively infrequent in American law, except in connection with industries affected by a public interest, and in such cases usually only as a limitation on price." SUBCOMM. ON PATENTS, TRADEMARKS AND COPYRIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 86TH CONG., 1ST SESS., THE ECONOMIC ASPECTS OF THE COMPULSORY LICENSE, STUDY NO. 6, 91 (Comm. Print 1958) (written by William M. Blaisdell), *reprinted in* 1 GROSSMAN, OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY (1960) [hereinafter cited as Blaisdell].

In particular, the Senate has conducted open hearings "on legislation that pits record companies and music publishers against tape and electronics manufacturers and people who tape music at home." Under the Proposed Home Recording Act of 1983 (S. 31, 98th Cong., 2d Sess. (1983); H.R. 1030, 98th Cong., 2d Sess. (1983)), manufacturers and importers of both tape recorders and blank tapes would be required "to 'contribute to a royalty pool that would be distributed among copyright holders' of recorded music. . . ." The purpose of the bill is to replace royalties lost when people made taped copies at home from the radio, records, or other tapes. Pareles, *Copyrights, Tapes & Royalties Issue*, N.Y. Times, Nov. 2, 1983, at C25, col. 1. The Senate Subcommittee on Patents, Trademarks, and Copyrights began hearings on the Home Recording Act of 1983 in October of 1983, but no other action has been taken. 1 CONG. INDEX (CCH) 21,001 (Feb. 2, 1984).

[20] 17 U.S.C. § 116 (1982).

Prior to 1976, jukebox operators were able to use pre-recorded music without any liability. "Under an express exemption in the 1909 Act, the performance of music on coin-operated machines, or jukeboxes, was not deemed a public performance for profit unless a fee were charged for admission to the place where such performance occurred." 2 M. NIMMER, NIMMER ON COPYRIGHT § 8.17 (1984) (citations omitted).

If it were not a public performance, then it would not violate the fourth exclusive right established in § 106 of the Act. Under this act, though, the performance of the jukebox was deemed to be public. However, the exclusive right under cl. (4) of § 106 was limited by § 116(a)(2), which stated that "[t]he operator of the coin-operated pho-

cable television.[22] The compulsory license for the recording and distribution of copyrighted music which was established under the 1909 Act[23] was further modified.[24]

Why is the copyright community experiencing this sudden surge in the application of compulsory licensing? Is this a predictable trend? Is it a trend to be encouraged?

One commentator has noted that "compulsory licensing is offered when technology has created new uses for which the author's exclusive rights have not been clearly established. It is also used when technology has made old licensing methods for established rights ponderous or inefficient."[25] We exist in a world of ever-changing and ever-expanding technology. As technological ideas increase, demand for their application also increases.[26] Today, for example, we have thousands of people purchasing videocassette recorder machines and taping hundreds of programs from television sets. Is copyright law suited to accommodate such a technology?

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norecord player may obtain a compulsory license to perform the work publicly on that phonorecord player by filing the application, affixing the certificate, and paying the royalties provided by subsection (b)." Initially, it was established under the Act that operators of the jukeboxes could secure a compulsory license upon paying a yearly royalty fee of $8.00 to the Copyright Royalty Tribunal (CRT). In 1981 the CRT increased the fee to $50.00 per jukebox per year.

In August of 1983, Senator Edward Zorinsky (D-Neb.) introduced S.1734—the "Coin Operated Phonorecord Player Act of 1983" to help ease the burden placed upon the jukebox owners by the CRT's 1981 ruling; Senator Zorinsky claimed that the ruling resulted in a 525% increase in the fee. The bill would require jukebox operators to register the jukeboxes they already own and pay a one time fee of not more than $25.00 per jukebox and would establish a compulsory license in jukebox manufacturers and importers upon mandatory payment of a royalty fee of $50.00 per jukebox.

Senator Alphonse D'Amato (R-N.Y.) opposed the bill and stated that the one-time payment "would be unconscionable when applied to future composers whose music will be played long after the one-time fee is distributed. The Copyright Royalty Tribunal was created under the 1976 Copyright Act to set fair royalty rates for compulsory licensing." *Senate Panel Hears Debate on Bill for One-Time Jukebox Royalty Fee*, 28 PAT. TRADEMARK & COPYRIGHT J. (BNA) No. 686, at 232-33 (June 28, 1984). The Performing Rights Societies of the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music Inc. (BMI) strongly supported Senator D'Amato's position. *Id.* at 233-34.

[21] 17 U.S.C. § 118 (1982). "Section 118 of the 1976 Copyright Act grants public broadcasting a compulsory license for non-dramatic literary and musical works (as well as pictorial, graphic and sculptural rights) subject to payment of *reasonable* royalty fees." Shooshan & Jackson, Inc., Cable Copyright and Consumer Welfare: The Hidden Cost of the Compulsory License 107 app. B (May 1981) (unpublished manuscript) (emphasis in original) (footnote omitted). The CRT regulates such fees to insure that they are reasonable.

[22] 17 U.S.C. § 111 (1982).

[23] Ch. 320, §(e), 35 Stat. 1075 (1909), *superseded by* 17 U.S.C. § 115 (1982).

[24] 17 U.S.C. § 115 (1982). For an excellent discussion, see Greenman & Deutsch, *The Copyright Royalty Tribunal and the Statutory Mechanical Royalty: History and Prospect*, 1 CARDOZO ARTS & ENT. L.J. 1 (1982).

[25] Lee, *supra* note 16, at 209 (footnotes omitted).

[26] *See generally* Krier & Montgomery, *Resource Allocation, Information Cost and the Form of Government Intervention*, 13 NAT. RESOURCES J. 89 (1973).

Are the solutions to be found in applying a compulsory licensing scheme?

This Note will address these issues as well as the problems associated with the socialization[27] of copyright. Although it will address the problems generally faced by all new technologies,[28] this Note will specifically analyze the current status of copyright in the cable television market. The success or failure of the Copyright Royalty Tribunal, which sets rates for the use of copyrighted material on broadcast signals used by cable television systems, will also be analyzed. Finally, this Note will focus upon the most current problem facing the latest technology in the communications industry, specifically, how to compensate copyright owners for materials taped and played on home videocassette recorders.

II. The Socialization of Copyright

"Copyright is today under stress."[29] Copyright protection is afforded to works which were technically inconceivable to the drafters of the original copyright clause of the United States Constitution.[30] The framers of the Constitution held the right to own property dear to their hearts. "Property was seen not as opposed to liberty, but indispensible to it; for men with property would be independent of the power of the State, in that rough-and-tumble rolling of opinion and power which marks freedom."[31] Thomas Paine stated:

> It may, with propriety, be remarked, that in all countries where literature is protected, (and it never can flourish where it is not), the works of an author are his legal property; and to treat letters in any other light than this, is to banish them from the country, or strangle them in the birth.[32]

Is the implementation of the compulsory license a violation of the property right as expressed by Thomas Paine? Is it a violation

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[27] The term "socialization of copyright" was introduced by the Dean of Benjamin N. Cardozo School of Law, Monroe E. Price, in an article in which he addressed the increased use of the compulsory license in copyright law. Dean Price states that the socialization of the creative process is an erosion of control that the creator has over his works: *i.e.* who uses the right and, also, the price established by the government. Price, *Copyright Law: The 'Betamax' Decision*, N.Y.L. J., Feb. 17, 1984, at 5, col. 1.

[28] Technology is "the science of the application of knowledge to practical purposes. . . ." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2348 (16th ed. 1971).

[29] Address by David Ladd (Apr. 13, 1983), *reprinted in* 25 PAT. TRADEMARK & COPYRIGHT J. (BNA) No. 627, at 530 (Apr. 28, 1983).

[30] *See supra* note 1.

[31] Ladd, *supra* note 29, at 532.

[32] Letter to the Abbe Reynal (1782), *reprinted in* 1 POLITICAL WORKS OF THOMAS PAINE 4-5 (1817), *quoted in* Ladd, *supra* note 29, at 532 (source omitted).

of the exclusive rights[33] found in the 1976 Copyright Act? Under the typical copyright scheme, an owner and a purchaser negotiate between themselves over the intellectual property rights sought to be purchased.[34] The individual copyright owner who would have the power, for a limited time,[35] to decide whether or not to assign or license his rights, determines the price at which these rights would be transferred.[36] Under a compulsory license scheme, the creator no longer has the power to decide if others should have access to his work nor the power to bargain for a price. As the process becomes socialized and the creator is removed from control,[37] these decisions are made by the Copyright Royalty Tribunal (CRT).[38] Chapter 8 of the 1976 Copyright Act establishes the CRT.[39] The Tribunal's statutory responsibilities are to make determinations concerning copyright royalty rates in the areas of cable television,[40] phonorecords,[41] jukeboxes,[42] and noncommercial broadcasting,[43] and to distribute cable television and jukebox royalties deposited with the Register of Copyright.[44]

The compulsory license appears to violate the principles of property established in copyright law because it establishes limits on the persons with whom the creator may choose to contract, the times at which he may contract, and the price at which he may contract.[45] If this is true, why is it maintained? The primary reason[46]

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33 *See* 17 U.S.C. § 106 (1982).

34 *See id.* § 201(d). *See also id.* § 204(a).

35 17 U.S.C. §§ 301-305 (1982).

36 Price, *supra* note 27, at 5. A "transfer of copyright ownership" is "an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights, comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license." 17 U.S.C. § 101 (1982); *see also* H.R. REP. No. 1476, *supra* note 7, at 123-24. 17 U.S.C. §§ 801-810 (1982).

37 Barbara Ringer, the former Register of Copyright, predicted that as we enter a decade of expanding technology, copyright will become less the exclusive right of an author and more a system, under which the author is guaranteed some remuneration for his work but is deprived of any control over the use to which the work is being put. Ringer, *Copyright in the 1980's—The Sixth Donald C. Brace Memorial Lecture*, 23 BULL. CR. SOC. 299 (1976).

38 17 U.S.C. §§ 801-810 (1982).

39 *Id.*

40 *Id.* § 111.

41 *Id.* § 115.

42 *Id.* § 116.

43 *Id.* § 118.

