The FCC's Deregulation of Cable Television: The Problem of Unfair Competition and the 1976 Copyright Act

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I. INTRODUCTION

The Federal Communications Commission (FCC), once considered a regulatory ally of the broadcasting industry, has bravely and feverishly moved to deregulate television broadcasters in the 1980's. Government interest in a fourth national broadcast network has emerged, and challengers, represented by alternative-communications technologies, have been unleashed. Proposed relaxation of the regulation of subscription television, satellite transmission and reception, and the proposed licensing of the new low-power local-broadcast stations promise to offer the home viewer a greatly expanded choice of channels, networks, and programs.


2. For a sampling of some of the literature on administrative deregulation in the 1970's, see Bleiberg, Winds of Change: For Airline Regulation They're Finally Blowing Hard, Barron's, July 25, 1977, at 7; The Economic Case for Deregulating Trucking, Bus. Wk., Nov. 2, 1974, at 56; Schultz, The Public Use of Private Interest, Harper's, May 1977, at 43.


6. See Amendment of Part 73, Section 73.642(a)(3) (Memorandum Opinion and Notice of Inquiry and Notice of Proposed Rulemaking in Docket No. 21502), 67 F.C.C.2d 202, 205 (1977); see also In re Application of Renaissance Broadcasting Corp., 75 F.C.C.2d 441, 442 & n.2 (1979) (waiving "complement of four" rule in light of public interest and pending reexamination of subscription television rules generally).


8. Inquiry into the Future Role of Low Power Television Broadcasting and Television Translators in the National Telecommunications System, 45 Fed. Reg. 69,178 (1980). Low power broadcasting would make numerous local television stations possible by filling empty UHF channels with signals that would be too weak to interfere with more distant high power broadcasters. Television could thus become more like radio with numerous local low power stations filling the broadcast spectrums.
The deregulation of the cable-television industry, which is very much a part of this larger context, has recently been advanced by a controversial FCC action. In a four to three decision, the Commission voted to eliminate rules restricting competition between cable-television systems and local television broadcasters. The eliminated rules addressed two areas: (1) the importation of distant stations by cable-system operators, and (2) the purchase and broadcasting of syndicated programs.

Syndicated-program exclusivity rules, as the eliminated rules were called, gave syndicated-program copyright owners, usually the producers of the program, the right to sell the program to a local broadcast station on an exclusive basis. If a cable system were operating in the same market as the local broadcaster and bringing in the same syndicated program, it could be required to black out the program so as not to compete with the local broadcast station which bought the exclusive. Thus, from the point of view of cable operators, the syndicated-program exclusivity rules were an FCC-created substitute for traditional copyright-infringement liability, which has never been applied to the cable industry. In contrast to the cable

9. Cable has been held out as a medium of great promise because it may be able to offer such services as access to a control computer that could be used for household or business purposes (e.g., shopping, paying bills, and conducting business meetings). The primary attraction now, however, is the availability of additional distant television signals from conventional broadcast stations. R. Berner, CONSTRAINTS ON THE REGULATORY PROCESS 50 (1976).

For a primer on cable television and speculation on its future impact, see The Cable-TV Revolution: How it Affects the Arts, N.Y. Times, July 5, 1981, § 2 (Arts and Leisure), at 1, col. 1.

10. For treatments of the importance of cable as a means of challenging the television broadcasting oligopoly and the historical protectionist stance of the FCC, see Long, Antitrust and the Television Networks: Restructuring via Cable TV, 6 ANTITRUST L. & ECON. REV. 99 (No. 4 1973); Pearson, Cable: The Thread by which Television Competition Hangs, 27 RUTGERS L. REV. 800 (1974).


12. Id.

13. Essentially three sources of program material are available for television broadcast: the national network, the station's own local production, and syndication. Syndicated programs are those purchased from their copyright owner, often the original production company, for broadcast in a particular locality. Generally they consist of reruns of a series that originally appeared on network television, such as "The Honeymooners" or "I Love Lucy." They might also consist of first-run single programs or a series. See 47 C.F.R. § 76.5(p) (1980).

14. For an explanation of the rules, see notes 173-177 infra and accompanying text.

15. See notes 168-177 infra and accompanying text.

16. See id.

17. See notes 75-114 infra and accompanying text.
operators’ position, broadcast stations were bound to respect the exclusive since an unauthorized broadcast would produce the traditional liability for copyright infringement. The rules thus guaranteed the copyright holder the possibility of contracting for an exclusive showing and assured the local broadcaster who bought the exclusive that he would be insulated from cable-television competition. The syndicated-program exclusivity rules also prevented cable operators from competing unfairly with the broadcasters by selling programs procured at little or no cost, while broadcasters paid negotiated royalties for the same material.\(^\text{18}\)

Distant-signal rules, which restricted the number of distant and otherwise unreceivable stations a cable company could bring into a local broadcast area, were also eliminated.\(^\text{19}\) The smaller the number of distant signals imported, of course, the greater the protection to the local broadcaster from outside competition.