44 *See id.* §§ 701-710; the Copyright Office collects the royalties from the community antenna television (CATV) representatives for the CRT. The CRT in turn distributes the fees to copyright holders. *Id.* § 801(b)(3). In addition, the CRT makes determinations concerning the adjustment of reasonable copyright royalty rates. *Id.* § 801(b)(1).

45 Blaisdell, *supra* note 19, at 91. This study contends that compulsory licensing should be abandoned.

46 *See* Lee, *supra* note 16, at 211-15 (explaining other reasons for the license).

for the use of the compulsory license is the elimination of transaction costs.[47] These include the costs of negotiation, contracting, and enforcement. It is the economists' goal to limit transaction costs and "to approximate the result the market would reach if bargaining were costless."[48] It appears though, as evidenced by the cable industry, that although transaction costs may be limited by the implementation of a compulsory license structure, the system may not sufficiently nor effectively mirror the marketplace.

III. Cable and The Compulsory License

The biggest step toward the socialization of copyright came in the 1976 Copyright Act with the cable television compulsory license.[49] Cable television is the distribution of video signals to households by coaxial cable.[50] The 1976 Copyright Act imposed a compulsory license fee on cable systems[51] for the transmission of distant,[52] non-network broadcast signals. The CRT is designated to distribute the royalty fees collected from cable operators among the various broadcasting industry participants whose

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47 *See* Demsetz, *The Cost of Transacting*, 82 Q.J. ECON. 33 (1968).

48 Lee, *supra* note 16, at 214 (construing Calabresi, *Transaction Costs, Resource Allocation and Liability Rules—A Comment*, 11 J.L. & ECON. 67, 69 (1968)). "Transactions . . . require money and because substitutes for transactions also are costly, the optimal result is not necessarily the same as if transactions had no costs." Lee, *supra* note 17, at 214.

49 17 U.S.C. § 111 (1982); *see* Price, *supra* note 27.

50 Besen & Crandall, *The Deregulation of Cable Television*, 44 LAW & CONTEMP. PROBS. 77, 79 (1981). A cable television system is defined as:

> a nonbroadcast facility consisting of a set of transmission paths and associated signal generation, reception, and control equipment, under common ownership and control, that distributes or is designed to distribute to subscribers the signals of one or more television stations, but such term shall not include (1) any such facility that serves fewer than 50 subscribers, or (2) any such facility that serves or will serve only subscribers in one or more multiple unit dwellings under common ownership, control, or management.

47 C.F.R. § 76.5(a) (1984).

Cable television was originally called community antenna television (CATV) because it was perceived as a way for a community to share the use of a powerful television antenna that provided better reception of local broadcast signals. This use did not appear to threaten the existing market for copyright program owners. *See, e.g.*, 17 U.S.C. § 111 (1982). Problems arose when the cable operators extended the use of the cable facility to import distant signals into the local market. *See* M. PRICE & D. BRENNER: THE NEW VIDEO TECHNOLOGY (1985).

51 17 U.S.C. § 111 (1982).

52 A "distant signal" is defined as "[a] signal carried beyond the predicted grade B contour of the station transmitting it." FERRIS, LLOYD & CASEY, CABLE TELEVISION LAW—A VIDEO COMMUNICATIONS PRACTICE GUIDE, app. E-5 (1984) [hereinafter cited as FERRIS]. A trade B contour is "[t]he line demarcating an area within which broadcast signals have sufficient strength to enable viewers to receive them at 90 percent of the locations for at least 50 percent of the time." *Id.* at E-8. A "distant signal equivalent" is "[t]he value assigned for copyright royalty purposes to the secondary transmission of any non-network television programming carried by a cable system in whole or in part beyond the local service area of the primary transmitter of such programming." *Id.* at E-6.

copyrighted work had been retransmitted over distant signals.[53] In addition, it is responsible for adjusting the statutory royalty rate when the Federal Communications Commission (FCC) makes changes in the distant signal importation of syndicated program exclusivity rules.[54]

Many experts believe that the compulsory license scheme as applied to the cable industry does not serve its purpose of limiting transaction costs.[55] They also believe that this scheme does not satisfactorily approximate the market value of the programming used.[56] If this system is not efficient, other alternatives, such as full copyright liability,[57] must be examined.

A. *The Origin of the Cable Compulsory License*

In the 1950's, distributors of copyrighted programs encountered refusals by television stations to buy their programs.[58] The reason for these refusals was that these shows had already been shown on local market stations by cable systems which had imported the programs from stations in distant markets without the permission of the copyright owners which telecast them. This "distant signal importation" undermined the exclusive contract agreement between program suppliers and broadcasting stations because the "new programs" were no longer "new" to the view-

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53 17 U.S.C. § 801(b)(3) (1982).

54 *Id.* § 801(b)(2)(B); *see also* Note, *The Cable-Copyright Controversy Continues—But Not in the Courts*, 48 BROOKLYN L. REV. 661, 669 (1982).

> The distant signal importation rules limit the number of signals that a cable system may retransmit from distant broadcast stations to its subscribers; the limit varying according to the market size and the number of available over-the-air local signals in the market. The syndicated program exclusivity rules authorize a local broadcast station, which has purchased exclusive exhibition rights to a program, to demand that a cable system delete that program from the imported distant signal retransmission.

Id. at 669 (footnotes omitted) (construing 47 C.F.R. §§ 76.151 to -.161 (1980), *repealed by In re* Cable Television Syndicated Program Exclusivity Rules and Inquiry Into the Economic Relationship Between Television Broadcasting and Cable Television, Report and Order, 79 F.C.C.2d 663 (1980) [hereinafter cited as Cable TV Syndicated Program]).

55 Besen, Manning & Mitchell, *Copyright Liability for Cable Television: Compulsory Licensing and The Coase Theorem*, 21 J.L. & ECON. 67 (1978) [hereinafter cited as *Copyright Liability for Cable*].

56 A program market based on compulsory licensing will fail to contain the number and variety of programs that would be produced in a market with full copyright liability in which producers, cable systems, and television stations more fully respond to consumer preferences. *Id.*

57 *See* 3 M. NIMMER, *supra* note 20, § 12.04[A]. The user is liable for damages incurred when he chooses to infringe a given work protected by full copyright liability. "A substantial taking is the definition of *infringement*." SELTZER, *supra* note 5, at 35 (emphasis in original).

58 Meyer, *The Feat of Houdini or How the New Act Disentangles the CATV-Copyright Knot*, 22 N.Y.L. SCH. L. REV. 545, 546 (1977).

ing public.[59]

Because of the detrimental economic impact the distant signal importation was having on broadcast television, the industry asked the courts to find the cable operators liable for copyright infringement each time they transmitted broadcast signals without permission. The Supreme Court refused to make this finding on two occasions.[60] In *Fortnightly Corp. v. United Artist Television, Inc.*,[61] the retransmission of local copyrighted programs by community antenna television systems was held not to be a performance under the Act and, therefore, no copyright infringement was found. The Court noted that to find copyright liability there must be a fixed performance[62] since "performance" is one of the exclusive rights of copyrighted works held by the author.[63] In *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*,[64] the Court expanded the *Fortnightly* holding to the retransmission of distant signals.

Although the Supreme Court would not extend copyright liability to the cable industry, it did urge Congress to resolve the issue.[65] Congress complied, and found that "a cable television system is performing when it retransmits the broadcast to its subscribers."[66] This finding was set forth in Section 111 of the Act.

Section 111 of the Act, entitled "Limitations on exclusive rights: Secondary transmissions"[67] severely limits the rights of copyright owners by exempting some cable retransmissions,[68] yet, it expands their rights by making others subject to a compulsory license and the payment of statutory license fees.[69]

Secondary transmissions made by cable stations of programs broadcast by FCC licensed television stations are subject to a

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[59] Note, *supra* note 54, at 665.

[60] *See* Teleprompter Corp. v. Columbia Broadcasting Sys., 415 U.S. 394 (1974); Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968).

[61] 392 U.S. 390.

[62] 392 U.S. at 400-01. "We hold that CATV operations, like viewers and unlike broadcasters, do not perform the programs that they receive and carry." *Id.*

[63] 17 U.S.C. § 106(4) (1982).

> To "perform" a work means 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.

17 U.S.C. § 101 (1982).

[64] 415 U.S. 394 (1974).

[65] "Detailed regulation of these relationships, and any ultimate resolution of the many sensitive and important problems in this field, must be left to Congress." *Id.* at 414 (footnote omitted).

[66] H.R. REP. No. 1476, *supra* note 7, at 63 (1976).

[67] 17 U.S.C. § 111 (1982).

[68] *Id.* § 111(a).

[69] *Id.* § 111(d).

compulsory license and royalty structure upon the satisfaction of five conditions.[70] The first condition is that a cable system must transmit only those signals permitted under the FCC rules.[71] Second, the system must comply with the notice requirements of the Copyright Office.[72] The Copyright Office, a division of the Library of Congress, is charged with the registration of claims to copyright and with related duties including the collection of royalties.[73] Third, every six months a cable system must send the Copyright Office a Statement of Account to show the basis for the semi-annual royalty fee the cable system owes under its compulsory license[74] and to provide information needed to allocate royalty fees among copyright owners. Fourth, each semi-annual Statement of Account must be accompanied by the deposit of a royalty fee covering retransmissions during the preceding six months.[75] And fifth, the cable systems must have abstained from any willful alterations of the transmission through changes, deletions, or additions to the program.[76] All five conditions must be

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70 Meyer, *supra* note 58, at 556.

71 *See* 17 U.S.C. § 111(c)(2)(A) (1982).

72 *See id.* § 111(d)(1). In order to obtain a compulsory license for secondary transmission of a broadcast signal, the cable system must record what is designated as an "Initial Notice of Identity and Signal Carriage Complement." 37 C.F.R. § 201.11(a)(1) (1984). The cable system must file the Initial Notice of Identity at least one month before the date when the cable system commences operations. *Id.* An Initial Notice of Identity must include: (1) the designation " 'Owner[,]' *id.* § 201.11(c)(1)(i); (2) the designation " 'System[,]' " *id.* § 201.11(c)(1)(ii); (3) the designation " 'Area Served[,]' " *id.* § 201.11(c)(1)(iii); (4) the designation " 'Signal Carriage Complement[,]' " *id.* § 201.11(c)(1)(iv); (5) [t]he individual signature of . . . [t]he owner of the cable system . . . [,]" *id.* § 201.11(c)(1)(v)(A); and (6):

> [T]he signature shall be accompanied by the printed or typewritten name of the person signing the Notice, by the date of signature, and, if the owner of the cable system is a partnership or corporation, by the title or official position held in the partnership or corporation by the person signing the Notice.