In broad terms, the rationale behind both sets of eliminated rules was the perceived need to control competition. Yet at least two subthemes can be discerned within this broader rationale. The first was that the public interest would best be served by maintaining the availability of free programming—no one must pay to view ordinary broadcast television—through protecting the economic health of the broadcasters. Free competition with cable was seen as a serious threat that could drive some local broadcasters under and cause others to lower the quality of their programming. The protectionist

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18. This result was made possible by the fact that the cable industry was never subject to traditional copyright liability. See text accompanying notes 75-114 infra. In the beginning, cable was exempted from copyright liability under court decisions, see text accompanying notes 75-93 infra, and then, after the revision of the copyright laws, was required to pay fixed royalties lower than that paid by broadcasters, see text accompanying notes 157-165 infra.

19. For an explanation of the rules, see text accompanying notes 180-182 infra. The cable-television/broadcast-television relationship can be further illustrated by considering an example. Suppose that a cable system, via its antenna in Chicago, receives a syndicated program (e.g. reruns of "I Love Lucy") broadcast by a Chicago station. The cable system, via relay antennas or long-distance transmission lines, imports the entire daily broadcast of the Chicago station into another market (e.g. the New York City market). If a local New York station has purchased the rights to broadcast the syndicated program in the New York market, the cable system, under the syndicated-program exclusivity rules, would be required to black out the syndicated program that it is importing from Chicago. See In re Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to CATV (Cable Television Report and Order), 36 F.C.C.2d 143, 211 app. A, at 234 (1972). The distant-signal rules simply limit the number of distant signals that can be imported. They consist of the signals that are broadcast by a distant station and normally include some syndicated programs. Hence, the syndicated-program exclusivity rules are a subset of the distant-signal rules in that duplicated syndicated programs could only appear as a component of a distant signal. See id. at 231-33.
justification here was from a consumer’s point of view, since the home viewers’ ability to see free programming might be affected as the broadcaster felt the pinch of competition.\(^{20}\) The second subtheme was that cable systems were unfair competitors because they were exempted from full copyright liability\(^{21}\) for syndicated programs and were perceived as somehow pirating the property of broadcasters by standing outside normal markets.\(^{22}\)

The elimination of the rules ignited immediate litigation, initiated by broadcasters, to have the FCC order set aside. The numerous separate lawsuits were consolidated in *Malrite T.V. v. F.C.C.*\(^{23}\) The *Malrite* court, however, refused to set aside the FCC order.\(^{24}\) This note will not deal directly with the *Malrite* decision, in which it was held that the FCC’s action was not an improper exercise of power;\(^{25}\) rather, the focus will be on the policy behind the order, i.e., on questions within the purview of the FCC and Congress, rather than that of the courts. Some issues discussed, however, such as the congressional intent behind the 1976 copyright revision,\(^{26}\) are relevant to the legal standards applied on judicial review as found in *Malrite*. Consequently, some criticism of the *Malrite* decision can be inferred.

This note has two purposes. The first, presented in section II,\(^{27}\) is to make the rules fully understandable by tracing their development and eventual elimination. Emphasis is placed on the underlying themes of unfair competition and free competition as a means of explaining the behavior and devices of the FCC and of the industry protagonists, represented by cable companies, broadcasters, and, to a lesser extent, copyright holders.\(^{28}\) The note then addresses important

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21. See text accompanying notes 75-93 infra.
22. See text accompanying notes 115-131 infra.
23. 652 F.2d 1140 (2d Cir. 1981).
24. Id. at 1152.
25. Id. at 1148.
26. See notes 229-237 infra and accompanying text.
27. See text accompanying notes 39-228 infra.
28. The consequences of elimination of the rules for professional sports are not within the scope of this note. Spokesmen for professional sports, however, did oppose the elimination of the rules on the theory that a flood of live sports coverage would be created by unrestricted importation of distant signals and that the net result would be a decreased ability for losing teams to sell broadcast rights, since more viewers would opt to view the more successful teams. See Joint Reply Brief for Petitioners (Commissioner of Baseball, National Football League, National Basketball Association and National Hockey League) at 5-11, Malrite T.V. v. F.C.C., 652 F.2d 1140 (2d Cir. 1981).
historical litigation based on unfair-competition and copyright theories, the emergence of FCC regulation to rectify inequities created by the courts’ treatment of the issues, and the effect of certain copyright law revisions. Against this background, a close look at the interindustry policy debate is presented, along with additional analysis of the unfair-competition issue. Finally, the industry compromise that created both sets of rules and events that led to their undoing are described.

The second purpose of this note, offered in section III, is to analyze the FCC’s decision to eliminate the rules. The thesis presented is that the simple elimination of the rules has reintroduced the problem of unfair competition and that the Commission could have avoided this problem and created the desired freer competition by more sophisticated action. Two preferable alternatives—the elimination of only the distant-signal rules and the introduction of a system known as retransmission consent—are discussed.

II. COPYRIGHT LIABILITY, UNFAIR COMPETITION, AND FCC INTERVENTION: THREE DECADES OF COMPETITION BETWEEN CABLE SYSTEM OPERATORS AND BROADCASTERS

A. Broadcasters’ Attempts to Control the Development of Cable Television: Early Litigation

Cable television grew up in rural areas in the early 1950’s as a means of improving “the quality of television signals for communities located on the fringes of good broadcast reception.” The means was simply a central antenna that was connected by cable to the homes of local subscribers. In these early years broadcasters encouraged the growth of cable because it provided a means of expanding audiences and advertising revenues. By 1958, however,

29. See notes 39-93 infra and accompanying text.
30. See notes 94-114 infra and accompanying text.
31. See notes 140-188 infra and accompanying text.
32. See notes 115-138 infra and accompanying text.
33. See notes 131-139 infra and accompanying text.
34. See notes 189-200 infra and accompanying text.
35. See notes 228-268 infra and accompanying text.
36. See notes 257-268 infra and accompanying text.
37. See notes 258-259 infra and accompanying text.
38. See notes 260-268 infra and accompanying text.
39. V. Mosco, supra note 1, at 87.
40. Cable television was, in fact, referred to as CATV (Community Antenna Television) until the early 1970’s. See D. LEDUC, CABLE TELEVISION AND THE FCC 6 (1973).
when cable systems began to bring in competing distant stations to urban areas, local broadcasters petitioned the FCC for protection.\footnote{41} The broadcasters were told that no jurisdiction existed because a cable system was not a common carrier of communications\footnote{42} within the meaning of the Communications Act of 1934.\footnote{43} After the FCC refused to step into the growing struggle, broadcasters sought relief in the courts under unfair-competition theories.

In \textit{Intermountain Broadcasting and Television Corp. v. Idaho Microwave, Inc.},\footnote{44} three Salt Lake City television stations sued a cable company in Idaho and its microwave carrier\footnote{45} for injunctive and declaratory relief in order to prevent them from receiving and retransmitting the broadcasters’ programming without consent.\footnote{46} The suits were based on the theories of unjust enrichment and unfair competition.\footnote{47} The three stations, each an affiliate of one of the major networks, sold portions of their broadcasts to an Idaho television-broadcast station, KLIX-TV, which then rebroadcast the material in a local community where the Salt Lake City signals could not be received.\footnote{48} The cable company, not yet in operation at the time of litigation, would carry all three distant stations and thus decrease the value of the program sold for broadcast by the plaintiffs.\footnote{49}

The plaintiffs relied\footnote{50} on \textit{International News Service v. Associated Press},\footnote{51} a landmark case, decided under federal common law principles, that defined unfair competition as, essentially, reaping

\begin{itemize}
\item \footnote{41} Frontier Broadcasting Co. v. Collier, 24 F.C.C. 251 (1958).
\item \footnote{42} \textit{Id.} at 253-54.
\item \footnote{43} Ch. 652, 48 Stat. 1064 (1934) (current version at 47 U.S.C. §§ 151-609 (1976)). The definition of “carrier” can be found in section 153(h).
\item The FCC based its reasoning on the legislative history of the Communications Act, which indicated congressional intent that the FCC follow the ordinary meaning of the term. 24 F.C.C. at 254 (citing H.R. REP. No. 1850, 73rd Cong., 2d Sess. 46 (1934)). Since common carriers must choose what they transmit and cable cannot choose its material but only receives what is broadcast, the FCC reasoned that cable television cannot be a common carrier. \textit{Id.} at 254-55.
\item \footnote{44} 196 F. Supp. 315 (D. Idaho 1961).
\item \footnote{45} \textit{Id.} at 321.
\item \footnote{46} \textit{Id.} at 317-18.
\item \footnote{47} \textit{Id.} at 318-19.
\item \footnote{48} See \textit{id.} at 321 (citing Plaintiff’s Opening Brief at 7-17, Civil Action No. 3528)).
\item \footnote{49} 248 U.S. 215 (1918).
\item \footnote{50} See \textit{id.} at 321 (citing Plaintiff’s Opening Brief at 7-17, Civil Action No. 3528)).
\item \footnote{51} 248 U.S. 215 (1918).
\end{itemize}
where one did not sow.\(^52\) International News involved one news wire service directly copying the other's late-breaking news.\(^53\) The facts supporting injunctive relief on the basis of unfair competition in International News, however, were distinguished by the Intermountain court in a number of ways. First, the two wire services in International News were clearly engaged in keen competition in precisely the same type of business.\(^54\) In Intermountain, however, broadcasters and cable operators were seen to be different in terms of primary purpose or function:\(^55\) The cable company sold antenna service and the broadcasters sold time to sponsors. The court, therefore, saw the cable profits as of a different type because they were reaped at a different point,\(^56\) i.e., from subscribers rather than advertisers. An insufficient competitive relationship, the court reasoned, existed to meet the International News standard.\(^57\) In addition, it was pointed out that the plaintiffs may have even benefitted by increasing their audiences through cable, thus enabling them to charge higher advertising rates. On the basis of International News, the court concluded that no property interest in need of protection was demonstrated.\(^58\)

In Intermountain, however, Judge Sweigert carefully left open the possibility that relief might be available on an unfair-competition theory if an exclusive contract had existed.\(^59\)

Judge Sweigert's exclusive-contract theory was tested, in Cable Vision, Inc. v. KUTV, Inc.,\(^60\) by KLIX-TV, the local station in Idaho Falls that had purchased the distant signal from the Salt Lake City broadcasters in Intermountain. The action arose on a counterclaim since Cable Vision had first sued KLIX-TV and KUTV, one of the Salt Lake City broadcasters, on antitrust grounds claiming that they were attempting to monopolize the Idaho Falls market.\(^61\) The theories employed by KLIX-TV, tortious interference with contractual relations and unfair competition,\(^62\) were presented before the same

\(^{52}\) Id. at 239.