Id. § 201.11(c)(1)(v)(C).

Also, the cable system must filed a "Notice of Change of Identity or Signal Carriage Complement" if the owner of the cable system changes, or if there is a change in the list of television and radio stations that the system is carrying regularly. *See id.* § 201.11(a)(2). The notice required by 17 U.S.C. § 111(d)(1) (1982) is to be recorded in the Copyright Office within 30 days after ownership or control of a cable system changes as a condition for maintaining a compulsory license for secondary transmissions. A Notice of Change of Identity or Signal Carriage Complement must include: (1) the designation " 'Former Owner[,]' " 37 C.F.R. § 201.11(d)(1)(i)(A) (1984); (2) the designation " 'New Owner[,]' " *id.* § 201.11(d)(1)(i)(B); (3) the designation " 'System[,]' " *id.* § 201.11(d)(1)(i)(D); and (4) "the effective date of the change of ownership[,]" *id.* § 201.11(d)(1)(i)(D).

73 17 U.S.C. §§ 701-710 (1982).

74 *Id.* § 111(d)(2)(A).

75 The royalty fee is computed on the basis of specified percentages of the system's gross receipts and the amount of distant non-network programming carried by the cable system. *Id.* § 111(d)(2)(B). These royalty rates are periodically revised and adjusted by the Copyright Royalty Tribunal and for these reasons no specific rates will be quoted in this Note. *See id.*

76 *Id.* § 111(c)(3).

met if the system is to be subject to the compulsory license; otherwise both legal and equitable remedies are available for violations.[77]

B. *Powers of the CRT Over the Cable Industry*

It is the responsibility of the CRT both to adjust the royalty rates and to distribute royalties that have been deposited with the Copyright Office by the cable industry.[78] These duties have proven to be difficult as the copyright owners/broadcasters and the cable industry have repeatedly disagreed on the issue of equitable royalty rates,[79] and the distribution process has proven to be excruciatingly slow.[80]

It is important to note on what occasion the CRT is empowered to adjust the royalty rates,[81] as they have been adjusted several times since 1978, the effective date of the 1976 Copyright Act.[82] In the first instance, the CRT may conduct a periodic five year review.[83] Section 804 of the Act provides for a periodic rate review, beginning in 1985 and occurring every fifth year thereafter.[84] Any adjustments in the royalty rates resulting from such review must be based only upon changes due to inflation or deflation.[85] Second, the CRT may adjust the rates as a result of an increase by the FCC of the number of distant signals permitted.[86] If the FCC changes its rules to permit the importation of more distant signals than allowed on April 15, 1976, any party may petition the CRT to request a rate adjustment proceeding.[87] Third, if the FCC changes its rules regarding syndicated or sports program exclusivity,[88] a rate adjustment proceeding can be

77 "The legal or beneficial holder of a copyright may seek an injunction, impoundment of illegal copies, actual or statutory damages, and recovery of costs and reasonable attorney fees. . . . Criminal penalties are available against willful infringement for commercial advantage or private gain. . . ." Greene, *The Cable Television Provisions of the Revised Copyright Act*, 27 CATH. U.L. REV. 263, 295 (1978).

78 17 U.S.C. § 801 (1982).

79 *See* National Cable Television Ass'n v. Copyright Royalty Tribunal, 724 F.2d 176 (D.C. Cir. 1983) (NCTA II); National Cable Television Ass'n v. Copyright Royalty Tribunal, 689 F.2d 1077 (D.C. Cir. 1982) (NCTA I).

80 *See* ANNUAL REPORT OF THE COPYRIGHT ROYALTY TRIBUNAL FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 1982.

81 Ladd, Schrader, Leibowitz & Oler, *Copyright, Cable, the Compulsory License: A Second Chance*, 3 COMS. & L. 3, 15 (1981) [hereinafter cited as Ladd].

82 *See* 17 U.S.C. § 301 (1982).

83 *Id.* § 804; *see also* Ladd, *supra* note 81, at 15; 37 C.F.R. § 301.61(b)(1) (1984).

84 17 U.S.C. § 804(a)(2)(A) (1982).

85 *Id.* § 801(b)(2)(A).

86 *Id.* § 801(b)(2)(B).

87 *Id.* § 804(a)(2); *see also* 37 C.F.R. § 301.61 (1984).

88 17 U.S.C. § 801(b)(2)(C) (1982). CATV systems may not "carry the live television broadcasts of [local sporting] event[s] if [an] event is not available live on a [local] televi-

instituted.[89]

The FCC's actions have indeed triggered CRT reaction. Prior to mid 1980, FCC rules severely restricted the carriage of distant signals by cable systems.[90] In particular, the FCC limited the number of distant signals a cable system could import depending on the location of the cable system and the number of local signals available in the community.[91] Additionally, the FCC authorized a local broadcast station to require the cable system to delete syndicated programs from the imported distant signals where the local stations had the exclusive rights[92] to those programs in the community.

These FCC rules provided some copyright protection by limiting the competition created by distant signal importation and by protecting the producer's exclusive rights to market programs. In 1980, however, the FCC repealed these rules after determining that such action was in the public's best interest. It concluded that the repeal of these rules would permit an increase in program diversity for cable subscribers without reducing the present supply of free television.[93] The FCC determined that the compulsory license provided the protection that these rules had given in the past. The Second Circuit upheld this decision in *Malrite Television of New York v. FCC*.[94]

The *Malrite* decision greatly altered the royalty scheme

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sion broadcast signal carried by the community unit pursuant to the mandatory signal carriage rules. . . ." 47 C.F.R. § 76.67 (1984).

89 17 U.S.C. § 801(b)(2)(C) (1982).

90 In the FCC's 1972 Cable Television Report and Order, 36 F.C.C.2d 143 (1972), the cable industry agreed to honor the agreements between broadcasters and syndicators granting syndicated exclusivity in the market. The restrictions on distant signal importation were somewhat relaxed in response to this agreement, though new restrictions were imposed. *Id.* In 1980, though, the FCC repealed its distant signal and syndicated exclusivity rule, Cable TV Syndicated Program, *supra* note 55, 79 F.C.C.2d 663, *aff'd*, Malrite Television of New York v. FCC, 652 F.2d 1140 (2d Cir. 1981), *cert. denied sub nom.* National Football League v. FCC, 454 U.S. 1143 (1982).

91 Under the distant signal importation rules, cable systems were required to carry all local broadcast signals within the 75 mile radius of the cable system's community. In addition, cable systems were limited as follows: (a) in the top 50 major television markets cable can only provide three network and three independent station signals including local signals. 47 C.F.R. § 76.61(b) (1980) (*modified*, Cable TV Syndicated Program, *supra* note 54). In the second 50 television markets, a cable system may provide three network and two independent station signals. 47 C.F.R. § 76.63(c) (1980) (*modified*, Cable TV Syndicated Program, *supra* note 54). In smaller markets, cable can provide three network and one independent station signal. 47 CFR § 76.59 (1980) (*modified*, Cable TV Syndicated Program, *supra* note 54).

92 The rules contained specific requirements for each market size. 47 CFR § 76.151 to -.161 (*repealed by* Cable TV Syndicated Program, *supra* note 54).

93 *In re* Inquiry Into the Economic Relationship Between Television Broadcasting and Cable Television, Report, 71 F.C.C.2d 632, 656 (1979).

94 652 F.2d 1140.

adopted in the Copyright Act of 1976.[95] The copyright owners believed that their protection had been removed and that the fees established in 1976 were now inadequate. The shift in FCC policy led the CRT to reevaluate the statutory fee schedule established by Congress six years earlier.[96]

On November 19, 1982, the CRT decided that it would abandon the "staggered-rate" increase procedure outlined in Section 111 of the Act,[97] and adopted what it believed to be a fair and reasonable flat rate of 3.75%[98] of a cable system's gross receipts for each additional distant signal added post-*Malrite*. Both the copyright owners and the copyright users disagreed with this finding.[99] The copyright owners, including the National Association of Broadcasters (NAB), asked that the CRT set a rate of 5% of cable's gross receipts.[100] Conversely, the copyright users, specifically the National Cable Television Association, Inc. (NCTA), proposed as a "worst case" a rate of 1%.[101] The NCTA asserted that

> any significant increase in the copyright fees would dramati-

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95 *See* Royalty Fee for Compulsory License For Secondary Transmission By Cable Systems, 37 C.F.R. § 308.2(c)(3) (1984). *See generally* Note, *supra* note 54.

96 *See* Note, *supra* note 54, at 679-80.

97 Section 111 of the Act provides in relevant part:

> [E]xcept in the case of a cable system whose royalty is specified in subclause (C) or (D) a total royalty fee for the period covered by the statement, computed on the basis of specified percentages of the gross receipts from subscribers to the cable service during said period for the basic service of providing secondary transmissions of primary broadcast transmitters, as follows:
>
> (i) 0.675 of 1 per centum of such gross receipts for the privilege of further transmitting any nonnetwork programming of a primary transmitter in whole or in part beyond the local service area of such primary transmitter, such amount to be applied against the fee, if any, payable pursuant to paragraphs (ii) through (iv);
>
> (ii) 0.675 of 1 per centum of such gross receipts for the first distant signal equivalent;
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> (iii) 0.425 of 1 per centum of such gross receipts for each of the second, third, and fourth distant signal equivalents;
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> (iv) .02 of 1 per centum of such gross receipts for the fifth distant signal equivalent and each additional distant signal equivalent thereafter; and in computing the amounts payable under paragraph (ii) through (iv), above, any fraction of a distant signal equivalent shall be computed at its fractional value and, in the case of any cable system located partly within and partly without the local service area of a primary transmitter, gross receipts shall be limited to those gross receipts derived from subscribers located without the local service area of such primary transmitter.

17 U.S.C. § 111(d)(2)(B) (1982).

98 37 C.F.R. § 308.2(c)(3) (1984).

99 Adjustment of the Royalty Rate For Cable Systems; Federal Communications Deregulation of the Cable Industry, 47 Fed. Reg. 52,146, 52,149 (1982).

100 *Id.* at 52,149.

101 *Id.* at 52,150.

> cally aggravate the cable industry's movement away from the carriage of distant signal programming, thus causing corresponding decreases to the public . . . [C]able operators would not pay the copyright fees proposed by the copyright owners, but elect to drop distant signals, and in effect restore the FCC restrictions on the carriage of distant signals.[102]

This, the NCTA argued, would cause irreparable harm to the cable operators and the subscribing public.[103] The NCTA further argued[104] that:

> The concept of a flat fee is inconsistent with the current statutory fee schedule which is regressive, reflecting the declining marginal value of additional distant signals. In stark contrast to the new 3.75 percent rate, current fees are .799 percent of basic revenues for carriage of the first DSE [distant signal equivalent]; .503 percent each for the carriage of the second, third, and fourth DSE; and .237 percent for the carriage of the fifth and each additional DSE. Thus, the 3.75 percent rate amounts to as much as a 1,500 percent increase in the fee paid per DSE for added distant signals.[105]

The CRT claimed, however, that customers would be willing to pay this increase.[106]

The effective date of the CRT's added distant signal rate adjustment decision had originally been set for January 1, 1983.[107] The Tribunal denied NCTA's request[108] to make the adjustment effective as of July 1, 1983,[109] in order to allow adequate lead time for the cable industry to adjust to the new rates. However, Congress reversed the CRT's decision, and determined that the Tribunal's 3.75% rate would be stayed pending completion of the appeal of the CRT decision.[110] The Copyright Office decided that it would not seek to implement the rate increase until after the appeal was

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102 *Id.* at 52,153.

103 *Id.* at 52,148.

104 Appellant's Motion for an Order Staying a Portion of the CRT's Decision, *National Cable Television Ass'n*, 724 F.2d 176.

105 Appellant's Motion at 5-6, *National Cable Television Ass'n.*

106 *Id.* at 6.

107 *Id.*

108 47 Fed. Reg. 52,159 (1982).

109 *Id.*

110
> Until the United States court [sic] of Appeals for the District of Columbia renders a final decision in Case No. 82-2389 (*National Cable Television Assoc.* [sic], *Inc. v. Copyright Royalty Tribunal*), or March 15, 1983, whichever occurs first, no funds appropriated by this Joint Resolution or any other Act of Congress which provides funds for the Library of Congress and the Copyright Royalty Tribunal for fiscal year 1983 shall be expended to implement, enforce, award, or collect royalty fees under, and no obligation or liability for copyright royalty fees shall accrue, until March 15, 1983. . . .

decided, but the collection would be retroactive as of March 15, 1983.[111] Signals carried for the entire first half of the year would be charged at the old rates for three months and at the new rates for three months. Any signals dropped between January 1 and March 15, would be charged at the old rates.[112]

On March 15, 1983, as expected, cable operators dropped distant signals. Signals were switched off, affecting six to eight million cable subscribers.[113] Accurately dubbed "Black Tuesday,"[114] March 15 was indeed a dark day for the cable industry. A spokesman for Group W,[115] a multi-system cable operator, said the company had "no other choices at this point but to drop distant signals in [some of its systems][116] in order to avoid passing on to [its] customers the substantial costs of carrying those signals."[117]

On December 30, 1983, the United States Court of Appeals for the District of Columbia Circuit found that the higher compulsory license royalty rates fell within the "zone of reasonableness"[118] and thus were acceptable. Judge Ginsburg noted that under the standard of review applied, the rates would not be struck down as arbitrary or capricious.[119] The Court noted that

> the Tribunal sought to estimate a market price in the absence

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H.R.J. Res. 631, 97th Cong., 2d Sess., 128 CONG. REC. H10575 (daily ed. Dec. 20, 1982) (emphasis in original).

[111] *Id.*

[112] *Id.*

[113] The President of the National Cable Television Association (NCTA) testified before the House of Representatives that 76% of all cable systems have dropped distant signals as a result of the CRT's rate increase. *House Panel Told Cable Rate Hike Is Unjustified*, 26 PAT. TRADEMARK & COPYRIGHT J. (BNA) No. 652, at 563 (Oct. 27, 1983).

[114] Witt, Leddy & Grillo, *Day the Channels Went Blank*, CABLEVISION, Mar. 28, 1983, at 14 [hereinafter cited as Witt & Leddy].

[115] Group W is a multi-system operator (MSO), an entity which owns and operates a number of cable facilities. The ownership of cable television systems in the United States is concentrated in the hands of the MSO's. Group W, a subsidiary of Westinghouse Company, is today one of the largest multisystem operators. *See*, W.S. BAER, CABLE TELEVISION: A HANDBOOK FOR DECISIONMAKING, 67 (1974).

[116] "In the end, 27 systems in 14 states dropped at least one distant signal, with WOR losing eight Group W affiliates, WTBS five and WGN four. Group W's Manhattan system cut three Philadelphia stations while viewers in Los Angeles lost WGN." Witt & Leddy, *supra* note 114, at 14.

[117] *Id.*

[118] 724 F.2d at 189. "Our prior decisions consistently hold that both the Tribunal's rate adjustments and its royalty allocations are subject only to 'zone of reasonableness' review." *Id.* at 190. This is not the first time that the courts have been faced with questions about the Tribunal's activities. On November 21, 1981, the United States Court of Appeals for the District of Columbia Circuit, in *National Cable Television Ass'n* heard the argument on the validity of the scheduled 1980 rate adjustment. The rate adjustment adopted by the CRT had increased the rates paid by the cable industry by 21% in order to account for the increase in inflation since October 1976 (as measured by the Consumer Price Index). The court affirmed the CRT's decision except for a mathematical error. 689 F.2d at 1091.

[119] 724 F.2d at 187.

> of a functioning market. It used the best, indeed, the only, analogies available to it. It could not mathematically derive its ultimate decision. Inevitably, it used its expert judgment to make a 'best guess'; we are not positioned to offer a better one.[120]

Top cable representatives have urged the industry to support the passage of congressional copyright reforms.[121] The industry is supporting two compatible approaches to alleviate the burden of the CRT decision. The first approach would allow operators to exempt three distant signals from the CRT's ruling instituting the 3.75% distant signal rate.[122] The second approach would exempt superstations[123] from paying royalty rates where they already pay national rights for their programming.[124] This latter proposal would greatly benefit major superstations such as WTBS of the Turner Broadcast System.[125]

In addition to setting royalty rates, the CRT is responsible for distributing cable television royalties deposited with the Register of Copyrights.[126] The CRT's mechanism of distribution often results in disputes between the parties which can slow down the distribution of royalties as much as two years.[127]

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120 *Id.*

121 Leddy, *Copyright Push Urged*, CABLEVISION, SEPT. 26, 1983, AT 65.

122 H.R. 2902, 98th Cong., 2d Sess. (1983), *introduced by* Representative Mike Synac (D-Okla.).

123 A superstation is a local broadcast station such as station WTBS in Atlanta that has achieved national distribution through use of satellite retransmissions. FERRIS, *supra* note 52, at app. E-15.

On October 25, 1978, the FCC initiated an "open entry" policy for "superstations." *See In re* United Video, Inc., 44 RAD. REG. 2d (P&F) 1217, 1228 (Nov. 9, 1978). For an excellent general discussion of "superstations," see Brotman, *Cable Television and Copyright: Legislation and the Marketplace Model*, 2 COMM/ENT L.J. 477, 480-83 (1979).

124 S. 1270, 98th Cong., 2d Sess. (1983), *introduced by* Senator Dennis DeConcini (D-Ariz.), and its House companion, H.R. 3419, 98 Cong., 2d Sess. (1983), *introduced by* Representative Sam Hall (D-Texas). *See* Leddy, *supra* note 121, at 65.

125 The prototype superstation is station WTBS, Atlanta. Utilizing satellite channels leased by a resale common carrier to connect into cable systems, the independent UHF-station broadcasts primarily sports and feature films. Brotman, *supra* note 123, at 481.

126 The Register of Copyrights is an employee of the Copyright Office, an entity distinct from the CRT. The Copyright Office, a division of the Library of Congress, is charged with the registration of claims to copyright and with related duties including the collection of royalties. See A. LATMAN & R. GORMAN, COPYRIGHT FOR THE EIGHTIES 27 (1981) for a discussion of the functions of the various operating divisions and offices of the Copyright Office.

127 "The final determination in the 1978 Cable Royalty Distribution Proceeding was completed in the fiscal year of 1980; however the Tribunal's determination was appealed by several interested parties." 1982 COPYRIGHT ROYALTY TRIBUNAL ANN. REP. 2. *See also* National Ass'n of Broadcasters v. Copyright Royalty Tribunal, 675 F.2d 367 (D.C. Cir. 1982). In distributing the royalties paid for the 1978 calendar year:

> The Tribunal divided its proceedings into 'two phases,' based on the fact that the claimants to the Fund could easily be broken down into specific groups. "Phase I would determine the allocation of cable royalties to specific

The solution considered by the CRT to solve the difficulties of the 1979 distribution is of particular interest. During that distribution there was a clash between the interests of the National Association of Broadcasters and the Joint Sports Claimants. Just recently,

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groups of claimants. Phase II would allocate royalties to individual claimants [NAB, National Public Radio, Major League Baseball, Canadian Broadcasting Corp., ASCAP] within each group.

Id. at 371-72 (quoting 45 Fed. Reg. 63,027 (1980)). Below is the Tribunal's Phase I 1978 distribution:

Program syndicators and movie producers	75%
Sports leagues	12%
Television broadcasters	3.25%
Public television	5.25%
Music claimants	4.5%

The Phase II proceedings were considerably simpler than those in Phase I because all but one of these claimant groups reached voluntary agreement on the allocation of shares within each group. The Tribunal had only to apportion the share of music claimants, and did so as follows:

American Society of Composers, Authors and Publishers (ASCAP)	54%
Broadcast Music, Inc. (BMI)	43%
SESAC, Inc.	3%

675 F.2d at 372.

After examining the CRT's two-phase procedure and its criteria for distribution, the CRT determined that the primary factors were:

(a) [T]he harm caused to copyright owners by secondary transmissions of copyrighted works by cable systems,

(b) the benefit derived by cable systems from the secondary transmissions of certain copyrighted works, and

(c) the marketplace value of the works transmitted.