\(^{53}\) Id. at 229-31.

\(^{54}\) Id. at 230.


\(^{56}\) Id. at 326.

\(^{57}\) Id. at 325.

\(^{58}\) Id. at 326.

\(^{59}\) Id. at 323.

\(^{60}\) 211 F. Supp. 47 (D. Idaho 1962), vacated and remanded, 335 F.2d 348 (9th Cir. 1964).

\(^{61}\) Id. at 50.

\(^{62}\) Id.
district court and judge that heard *Intermountain*. This time both were upheld. The crucial difference in *Cable Vision* was the existence of the exclusive contract. In the earlier litigation the common law action of tortious interference with contractual relations was not asserted. In addition, the alleged unfair competition was recognized by the district court to be within the bounds of *International News* since a sufficient property interest, it was held, existed because of the exclusive contract.

On *Cable Vision’s* appeal to the Ninth Circuit, the district court’s decision was reversed. The court of appeals noted that two recent cases decided by the Supreme Court in the time between the initial decision and the appeal established that (1) in the absence of patent or copyright protection, a strong federal interest in free public access to information exists, which is rooted in the Constitution, and that (2) no state common law or statutory intrusion is permissible to protect uncopyrighted material unless it embodies a dominant federal purpose. Because the material licensed for rebroadcast was in part not copyrighted, and because the claim was argued on a noncopyright theory, the court assumed the programs were in the public domain. Furthermore, no other countervailing federal interest was identified. The decision, therefore, went against the local broadcaster.

With the failure, in *Intermountain* and *Cable Vision*, of the unfair-competition approach, the only remaining legal theory to which broadcasters could look for protection, barring the assertion of an interest that would outweigh the constitutionally based free-access interest, was copyright. Two other statutory notions of unfair competition existed, apart from common law, but were inapplicable. Specifically, no objectionable methods of doing business had occurred that were covered under the Federal Trade Commission Act since the cable problem did not stem from a method or a manner of doing

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63. *Id.* at 47, 49.
64. *Id.* at 58-59.
65. *Id.* at 56-58.
66. 335 F.2d 348 (9th Cir. 1964).
68. *Id.* at 350.
69. *Id.* at 350-51.
70. *Id.* at 351.
71. *Id.* at 352-53.
72. *Id.* at 354.
business. Also, no predatory methods or intent to monopolize existed within the meaning of the antitrust laws. The inability to fit these disputes into recognized unfair-competition categories was inherent in the nature of the industry; accordingly, the unfair-competition issue from this point on could be defined only as a foundation concern for future FCC policy.

B. The Failure of the Copyright Theory of Protection

Although immediately after Cable Vision the FCC acted to aid local broadcasters, copyright liability for cable operators would have also aided local stations by requiring cable companies to compete in the normal market. If cable operators were liable under copyright laws, they would no longer be able to compete unfairly since they would have to pay market prices, just as broadcasters do, for the right to transmit copyrighted programs. Consequently, the copyright owners had an important role in the rivalry between broadcasters and cable systems because they acted as a third-party supplier to two competing buyers.

By 1968 the question of copyright liability for the cable-television industry reached the Supreme Court in Fortnightly Corp. v. United Artists Television, Inc. The suit was brought this time by the copyright holder, United Artists, who claimed that the Fortnightly Cable Corporation infringed its copyrights when it carried stations that duplicated syndicated-program material, in this case movies, that had been licensed by United Artists to a local West Virginia broadcaster for exclusive showing. The action was based on sections 1(c) and 1(d) of the Copyright Act of 1909, which gave the copyright holder a right to license a work for performance to the exclusion of non-licensees, with violations actionable as copyright infringements. The notion of performance under the Act of 1909 was based on a theatre model; that is, the mere public reading of a work

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74. For a concise explanation of the nature of unfair competition from the FCC’s view, see In re Amendment of F.C.C. Rules and Regulations Relative to CATV (Notice of Proposed Rulemaking and Notice of Inquiry in Docket No. 18397), 15 F.C.C.2d 417, 431 (1968).
75. See text accompanying notes 94-114 infra.
76. 392 U.S. 390 (1968). It is not surprising that the suit was brought by the copyright holders who were not also broadcasters, since most television programming is purchased from the syndicated market or provided through the network. See note 13 supra. In this case the local broadcasters had no cause of action as non-copyright holders. 392 U.S. at 391-93.
77. 392 U.S. at 391-93.
79. Ch. 320, 35 Stat. 1081.
was seen as a permissible form of speech whereas a performance was a direct encroachment on the artist’s interest and represented a disincentive to produce creative works.\textsuperscript{80} The \textit{Fortnightly} Court, in an opinion delivered by Justice Stewart, reasoned that a cable system functions more like the passive theatre audience than like a performer essentially because nothing was done to the existing signal other than improve reception.\textsuperscript{81} (The signals of the local broadcaster were receivable but of very low quality because of the hilly West Virginia terrain.\textsuperscript{82}) Accordingly, the Court held that, at least in the case of local signal carriage, no copyright liability attached to the cable operator.\textsuperscript{83}