Id. at 373 (quoting 45 Fed. Reg. 63,035 (1980)).

The CRT found that the secondary factors were:

(a) [Q]uality of copyrighted program material, and

(b) time-related considerations.

Id.

The court remanded for further proceedings on the claim of the National Public Radio, one of the interested parties, 675 F.2d at 385. The rest of the 1978 Cable Royalty Fee Fund has been distributed according to the final determination of the CRT. 1982 COPYRIGHT ROYALTY TRIBUNAL ANN. REP. 3.

A total of $20,700,000 in royalty fees was collected for distribution in 1979. Although there were more problems involved in the 1979 distribution than in the 1978 one, the CRT's distribution has been affirmed for the most part. *Appeals Court Criticizes CRT, Upholds Most of '79 Decision*, BROADCASTING, Oct. 31, 1983, at 54.

During 1983 and 1984 the CRT made partial royalty distribution for 1980 and 1981. *Copyright Royalty Tribunal Orders Directing Partial Distribution of 1980 and 1981 Cable Fees*, 26 PAT. TRADEMARK & COPYRIGHT J. (BNA) No. 638, at 267 (July 21, 1983). "The CRT is seeking to determine whether a controversy exists concerning distribution of 1982 royalty fees." *Cable Royalty Tribunal, Cable Fees*, 26 PAT. TRADEMARK & COPYRIGHT J. (BNA) No. 641, at 334 (Aug. 11, 1983).

however, the CRT has adopted these parties' proposal to allocate royalty fees between each station and the sports clubs whose game it televises, through private negotiations.[128] Private negotiation would allow the parties to bargain among themselves and would limit government intervention. Although the royalty rates have been predetermined by the CRT, there is room to limit the socialization of the process by allowing for some private negotiation.

In addition to the problems encountered in fulfilling its statutory responsibilities, there are several structural problems faced by the CRT.[129] Many of the problems of the CRT may be caused by its limited size.[130] The problem of the CRT's size is magnified by the reams of paperwork it must encounter[131] and its lack of subpoena power in collecting royalty fees.[132] Because of these difficulties,

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128 *Cable Royalty Tribunal, Cable Fees*, 27 PAT. TRADEMARK & COPYRIGHT J. (BNA) No. 666, at 364 (Feb. 9, 1984). As a result of this development, the CRT has directed 5.5% of the cable royalty fund to the Joint Sports Claimants. Such private negotiation should be encouraged, particularly in Phase II proceedings, where the interested parties are so closely aligned.

129 Judge Abner Mikva stated that the appeals court expects improved decision writing from the CRT in the future. He stated that:

> We do not mean to charge the Tribunal with needless formalism. . . . But Congress *has* directed the Tribunal to state in detail the criteria, factual findings and 'specific reasons' for its determinations. . . . The Tribunal may not abdicate this responsibility. Nor may it attempt to distinguish apparently inconsistent awards with simple undifferentiated allusions to a 10,000 page record.

Christian Broadcasting v. Copyright Royalty Trib., 720 F.2d 1295, 1319 (D.C. Cir. 1983) (emphasis in original).

130 At the present time there are five commissioners, and "[t]he only staff of the Tribunal is a personal assistant to each commissioner. The legislative history of the Copyright Act reflects the intention that the Tribunal remain a small independent agency in which the commissioners perform all the professional responsibilities themselves." 1982 COPYRIGHT ROYALTY TRIBUNAL ANN. REP. 1. The court recognized that the CRT operates without a staff, and acknowledged that "the Tribunal's task may become even more difficult as claimants attempt to interpret the nuances of the Tribunal's past decisions and to improve accordingly the sophistication of their evidentiary presentations." *Id.* at 1318.

131 "The cable television industry has recommended [using] the same filing form as the FCC. This suggestion has been opposed by the copyright owners and broadcasters who assert that additional information necessitates the use of different reporting forms." Greene, *supra* note 77, at 299 n.158.

132 Under § 111 of the Act, cable systems are obligated to report data to the Copyright Office, but it is not clear what the Register can do to compel a detailed statement of the copyrighted material used by such compulsory licenses. 17 U.S.C. § 111(d)(2) (1982). Without explicit subpoena power, the CRT would not have access to data on copyrighted ownership, compulsory licenses, and fees collected except from the records of the Copyright Office. Additional information may be necessary. The CRT is the only rate setting agency without subpoena powers.

> An essential condition for assuring proper royalty distribution under the New Act is that adequate data on royalty collections and the usage of copyrighted material by licensees be compiled and made promptly available to potential distributees to permit orderly and timely filing of claims. Unresolved is the question whether the statute vests the Copyright Office or the

there have been calls to abolish the tribunal.[133]

C. *Compulsory Licensing or Full Copyright Liability: Which is the Best Alternative for the Cable Industry?*

The economic justification of copyright law is to foster creation by establishing the rights of the producers of particular goods to exclude non-payers.[134] There is a controversy as to whether or not the cable compulsory license established in Section 111 of the Act furthers the purpose of the copyright laws.

In order to adequately examine the alternatives between compulsory licensing and full copyright liability, some background on transmission costs and externalities is necessary. The economist, A.C. Pigou, developed the theory of externalities.[135] He defined externalities as

> a divergence between private and social cost that occurs "when some activity of party *A* imposes a cost or confers a benefit on party *B* for which party *A* is not charged or compensated by (or through) the price system." Pollution is a common example. If a steel factory, *A*, pollutes the air and streams with by-products of steel production, many *B*'s suffer damage because of the reduction in air and water quality. . . . The cost of damage, which is not considered in the market for steel, is said to be external to that market or an 'externality.'[136]

Pigou believed that the only way to eliminate externalities was to impose government taxes upon the party producing the externality, for the benefit of the injured party.[137] Another economist, R.H. Coase, disagreed with Pigou's proposition and stated that, in certain circumstances, the allocation of resources in the economy is unaf-

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> Tribunal with the authority to collect this essential data from the compulsory licensees.

Brylawski, *The Copyright Royalty Tribunal*, 24 UCLA L. REV. 1265, 1272 (1977).

[133] The CRT does have structural problems, as has been illustrated, but "[t]he most startling development in the Tribunal's short history was the call to abolish it, from its then Chairman, Commissioner James." Greenman & Deutsch, *supra* note 24, at 81. James "testified before a House subcommittee that [the] CRT wasn't working and should be radically restructured or abolished." *Clarence James Resigns from CRT*, BROADCASTING, May 11, 1981, at 52. James said that "copyright owners will be more confidently assured of compensation if that compensation is determined by the market or contract." *Id.*

[134] *Copyright Liability for Cable*, *supra* note 55, at 67.

[135] A. PIGOU, THE ECONOMICS OF WELFARE, 172-93 (4TH ED. 1932).

[136] Cirace, *When Does Complete Copying of Copyrighted Works for Purposes Other Than For Profit or Sale Constitute Fair Use? An Economic Analysis of the Sony Betamax and Williams & Wilkins Cases*, 28 ST. LOUIS U.L.J. 647, 673 (1984) (citations omitted) (quoting PIGOU, *supra* note 135, at 105).

[137] PIGOU, *supra* note 135, at 192. It would be impractical to bargain individually with each injured party as the transaction costs would indubitably be very high.

fected by the way in which the rights are distributed.[138] Regardless of how property rights are initially allocated, they will ultimately be possessed by the persons who value them most highly, provided that there are no transaction costs.[139]

What is the relevance of the Coase theorem in a discussion concerning the choice between compulsory licensing and full copyright

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[138] Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). *See generally* Calabresi, *supra* note 48.

[139]

> Let us suppose that a farmer and cattle-raiser are operating on neighboring properties. Let us further suppose that, without any fencing between the properties, an increase in the size of the cattle-raiser's herd increases the total damage to the farmer's crops . . . . I shall assume that the annual cost of fencing the farmer's property is $9 and that the price of the crop is $1 per ton. Also, I assume that the relation between the number of cattle in the herd and the annual crop loss is as follows:
>
> | Number in Herd | Annual Crop Loss | Crop Loss Per Additional Steer |
> |---|---|---|
> | (Steers) | (Tons) | (Tons) |
> | 1 | 1 | 1 |
> | 2 | 3 | 2 |
> | 3 | 6 | 3 |
> | 4 | 10 | 4 |
>
> In the first instance, assume that property rights are determined by damage-conscious farmers. Cattlemen are absolutely liable for damage done to farm crops by their straying steers. In this case, none of the costs of cattle raising can be shifted to farmers. A cattleman treats liability for damage done by cattle as a cost of production that must be considered in determining the most profitable size herd. If his decision is to maintain a herd of four steers or more, the solution is easy. He will spend nine dollars a year on a fence and reduce the damage done by wandering steers to zero.
>
> For a herd of three steers or less, however, it is cheaper to pay damages than to build a fence. Add another steer so long as the value of additional meat produced is equal to or greater than additional costs incurred. One of the costs that must be considered is the absolute liability in damages to the farmer whose crops are damages when an extra steer is added.
>
> Now assume that cattlemen control the legislature and that they rewrite the laws so that there is no legal liability for crop damage done by steers. Such damage is now treated as an act of God. Coase demonstrates that resource allocation will be exactly the same under this alternative specification of property rights. If the herd consists of four steers or more, the cost of maintaining the fence—nine dollars a year—is promptly dropped by the cattleman and picked up by the farmer. Now suppose that before the cattlemen rewrote the legal code the cattleman maintained a herd of two steers. One might think that he has a new incentive to add a third steer without paying another three dollars to the farmer for damage done. The third steer, however, will not add more than three dollars to his income or he would have added it even before the law of liability was changed by the cattlemen. Consider the impact of the law's change from the farmer's standpoint. It will now be to his advantage to bribe the cattleman to keep his herd at two steers. if the herd goes from two steers to three, the farmer will suffer an additional crop loss of three dollars; therefore, he will pay up to three dollars in order to prevent this loss. Thus, the additional cost of adding the third steer is three dollars to the cattleman regardless of the property right endowment.
>
> In sum, the output of cattle and crops will not be affected by legal liability.

Cirace, *supra* note 136, at 674 n.149 (citations omitted).

liability in the cable television industry? If there are no transaction costs, then, according to the Coase theory,

> both the number and nature of the programs that cable systems will import will be the same whether cable systems are permitted to import distant signals without compensating program suppliers or whether, instead, program suppliers can deny cable systems the right to retransmit a program unless they pay compensation.[140]

Transaction costs do exist. As the cable industry demonstrated during the post-*Malrite* royalty rate battle, the form of liability will indeed affect programming.

1. Arguments for Retaining the Cable Television Compulsory License

A system of compulsory licensing obviates the need for direct bargaining between copyright holders and copyright users.[141] Direct bargaining creates an added cost to cable operators, and the clearance process causes massive paperwork.[142] The major advantage of compulsory licensing is the reduction of transaction costs in the form of identification costs, information costs, and time costs. In addition, the scheme helps to strike a balance between the user and the copyright owner. The author and copyright owner get paid for their work as the compulsory license provides guaranteed protection. On the other hand, the cable industry is guaranteed use of the work in an effort to serve the needs of the public.[143]

If the compulsory license were to be retained, some changes would have to be made to resolve the problems elaborated upon earlier. The staff of the CRT would have to be expanded to handle the ever increasing paperwork. Additionally, the CRT would have to be granted subpoena power. During the 1980 royalty adjustment proceedings, for example, the commissioners were hampered by receiving only the evidence that the parties chose to present.[144]

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140 *See Copyright Liability for Cable*, *supra* note 55, at 79.

141 S.J. Liebowitz, Copyright Obligations for Cable Television: Pros and Cons., (n.d.) (a publication of the Consumer and Corporate Affairs of Canada, an organization which investigates the economic impact of compulsory license proposals on the cable industry in Canada).

142 *Id.* at 14.

143 *See* H.R. REP. No. 1476, *supra* note 7, at 107.

144 Greenman and Deutsch, *supra* note 24, at 83 (citing *Oversight of the Copyright Act of 1976 (Cable Television): Hearings Before the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 31 (1981)).

2. The Cable Compulsory License Should be Eliminated and Replaced with Full Copyright Liability

In the modern effort that led to the Copyright Act of 1976, the Copyright Office concluded[145] that, as a matter of principle, the government should not impose a compulsory license mechanism on copyright owners that deprives them of fair compensation for retransmissions of their work.[146] This position, recently echoed in a bill proposing the elimination of cable television compulsory licensing,[147] merits careful examination and ultimate adoption.

There are several principal objections to the use of the compulsory license in general, and to its application in the cable industry in particular. First, it is evident that the CRT does not adequately consider the economy when setting royalty fees; the fees do not accurately represent the prices that the marketplace would generate.[148] The compulsory licensing mechanism greatly diminishes the copyright owner's opportunity to get a higher price for his product because he no longer has the power to exclude certain competitors.[149] Thus, the owner's "bargaining chip" is lost. Under a system of strict liability, however, the copyright owner would be holding a full deck because he would have the opportunity to gain additional revenue by threatening to exclude the cable television system.

A second objection is that the formula used by the CRT does not adequately reflect changing economic developments. Although the Act establishes those occasions when the CRT can reexamine and adjust the rates, neither the Act nor the legislative history provides guidance to the CRT as to what is a "reasonable" revision. In addition, while there are three specified instances in which the rates may be changed,[150] the CRT is not permitted to change the fee schedule in response to other important changes in circumstances, except with respect to revisions in

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145 Ladd, *supra* note 81, at 58.

146 *Copyright Liability for Cable*, *supra* note 55, at 95.

147 H.R. 1388, 98th Cong., 2d Sess. (1983). *See also New House Bill Would Eliminate Cable TV's Compulsory License*, 25 PAT. TRADEMARK & COPYRIGHT J. (BNA) No. 619, at 365 (Mar. 3, 1983).

148 But, it can be argued that the CRT does take the economy into consideration. "In the absence of a free market or any marketplace directly analogous to that for distant signals, the Tribunal looked for its initial guidance to the marketplace analogies presented by the copyright owners and to the value for their programming that they drived from them." Adjustment of the Royalty Rate for Cable Systems, 47 Fed. Reg. 52,146 (1982) (codified at 37 C.F.R. § 308 (1984)).

149 *See* 17 U.S.C. § 111 (1982); *see also* Liebowitz, *supra* note 141, at 15.

150 *See supra* notes 84-85, 89 and accompanying text.

FCC rules.[151]

A third objection is the difficulty of the distribution mechanism. Disputes often arise which can slow the distribution of royalties up to two years.[152] There is a need for some liberalization of the distribution process[153] and private negotiation must be encouraged. Private negotiation would allow for a greater representation of a product's value. For example, through private negotiations the creators of a popular show could seek to get a greater share of the profits from their show than from a less popular one with average ratings.[154] It is not the responsibility of the CRT to determine which show is more popular. Perhaps, if such negotiations were left to the Television Broadcasters Association, which possesses this knowledge through its involvement, the distribution would become more equitable.

The final objection to the use of compulsory licensing is the detrimental impact on the program supply markets.[155] Since the fees generated by the Act will most likely fall short of their market value, the aggregate earnings of programs would be low and would therefore discourage production. This result runs counter to the basic principle of copyright law—to foster creation.

The workable alternative to a compulsory license scheme would be full copyright liability for distant signal importation.[156] Copyright owners would be more assured of rightful compensation if the payment were determined by the market and manifested in contractual agreements. This would be possible in most situations. Independent stations, for example, manage to successfully negotiate for programs to be shown during the broadcast day.[157]

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[151] *Copyright Liability For Cable, supra* note 55, at 91.

[152] *See supra* note 80 and accompanying text.

[153] See *supra* note 127 for a discussion concerning the intricacies of and the problems associated with Phase I and Phase II proceedings.

[154] Liebowitz, *supra* note 141, at 16. Compulsory licensing proposals do not address this issue.

[155] *Copyright Liability For Cable, supra* note 55, at 92.

[156] This conclusion would also effect the must-carry rules. Must-carry guidelines require cable-television systems to carry all local broadcast station signals. Turner Broadcasting System said:

> Both the CRT royalty decision and the continued existence of the must-carry rules work against cable programmers' abilities to reach viewers, and against cable operators' free editorial choices as to how best to serve the diversity interests of their viewers. Both act to create a double regulatory bind that forecloses these markets through government fiat.

Leddy, *TBS Renews Must-Carry Siege*, CABLEVISION, Apr. 4, 1983, at 116. Mark Fowler, chairman of the FCC, also believes that a full copyright liability system should replace the compulsory license and the must-carry rules should be eliminated. Fields, *Broad Copyright Issues Emerging in Washington*, CABLEAGE, Sept. 12, 1983, at 20.

[157] Besen, Manning and Mitchell state that negotiations would also be feasible in the

The cable industry is no longer a toddler to be cradled by a compulsory license.[158] It can walk on its own. When the cable industry began, it was undoubtedly a struggling business in need of fixed royalty payments to insure its development and viability.[159] Today, the industry is in a different situation. Because it is financially sound,[160] cable no longer needs the protective support of the compulsory license.[161] Cable can now exist in a world of full copyright liability, a world into which most entertainment industries are born.

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cable context, but they have not been encouraged. The courts have held that "cable operators were not subject to copyright liability for distant signals, [and therefore,] operators may not have wanted to establish a precedent of liability for the signals they imported. If full liability for retransmission had been imposed, then contracts and institutions would have developed to facilitate negotiations." *Copyright Liability For Cable, supra* note 55, at 87.

158 "This is apparent from a number of objective indica, including the unprecedented growth in industry subscribers, revenues, and stock values, as well as in the values of individual systems and the availability of capital to finance expansion." Hatfield & Garrett, *A Reexamination of Cable Television's Compulsory Licensing Royalty Rates*, 30 J. COPYRIGHT SOC'Y 433, 458-59 (1983) (footnotes omitted).

159 *Id.*

160 The number of basic cable subscribers has grown from about 12 million at the beginning of 1976 to over 28 million as of February 1983. *CableVision*, April 18, 1983, at 145. Currently, 34 percent of all television households subscribe to basic cable; by 1990, 61 percent are expected to subscribe. This compares to a 17 percent figure in 1976.

Id.

Hatfield & Garrett, *supra* note 158, at 458 n.92.

> The total operating revenues of the cable industry increased from less than $1 billion in 1976 to over $3.5 billion in 1981, and to nearly $5 billion (estimated) in 1982—*i.e.* revenues have increased fivefold since the enactment of the statutory royalty rates. . . . The growth in cable revenues is not explained simply by inflation. During the period 1976-1982, the CPI rose by 69 percent from 170.5 to 288.6.

Id. at n.93 (citations omitted).

> The growth in the value of cable television stocks versus the performance of the stock market as a whole is illustrated in a cable stock index which [was] compiled by Paul Kagan Associates. The average price of a share in the cable index rose from approximately $6 at the start of 1976 to a record high of $111 in November 1982. During this same seven-year period, the Dow Jones Industrial Average rose a mere 22 percent.

Id. at n.94 (citation omitted).

"In the 1970's, cable systems typically sold for about $300 per subscriber." *Id.* at n.95 (citations omitted).

> During the 1975 copyright hearings, a representative of the investment firm of Warburg Parabas Becker presented a study which concluded that the cable industry would be unable to attract the debt funds which it needed in order to expand. [A]s Michael Botein of the Communications Media Center at New York Law School stated in his 1981 testimony before a congressional subcommittee: "As the cable television industry has proven its financial stability, regional, as well as local banks, insurance companies, and other investors have shown a willingness—and at times even a fervor—to make long-term debt commitments to any company with an apparently profitable franchise in hand."

Id. at n.96 (citations omitted).

161 Ladd, *supra* note 81, at 59.

IV. Video Cassette Recorders and the Compulsory License

Although the cable industry is much stronger today than it was several years ago, it does face stiff competition for the public's viewing hours from a recent technological innovation—the videocassette recorder (VCR).[162] A VCR receives electrical signals from broadcast or television waves and duplicates them on tape for future use. It can also be used to show prerecorded tapes.[163] It therefore affords the viewer the choice among viewing broadcast or cable television as it is presented at a given time, broadcast or cable television as it has been previously presented, or a prerecorded movie that may be rented or purchased at a video store. While a VCR presents a smorgasbord of options to the viewer, it is poison to the copyright owner whose work is continuously being exploited without compensation for the copying of his creation. A wrong is being committed against the copyright owner, and, as in the case of the cable industry, an attempt must be made to "remedy" this wrong.