Justice Fortas, in a well-reasoned dissent, stated that the majority’s narrow approach of reinterpreting the obsolete copyright law’s performance notion was dangerously simplistic.\textsuperscript{84} Since the economic consequences of this decision were complex and far-reaching in terms of the subsequent growth of both broadcasters and cable operators, it would be better, Fortas reasoned, to have affirmed the lower court’s decision, which was based on an old precedent,\textsuperscript{85} and leave change to the legislature.\textsuperscript{86} “Our ax,” he said, “being a rule of law, must cut straight, sharp, and deep; and perhaps this is a situation that calls for the compromise of theory and for the architectural improvisation which only legislation can accomplish.”\textsuperscript{87}

The \textit{Fortnightly} rule applied to broadcast signals that were receivable in the local broadcast market. The question of whether a cable operator who imported distant signals that were \textit{not} otherwise receivable in the local market was subject to copyright liability was decided in 1974 in \textit{Teleprompter Corp. v. C.B.S., Inc.}\textsuperscript{88} The Second Circuit had held, using the function test of \textit{Fortnightly}, that because cable distributes a signal to an antenna that could not otherwise receive it, it functions like a broadcaster and accordingly should be

\begin{itemize}
  \item \textsuperscript{80} See D. LeDuc, \textit{supra} note 40, at 163.
  \item \textsuperscript{81} 392 U.S. at 397-400.
  \item \textsuperscript{82} \textit{Id.} at 391-92.
  \item \textsuperscript{83} \textit{Id.} at 401-02.
  \item \textsuperscript{84} \textit{Id.} at 402 (Fortas, J., dissenting).
  \item \textsuperscript{85} \textit{Id.} at 405 (Fortas, J., dissenting) (citing \textit{Buck v. Jewell-LaSalle Realty Corp.}, 283 U.S. 191 (1931)). In \textit{Buck} copyright interests successfully sued a hotel for transmitting radio programs by wire to rooms in the hotel. The Court concluded that the hotel, by connecting the wiring, was engaged in a performance within the meaning of the Copyright Act. 283 U.S. at 201.
  \item \textsuperscript{86} 392 U.S. at 408 (Fortas, J., dissenting).
  \item \textsuperscript{87} \textit{Id.} (Fortas, J., dissenting).
  \item \textsuperscript{88} 415 U.S. 394 (1974).
\end{itemize}
liable for a performance as would a broadcaster.\textsuperscript{89} The Supreme Court, in an opinion again delivered by Justice Stewart, rejected this analysis. It was held, again rather simplistically, that a cable operator does not function like a performer in spite of the importation of distant signals because importation is only a quantitative rather than a qualitative difference in function.\textsuperscript{90} In other words, the importation of a distant signal is only \textit{quantitatively} different from the carriage of a local signal in the sense that the distant-signal carriage involves bringing the distant signal in from a quantitatively greater distance. If this is not a significant difference, the Court reasoned, then cable's importation of distant signals cannot qualify as a copyrightable performance since the carriage of local signals does not qualify.\textsuperscript{91} Furthermore, cable was still seen as too passive to be a performer within the meaning of the Copyright Act.\textsuperscript{92} What exactly constituted a sufficient \textit{qualitative} difference or an active role in transmission that would amount to a performance was left unclear.

The failure of copyright liability as a means for copyright holders to gain compensation also put broadcasters facing their cable rivals at an artificial disadvantage in the marketplace. Syndicated programming was free for the taking to cable operators. They could simply carry it as it appeared in the broadcast signals they received, while a competing local broadcaster had to pay for the same material. The 1976 copyright-revision legislation eventually would provide some liability for cable,\textsuperscript{93} but it was the FCC that would temper the impact of cable's copyright-liability exemption on television broadcasters.

C. \textit{The FCC Steps In To Protect the Broadcasters}

While the unfair-competition and copyright theories were failing in the courts in the 1960's and early 1970's, the FCC was gradually moving to protect the broadcasting industry from cable. The process began slowly. In the late 1950's when the 'young' cable industry posed no competitive threat to broadcasters, the FCC declined jurisdiction.\textsuperscript{94} As already noted,\textsuperscript{95} cable-television lines were believed

\textsuperscript{90} 415 U.S. at 407-08.
\textsuperscript{91} \textit{Id.} at 408-09.
\textsuperscript{92} \textit{Id.} at 409-10.
\textsuperscript{93} See notes 157-164 \textit{infra} and accompanying text.
\textsuperscript{94} Frontier Broadcasting Co. v. Collier, 24 F.C.C. 251 (1958).
\textsuperscript{95} See note 43 \textit{supra} and accompanying text.
not to qualify as common carriers within the meaning of the Communications Act of 1934 and were thus considered to be outside the FCC's responsibility. In 1962, however, when a rural broadcaster in Wyoming protested the pending operation of a cable system because it represented a serious threat to the station's economic survival, the Commission reversed itself.\(^\text{96}\) The cable system, which in this case was fed by a microwave relay that the FCC recognized as a common carrier, was subsequently denied authorization.\(^\text{97}\)

In 1965, the same year that broadcasters lost on unfair-competition grounds in \textit{Cable Vision}, the FCC expanded its role by establishing general regulations for microwave-fed cable systems.\(^\text{98}\) Though \textit{Cable Vision} had for all practical purposes eliminated the possibility of private litigation on an unfair-competition theory, the legal significance of unfair competition lived on since it was the fundamental rationale behind these rules.\(^\text{99}\)