In *Universal City Studios, Inc. v. Sony Corp. of America (Betamax)*,[164] the question of copyright infringement perpetrated by VCR's duplication of programs was examined. Two film production companies, Universal Studios and Walt Disney Productions, which hold the copyrights on a substantial number of motion pictures and other audiovisual works,[165] brought a copyright infringement action against Sony Corporation. Sony manufactures video tape recorders, specifically the Betamax VCR, which can record programs televised over the public airwaves. The film production companies claimed that "in the future Betamax would decrease the value of their copyrights in a number of ways, [for example], by exhausting interest in reruns and by fragmenting the live television audience."[166] The issue before the Supreme Court was whether in-home videotaping of copyrighted works constituted a copyright infringement or a "fair use" within the meaning of section 107 of the Act.[167] Would the

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[162] *See* Harmetz, *Ratings for Top Movies on HBO Are Falling*, N.Y. Times, Apr. 15, 1985, at C17, col. 4.

[163] D. Kelley, The Economics of Copyright Controversies in Communications 9, 10 (June 1983) (unpublished manuscript).

[164] 480 F. Supp. 429 (C.D. Cal. 1979), *rev'd in part*, 659 F.2d 963 (9th Cir. 1981), *rev'd*, 104 S. Ct. 774, *reh'g denied*, 104 S. Ct. 1619 (1984).

[165] 104 S. Ct. 778.

[166] 480 F. Supp. at 440. The plaintiffs were unable to predict at which point in either time or Betamax sales such harm would occur. *Id.*

[167] 104 S. Ct. at 784.

public be allowed to record a television program at its time of transmission for convenient subsequent viewing, or would it find itself in the following scenario as so humorously put by columnist Erma Bombeck?

> [A] family of four [is] sitting around in their living room, eating popcorn, playing with the dog and watching an illegal tape, when the door whips open, a couple of federal agents yell, "freeze!" and the father runs to the bathroom trying to flush "Laverne & Shirley" down the commode.[168]

On January 17, 1984, the Supreme Court quelled the public's fears.[169] There would be no need for a VCR division of the FBI. The Supreme Court, in a 5-4 decision, found that home video recording does not violate the copyright law when the tapes are used privately.[170] The Court noted that most owners of video recorders used them to tape programs to be viewed at a more convenient time. This timeshifting function of VCRs was deemed to be a "fair use".[171] Although the Supreme Court did not find copyright infringement on the part of either VCR users or Sony, the manufacturer, the Court once again appealed to Congress to solve the copyright dilemma. Justice Stevens, delivering the opinion of the Court, stated that "[i]t may well be that Congress will take a fresh look at this new technology, just as it so often has examined other innovations in the past. But it is not our job to apply laws that have not yet been written."[172] In a minority opinion, Justice Blackmun quoted the landmark decision, *Twentieth Century Music Corp. v. Aiken*,[173] stating that "like so many other problems created by the interaction of copyright law with a new technology, '[t]here can be no really satisfactory solution to the problem presented here, until Congress acts.' "[174] As in the case of the infant cable industry,

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[168] Bombeck, *The Supreme Court v. The Smoking Video Cassette*, Field Enterprises, Inc. (1981), *reprinted in* Selected Press Articles, Editorials and Cartoons from the Sony Betamax Case, Sony Corp. of America (n.d.).

[169] 104 S. Ct. 774.

[170] *Id.* at 795.

[171] *Id.*

[172] *Id.* at 796. "It was the view of the majority that copyright has been affected by new technologies, but [they] contended that judicial restraint toward expansion without explicit legislative guidance had been a recurring theme in copyright history." P. Wallace, Jr., Universal City Studios, Inc. v. Sony Corp. of America: A Legal Analysis 8 (Jan. 23, 1984) (unpublished manuscript).

[173] 422 U.S. 151 (1975). This case involved "whether the reception of a radio broadcast of a copyrighted musical composition can constitute copyright infringement, when the copyright owner has licensed the broadcaster to perform the composition publicly for profit." *Id.* at 152. The Court held that a radio listener does not "perform" every broadcast that he receives. *Id.* at 162-63.

[174] 104 S. Ct. at 819 (quoting 422 U.S. at 167 (Burger, C.J., dissenting)).

Congress once again faces a choice concerning a new technology. It is a different choice though. It is not a choice between the compulsory license and full copyright liability, but a choice between the compulsory license and copyright exemption through the implementation of the fair use limitation. The choice initially appears to be a dismal one, presenting a no-win situation for the copyright owner. However, this is not the case.

A. *Arguments for Imposing a Compulsory Licensing on the Audio-Visual Home Recording Industry*

Congress quickly responded to the Supreme Court's request for action by proposing the Home Recording Act of 1983.[175] Under this legislation, an individual who makes an audio or video recording of a copyrighted work would be exempt from liability if the recording is for the private use of the individual or his family.[176] In return for this "fair use" exemption, manufacturers and importers of blank tapes and of video and audio recording devices would be required to pay to the copyright owners a royalty fee. David Ladd, Register of Copyrights, commenting on the bill, stated that it would provide a "means for remunerating copyright owners without impinging upon home privacy and without impeding hardware development."[177]

One possible method of implementing the compulsory license scheme proposed by Congress in the Home Recording Act of 1983 would be to place the CRT in charge of it. However, there are several problems with this method. As was the case with the cable industry, it is not unreasonable to believe that the CRT will once again find it extremely difficult to set accurate royalty rates that reflect the VCR marketplace. In addition, the structural problems[178] associated with the CRT would probably interfere with the licensing mechanism. For these reasons, Sena-

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[175] The Senate bill was S. 31, 98th Cong., 2d Sess. (1983), *introduced by* Senator Charles McC. Mathias, Jr. (R-Md.), and the House bill was H.R. 1030, 98th Cong., 1st Sess. (1983), *proposed by* Representative Don Edwards (D-Calif.).

[176] *Home Taping and "First Sale" Doctrine Are Focus of New Copyright Legislation*, 25 PAT. TRADEMARK & COPYRIGHT J. (BNA) No. 616, at 305 (Feb. 10, 1983).

[177] *Need for Home Recording Legislation Debated before Senate Subcommittee*, 27 PAT. TRADEMARK & COPYRIGHT J. (BNA) No. 653, at 8 (Nov. 3, 1983).

[178] "Given the difficulties of enforcing liability against individuals and of determining proper fee levels and distributions," Daniel Kelley has suggested that non-commercial users, for whom enforcement is quite expensive, be excluded from copyright liability and those who commercially profit from the tapes (*i.e.* sell or rent) be assessed full copyright liability. Kelley, *supra* note 163, at 11. *See also* S. 175, 98th Cong., 1st Sess. (1983), *introduced by* Senator Dennis DeConcini (D-Ariz.), a bill which would exempt individuals from infringement liability for home video recording. Although the transaction costs would be lessened, they would still be present if this alternative were adopted.

tor Mathias and Representative Edwards, sponsors of the Home Recording Act of 1983, believe that a system involving the private market would be more successful. Although deemed a compulsory license the Home Recording Act of 1983 would allow for private negotiations between the parties.[179] Under their proposal, if these negotiations prove unsuccessful, the parties would then be required to submit to compulsory binding arbitration under the guidance of the Register of Copyrights.[180] Unlike the CRT model, government intervention would be a last resort.

This approach is also advocated by Professor Melville B. Nimmer. While Nimmer disagrees with the premise underlying both the Supreme Court decision and the Home Recording Act—that private taping constitutes a fair use—he does recognize that the manufacturers of recording equipment must provide some royalty relief.[181] He notes that, "[i]t is likely, of course, that the manufacturer would shift the cost of the royalty payment to the consumer by raising the price of audio recording equipment; but because the consumer is the primary infringer, there is no reason why he should not ultimately pay for the privilege of recording copyrighted works."[182]

Nimmer, like Mathias and Edwards, encourages private ne-

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179 VOLUNTARY NEGOTIATION.—Not later than five days after the effective date of this Act, and on the commencement of every three-year adjustment under clause (6) of this subsection, the Register shall cause notice to be published in the Federal Register of the initiation of voluntary negotiation proceedings for the purpose of determining the terms and rates of royalty fees to be paid by manufacturers and importers of video recording devices and video recording media under subsection (b)(1) of this section.

S. 31, 98th Cong., 2d Sess. § 2(c)(2)(A) (1983), *reprinted in* 25 PAT. TRADEMARK & COPYRIGHT J. (BNA) No. 616, at 318 (Feb. 10, 1983).

180 COMPULSORY ARBITRATION.—Not later than four months after the effective date of this Act, and on the commencement of every three-year adjustment under clauses (6) [sic] of this subsection, the Register shall cause notice to be published in the Federal Register of the initiation of arbitration proceedings for the purpose of determining reasonable terms and rates of royalty fees to be paid under subsection (b)(1) of this section by manufacturers and importers of video recording devices or video recording media who are not parties to a voluntary agreement filed with the Copyright Office in accordance with clause (2) of this subsection, unless the Register determines that such voluntary agreements have been accepted by all such importers and manufacturers. Such notice shall include the names and qualifications of potential arbitrators chosen by the Register from a list of available arbitrators obtained from the American Arbitration Association or such similar organization as the Register shall neglect.

S. 31, 98th Cong., 2d Sess. § 2(c)(3)(A) (1983), *reprinted in* 25 PAT. TRADEMARK & COPYRIGHT J. (BNA) No. 616, at 319 (Feb. 10, 1983).

181 Nimmer, *Copyright Liability for Audio Home Recording: Dispelling the Betamax Myth*, 68 VA. L. REV. 1505, 1529-34 (1982).