The rules were of two types: nonduplication rules,\(^\text{100}\) which applied equally to network and syndicated material; and mandatory signal-carriage rules.\(^\text{101}\) Under the nonduplication rules the cable system could not carry any program the broadcaster had carried or would carry within fifteen days.\(^\text{102}\) The mandatory signal-carriage rule required that the cable system must carry programming of all the local broadcasters who made the request.\(^\text{103}\)

Amidst growing concern over the rapidly expanding cable industry and economic vulnerability of many newly established UHF stations, the Commission, in a Report and Order issued the following year, successfully expanded its jurisdiction to include all cable systems whether fed by microwave or by long-distance transmission lines.\(^\text{104}\) The FCC's view here was protectionist: Cable was to be not an impediment but a supplement to the broadcast industry by providing clearer reception and expanded audiences.\(^\text{105}\) The Commission


\textbf{97.} \textit{Id.} at 465.

\textbf{98.} \textit{In re} Rules re Microwave-Served CATV (First Report and Order in Docket Nos. 14895 and 15233), 38 F.C.C. 683 (1965).


\textbf{100.} \textit{Id.} at 719-30.

\textbf{101.} \textit{Id.} at 716-19.

\textbf{102.} \textit{Id.} at 743.

\textbf{103.} \textit{Id.} at 742.

\textbf{104.} \textit{In re} CATV (Second Report and Order in Docket Nos. 14895, 15233 and 15971), 2 F.C.C.2d 725 (1966).

\textbf{105.} \textit{Id.} at 746.
seemed to believe that this was mandated by the Communications Act, which required maximizing service to all the people of the United States.\textsuperscript{106} Presumably broadcasting was superior to cable in this respect because it is free and accordingly reaches more people. The rationale for extending jurisdiction, which was tested and upheld in the courts,\textsuperscript{107} was that in order for the FCC to carry out its public-interest mandate under the Communications Act, matters which directly affect the viability of the broadcast industry must also be subject to the agency regulation.\textsuperscript{108}

The Report and Order made some refinements in the nonduplication rules but pointed out that more effective relief was needed to protect syndicated-program exclusivity.\textsuperscript{109} This was the case because no set nonduplication time period could give adequate protection to syndicated programs that are not normally aired on a simultaneous nationwide basis.\textsuperscript{110} Thus a cable’s retransmission of a syndicated program from a distant station could easily overlap with a local broadcast of the same program. This possibility would be intensified if the syndicated program was part of a series or if the cable company carried a distant independent station that broadcast nothing but syndicated material.

A stringent system of checking cable expansion was also put into effect by the order. It required that any new cable system that intended to carry distant signals obtain a waiver from the Commission.\textsuperscript{111} In order to obtain a waiver, elaborate evidentiary hearings were necessary in which the cable applicant was required to show that local broadcasting would not be adversely affected and that the public interest would, as a result, be served.\textsuperscript{112} This requirement proved too cumbersome\textsuperscript{113} in that virtually no new cable operations were approved. The ultimate result was a freeze in cable development that was to last seven years.\textsuperscript{114}

\begin{itemize}
\item \textsuperscript{106} Id.
\item \textsuperscript{107} United States v. Southwestern Cable Co., 392 U.S. 157 (1968).
\item \textsuperscript{108} Id. at 178. FCC jurisdiction over cable was held to exist when the matters in question were “reasonably ancillary to the effective performance of the Commission’s various responsibilities for the regulation of television broadcasting.” Id.
\item \textsuperscript{109} 2 F.C.C. 2d at 748.
\item \textsuperscript{110} Id.
\item \textsuperscript{111} Id. at 805.
\item \textsuperscript{112} Id. at 804-05.
\item \textsuperscript{113} D. LeDuc, supra note 40, at 175.
\item \textsuperscript{114} Id. at 182-83.
\end{itemize}
D. The Structure of the Interindustry Debate and the Nature of the Unfair Competition

1. The Interindustry Debate.—A complex debate, which centered on economic and policy considerations, raged between broadcasters, cable operators, and copyright owners during the seven-year freeze. The arguments were presented both to the FCC and to Congress, which was holding hearings on Copyright Act revision.115 In order to understand more precisely the resolution that was eventually to lift the freeze, the unfair-competition issue and the structure of the debate must be examined more closely.

The arguments put forth by each industry can best be understood through consideration of some of the more obvious interests they were intended to protect. It is reasonable to assume that the broadcasters wanted to protect their audiences by generally minimizing all competition and specifically minimizing unfair competition. The cable companies’ broad goals were, no doubt, to minimize their liability to pay for the signals they carried and, as a young industry, to maximize growth by gaining entrance to new markets. The copyright holders, of course, wanted, at the very least, to maximize the payments they received for their programs.

The arguments made in support of these interests by the broadcasters and copyright holders were ostensibly the same. They were based on what can be called the free-ride argument and also the right to enter into a contract for an exclusive showing. The cable operators’ basic counterargument was that there should be no double payments.116

Both copyright interests and broadcasters believed, at the most elementary level, that the Supreme Court’s exemption of cable from copyright liability unfairly allowed cable operators to get something for nothing. But the specifics of the free-ride argument put forth by each differed.

115. Copyright revision had been under consideration by Congress since 1955. See, e.g., Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary, 86th Cong., 1st Sess., Studies on Copyright Law Revision iii (Comm. Print 1960). Technical advances in tape recording, copying machines, and broadcasting all contributed to the need to revise the 1909 Act. For a compilation of the complete legislative history, see 1-16 Omnibus Copyright Revision Legislative History (1977).
116. For the record of the 1975 congressional hearings, see Hearings on Copyright Law Revision Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 94th Cong., 1st & 2d Sess., Parts 1-3 (1975), reprinted in 14-16 Omnibus Copyright Revision Legislative History (1977) [hereinafter cited as 1975 House Hearings].
The copyright holders claimed that the absence of copyright liability for cable would eventually lead to a decrease in the quality and quantity of syndicated programs.117 Their position was that broadcasters who lost audiences to cable would suffer a decrease in advertising revenues resulting in a diminished ability to pay for programming.118 In the absence of payments by cable operators, the argument went, a net decrease in purchasing power would result that would decrease the quality and supply of future production.119

The broadcasters, in essence, had two free-ride arguments: One centered on the unfair-competition issue and came from the local stations that were not carried to any distant market; another came from those that were. The argument of the uncarried local stations was that the cable company, by virtue of its free ride, competes unfairly because it does not pay freely negotiated copyright rates. Instead, it stands outside the market delivering the same material to the same audience at no cost.120 The carried broadcasters’ anti-cable argument was that the free ride consists of cable’s pirating the station’s signal and making a profit on it by exporting it to distant markets.121 Their position was that even though the broadcaster does not usually produce the program, the creative efforts and expense of network and non-network program assemblage still deserved compensation.122

In contrast, the cable operators maintained that, in reality, a benefit is produced for the broadcasters and copyright holders.123 Their argument was that the cable-carried broadcasters expand their audience and thus increase their advertising revenue and that the increased revenue would in turn permit the program producers to collect higher copyright rates. Therefore, cable copyright liability, they said, would amount to double royalty payments to the copyright holders since they were already compensated for the larger cable

117. See, e.g., 1975 House Hearings, supra note 116, at 704-08 (statement of Jack Valenti, President of Motion Picture Association of America, Inc., and Association of Motion Picture and Television Producers, Inc.).

118. Id. at 708.

119. Id. at 763 (supplemental statement of Jack Valenti).

120. Id. at 767 (testimony of Robert V. Evans, Vice President and General Counsel, CBS, Inc.).

121. Id. at 768.

122. See, e.g., id. at 766-67. For an argument in favor of obtaining compensation for these creative efforts that was rejected by the copyright tribunal, see Simon, Local Television Versus Cable: A Copyright Theory of Protection, 31 FED. COM. L.J. 51, 61-78 (1978).

123. See, e.g., 1975 House Hearings, supra note 116, at 667-68 (testimony of William J. Bresnan, President, Cable Television Division of Teleprompter Corp.).
Audience by the broadcaster.\textsuperscript{124} Broadcasters answered that since some of their advertising revenue comes from purely local advertisers, distant audiences had no effect on the local advertising rate that could be charged\textsuperscript{125} because the distant audience would not be able to buy the local advertisers' products.\textsuperscript{126} They might have made the additional argument, of course, that in the event that they also had a cable system in their area, the imported distant signal could create more audience diversion than could be offset by any audience gain in a distant market.

The copyright interests denied being paid twice and receiving significantly increased royalties.\textsuperscript{127} One reason given was that the syndicated-program market was a buyer's market.\textsuperscript{128} Too many programs available for syndication, they maintained, insured an oversupply in the market. Broadcasters would not pass on to the copyright holders any increase in revenue gained from reaching larger audiences because, the argument went, the oversupply would continue to keep syndicated prices low. They also argued that the showing of their programs to large audiences for free would have an adverse effect on the program supply. It was claimed that local stations, which might lose audiences because of cable competition, would pass advertising-revenue losses on to copyright holders and/or program producers by bidding less for their programs.\textsuperscript{129}

An additional argument endorsed by both broadcasters and copyright holders was that exclusive contracts, allowing the broadcaster-purchaser to have the exclusive right to show a particular syndicated program in a particular area, should be protected and preserved. The copyright interests maintained that the right to make an exclusive sale was the essence of copyright protection,\textsuperscript{130} and that their ineffectiveness against cable operators would be reflected in lower royalty prices since the purchasers of the exclusives would find them less valuable. The broadcasters believed that exclusivity meant

\begin{itemize}
  \item \textsuperscript{124} See, e.g., \textit{id.} at 628 (testimony of Frederick W. Ford, Counsel, Ad Hoc Committee of Concerned Cable Television Operators for a Fair Copyright Law).
  \item \textsuperscript{125} For a discussion of this problem, see \textit{id.} at 678 (questioning of William J. Bresnan, President, Cable Television Division of Teleprompter Corp.).
  \item \textsuperscript{126} \textit{id.}
  \item \textsuperscript{127} \textit{id.} at 710 (statement of Jack Valenti, President of Motion Picture Association of America, Inc., and the Association of Motion Picture and Television Producers, Inc.).
  \item \textsuperscript{128} \textit{id.} at 743 (letter from Jack Valenti to Subcommittee Chairman).
  \item \textsuperscript{129} See notes 118-119 supra and accompanying text.
  \item \textsuperscript{130} 1975 House Hearings, \textit{supra} note 116, at 707 (statement of Jack Valenti, President of Motion Picture Association of America, Inc., and the Association of Motion Picture and Television Producers, Inc.).
\end{itemize}
larger audiences.\textsuperscript{131}