182 *Id.* at 1531. This position was also advocated by Ms. Beverly Sills, the General Director of the New York City Opera. Ms. Sills is also Chairwoman of the Coalition to Save America's Music, "a group of music organizations that supports enactment of legis-

gotiations between the parties but suggests that this be done through a structure similar to the performing rights societies already in existence.[183] The best known performing rights societies are the American Society of Composers, Authors and Publishers (ASCAP),[184] Broadcast Music, Inc. (BMI),[185] and the Society of European Stage Authors and Composers, Inc. (SESAC).[186] These private societies grant blanket licenses.[187] Under a blanket license the licensee is given permission to perform publicly, for profit,[188] all of the copyrighted music that the performing rights society controls in exchange for an appropriate percentage of the licensee's gross income. The royalties, minus the performing rights society's commission, are distributed to the original copyright owners commensurate with the frequency with which the works are broadcast."[189]

This arrangement is well suited to the audio/video home recording industry for several reasons. First, it eliminates the need for CRT intervention and its concomitant problems of establishing adequate royalty rates.[190] Second, it allows the parties to settle upon a reasonable royalty through negotiation, and "relieves the courts of working out the details of a royalty scheme."[191] Third, although the parties are allowed to bargain as though full copyright liability had been established, the primary value of a blanket license scheme, not unlike the CRT's application of the compulsory license, is that the performing rights society can reduce transaction costs.[192]

Blanket licensing applied to the *Betamax* situation can reduce transaction costs in several ways. It can reduce identification

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lation that would benefit creators and copyright owners of music." Sills, *For Taxes To Offset Loss From Tapes*, N.Y. Times, Mar. 1, 1984, at A23, col. 3.

[183] Nimmer, *supra* note 181, at 1532-33.

[184] *See* ASCAP, Music and the Law, (n.d.) (available at American Society of Composers, Authors & Publishers, National Headquarters, New York City).

[185] Note, *Section 116 of the 1976 Copyright Revision Act: Jukebox Operators and Copyright Owners Juke It Out Over Royalties*, 3 CARDOZO ARTS & ENT. L.J. 343, 344 (1984).

[186] *Id.* at 344 n.6.

[187] S. ROTHENBERG, COPYRIGHT AND PUBLIC PERFORMANCE OF MUSIC 32 (1954).

[188] 17 U.S.C. § 106(4) (1982).

[189] Nimmer, *supra* note 181, at 1533.

[190] *Id.* at 1534.

[191] "The private agreement would form the basis of a consent decree, which the court could enforce by retaining jurisdiction over the matter, and, if necessary, appointing a master to oversee the execution of the parties' plan." *Id.* at 1534.

[192] "Individually licensing performance rights for millions of musical compositions in separate transactions between thousands of copyright owners and music users would [create great] transaction costs." Note, *Controlling the Market Power of Performing Rights Societies: An Administrative Substitute for Antitrust Regulation*, 72 CALIF. L. REV. 103, 107 (1984).

costs,[193] information costs,[194] and transaction time costs.[195] In addition, the performing rights societies help to balance the bargaining power of the user and the copyright owner which might otherwise be unstable under a situation of full copyright liability.

A viable solution for allocating the copyright liability for VCRs[196] would be the formation of an organization similar to that of the performing rights societies of ASCAP and BMI.[197]

B. *Arguments for Exempting all Taping of Broadcast Materials from Copyright Liability*

Although the copyright issues involved in *Betamax* appear to be similar to those in the cable area, *Betamax* demands a much different solution. The transaction costs of full copyright liability on all users of VCRs are large.[198] As a result, imposing such liability is not a feasible solution. If, for some unforeseen reason, an adequate compulsory licensing scheme cannot be structured for this newly found VCR technology, will this failure destroy the industry, as arguably it might have done to an infant cable industry? Upon careful consideration it appears that the home recording industry is a more resilient one.

During recent debate on the implementation of the Home Recording Act of 1983, Charles D. Ferris, representing the Home Recording Rights Coalition, characterized the proposed royalty as a "tax." He believes "that copyright owners are already adequately compensated by existing market mechanisms."[199] Professor John Cirace, echoing Ferris, concluded that any additional royalty is a tax overcompensating those suffering the externality[200] because the producers of the films and audiovisual materials have the ability to engage in a form of price discrimination by selling their materials (i.e. films) in many different forms. Price

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193 "Potential licensees of a given musical work may find it difficult to identify and locate the copyright owner who can authorize public performances." *Id.* at 107.

194 *Id.* at 107-08. Often it is difficult to obtain "the information necessary to negotiate a price for a given performance right." *Id.*

195 *Id.* at 109. Time is consumed by individual negotiation.

196 Justice Blackmun predicted that the "Court's decision . . . provides little incentive for congressional action." 104 S. Ct. at 796 (Blackmun, J., dissenting).

197 As yet, the National Endowment for the Arts (NEA) has not confronted the "Betamax" questions, nor is there any indication that it will in the near future. The NEA is an independent agency of the federal government created in 1965 to encourage and support American arts and artists. It awards grants to these artists. *See* NATIONAL ENDOWMENT FOR THE ARTS, GUIDE TO THE NATIONAL ENDOWMENT FOR THE ARTS (1983).

198 Kelley, *supra* note 163, at 10.

199 *Need for Home Recording Legislation Debated Before Senate Subcommittee*, 27 PAT. TRADEMARK & COPYRIGHT J. (BNA) No. 653, at 8 (Nov. 1983).

200 Cirace, *supra* note 136, at 680.

discrimination occurs when the same commodity or service is sold to different people at different prices.[201] Professor Cirace elaborated:

> Consider feature films. A producer-distributor can license a film for exclusive showing at major or first-run theaters at one price; then he can distribute the film more widely and charge another price for a license to show it at second-run theaters. He can then charge another price for the right to record it on video cassettes or discs that are rented to the public. Then he can charge different prices for the rights to show the film on cable or pay television, on network television, and on independent television stations. Finally, he can redistribute the film to theaters at another price.[202]

The economic harm suffered by film production companies would be limited,[203] and much of it would be avoidable. Cirace, commenting on Coase's analysis,[204] states that "one should ask whether there are actions that copyright owners can take to mitigate or avoid the externality that would cause less distortion to income distribution and resource allocation than would occur from the imposition of . . . [a] per unit tax."[205] In *Betamax*, the district court found that the "plaintiffs have marketing alternatives at hand to recoup some of [their] predicted loss. They stand ready to make their product available in cassettes and compete with the [VCR] industry."[206]

The VCR industry is indeed flourishing. In December 1984 industry reports showed that 1.2 million VCRs were sold.[207] The Electronics Industries Association has predicted that ten million VCRs will be sold in 1985,[208] bringing the worldwide VCR total to more than 58.1 million.[209] Today, a VCR can be found in one out of every five American homes,[210] and the American public appears to

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201 *Id.* at 678.

202 *Id.* at 680 (citations omitted).

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> The owners argue that tape viewers are not valuable to advertisers because tape viewers can delete the advertisements. [But], [i]f a viewer watches a program on tape that he would not have watched without tape, there is no net loss to advertisers, and a possible gain. [Also,] [t]here is no guarantee . . . that non-taping viewers watch the advertisements.

Kelly, *supra*, note 163, at 10-11.

204 Cirace, *supra* note 136, at 681.

205 *Id.* The Cirace article also argues that the Coase Theorem holds true even if transaction costs are prohibitive. *Id.* at 675-76.

206 480 F. Supp. at 452.

207 *VCRs Raise Eyebrows*, N.Y. Daily News, Jan. 28, 1985, at 56.

208 *Id.*

209 Home Video Publisher, July 16, 1984, at 1. Worldwide VCR distribution was estimated to grow 43% in 1984 to 58.1 million.

210 Daily News, *supra* note 207, at 56.

be creating a movie rental boom as they buy/rent recent or classic movies to be viewed without commercials at a convenient time.

Metro-Goldwyn-Mayer/United Artists has recently announced that a video version of the film classic, "Gone With the Wind" is available in stores for $89.46.[211] This hefty price for the popular film will generate funds for the copyright owner and help to mitigate his VCR related losses. But what is the result when the video store rents the film for daily use at a nominal fee? Is the copyright owner protected? Will he share in the profits generated from such rental? The Record Rental Amendment of 1984[212] and The Consumer Video Sales/Rental Amendment of 1983[213] have been introduced into Congress to allow the copyright owner to obtain a share of the enormous profits being made. These amendments would establish that prerecorded phonorecord videocassette, audio records, and tapes may not be rented without first obtaining the permission of the copyright owner.[214] During debate on The Consumer Video Sales/Rental Act of 1983, Senator Mathias and Representative Edwards suggested that it establishes a commercial lending right in the copyright owner so that he could share the revenues produced in the rental market.[215] Such a public lending right has also been proposed by Senator Mathias in the context of the lending of books.[216] If such a program could be established in the public library without destroying that great institution of learning, its application to the VCR industry should not be discouraged. If a royalty scheme proves impossible to implement, the copyright owner should not be left in the cold. He deserves to be afforded some protection.

V. CONCLUSION

As technology advances, copyright law is increasingly tested. As the law is tested it finds different solutions. In the context of the cable industry, the application of full copyright liability is superior to the use of the compulsory license. Although the copy-

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211 N.Y. Times, Mar. 10, 1985, at 31, col. 1.

212 Record Rental Amendment of 1984, Pub. L. No. 98-450, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 1727. This law amends the copyright law with respect to the renting, leasing, or lending of sound recordings.

213 S. 33, 98th Cong., 2d Sess. (1983); H.R. 1029, 98th Cong., 1st Sess. (1983). These bills would amend the copyright law with respect to the renting, leasing, or lending of motion pictures and other audio-visual works.

214 *Text of Home Taping Bills and Introductory Remarks*, 25 PAT. TRADEMARK & COPYRIGHT J. (BNA) No. 616, at 324 (Feb. 10, 1983).

215 S. 33, 98th Cong., 2d Sess. (1983); H.R. 1029, 98th Cong., 1st Sess. (1983).

216 S. 2192, 98th Cong., 2d Sess. (1983). This bill introduced by Senator Mathias would establish a commission to study and make recommendations on the desirability and feasibility of compensating authors for the lending of their books by lending institutions.

right issues involved in videocassette recording appear to be similar to those in the cable area, the *Betamax* scenario demands a much different solution. A blanket license may be a more suitable solution for the VCR industry. If this proposed solution ultimately fails, however, the videocassette industry will still survive. Fair use will not become VCR's demise because the copyright owner can still be compensated satisfactorily by videocassette sales and rentals.

Copyright law will always be faced with problems created by new technology. Although the solutions found may not be uniform, the law must not be afraid to creatively accommodate the advances of a progressive society.

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