2. The Nature of the Unfair Competition.—The overriding purpose of the FCC cable policies of the 1960's and 70's was to minimize "unfair competition," but no attempt was ever made at further clarification of the term beyond what could be gleaned from the above potpourri of arguments. Much of the debate, at least in the abstract, would remain complex and difficult to resolve even though the issues were in fact destined to be mooted by real world compromises embodied in future copyright legislation and FCC regulation. Since the FCC's 1980 deregulation order has reintroduced concern over some of the issues raised in the debate, however, it is useful to depart from the historical treatment presented thus far in order to gain a fresh and more precise view of the nature of the unfair competition. Some distinctions first will be drawn between broad fairness issues relating to the exclusivity and pirating concerns and other fairness issues relating more directly to competition. With this basic distinction drawn, additional analysis will be presented aimed at further clarification of the unfair-competition issue.

Two observations can be made concerning fairness and the nature of exclusivity contracts that are ineffective against cable. The observations are related to but conceptually distinct from competition between cable and broadcast television. First, an unfairness may be suffered by a broadcaster who purchases a program for an exclusive showing and later learns that he did not get what he thought he paid for because the exclusive has turned out to be ineffective against cable. This would occur before the broadcaster knows of cable's position, \textit{e.g.}, when a new system has opened in his area, or when rules protecting his exclusivity contract (rules that in fact did not exist until 1972) are changed before the existing contracts have expired. But once a broadcaster has knowledge of cable's position, the price he would be willing to pay for a syndicated program would presumably be discounted: The program would be less valuable since it would be likely to draw a smaller audience and thus less advertising revenue.

Another related fairness concern, in connection with the exclusivity problem, is simply that an exclusive contract is effective against all other television broadcast stations, VHF and UHF alike, in a particular market. Unless some justification can be found for the

privilege afforded cable, this amounts to an arbitrary treatment. No unfair competitive consequences result, however, unless there exists a price disparity between competitors and cable for the same material. Even if cable remained privileged to invade exclusivity contracts, unfair competition would necessarily result only if cable paid less or nothing for the programs. Hence, the determinative unfairness factor is price differentiation, not the exclusive nature of the broadcaster’s right.

Another fairness issue that was prominent in the interindustry debate was the “pirating” aspect of the broadcaster’s free-ride argument.\(^{132}\) It may be that a television station’s entire broadcast day should be considered subject to the broadcaster’s copyright interest and thus qualify for some royalty payments from cable.\(^{133}\) Nevertheless, while the fairness issue relating to compensation is a genuine question, competition, per se, is not a part of this problem. It becomes an issue only when the cable system that takes the signal competes with a broadcast station; when this occurs, as will be seen, the issue relating to unfair competition is not really pirating but cable getting an artificial exemption from paying for the material it sells.

The heart of the unfair-competition issue, in contrast to these broader fairness concerns, is the price-differential form of the broadcasters’ free-ride argument noted above. It relates directly to costs that two classes of competitors must bear in relation to a third-party supplier.\(^{134}\) The harm to a broadcaster who pays more for his supply of syndicated programming arises from his competitive relationship with a rival who has the advantage of paying less. Unfairness results unless some justification can be found for the discrimination.

A more precise understanding of where and how a broadcaster faces competition from a cable company that imports signals from distant stations can be gained by examining two basic factors: whether the broadcaster claiming injury from the competition of a cable system is also carried in a distant market by another cable system; and what type of material is imported by the cable

\(^{132}\) See, e.g., 1975 House Hearings, supra note 116, at 766-67 (testimony of Robert V. Evans, Vice President and General Counsel, CBS Inc.); Greene, supra note 131, at 266.


\(^{134}\) It is interesting to note that if a commodity were involved and if the price differential were the result of a third-party supplier’s discrimination, not operation of the Copyright Act, it might be actionable price discrimination under the Robinson-Patman Act, 15 U.S.C. §§ 13-13b, 21a (1976).
competitor.

In the case of syndicated material, the broadcaster who faces competition from a duplicated program brought in by cable but whose signal is also carried into a distant market probably suffers less from the effects of unfair competition. This is likely because, while both the carried and uncarried broadcasters suffer a similar price differential vis-à-vis their cable rivals, the carried broadcaster, in effect, receives some reimbursement from the increase in his audience, and thus his advertising revenue. The uncarried broadcaster has no such potential for compensation and so suffers the most from unfair competition.

Virtually all of the programming that is broadcast by independent stations, which are not affiliated with any network, is syndicated-program material. These stations face unfair competition in the same way an affiliate does. If they are carried into a distant market, they fare better than if they are not. Their vulnerability, in facing syndicated-program duplication from cable operators, is greater than that of network affiliates since more of their programming is syndicated. Consequently, they would risk having more of their programs duplicated and thus risk losing more of their audience.

When network material (i.e. most of the portion of the imported signal that is not syndicated) is brought into the local broadcaster's market, the issue of unfair competition disappears although the potential for injury to the local broadcaster from competition remains. Importing network material does not produce unfair competition because a broadcaster does not pay for a network program but is paid, as an affiliate, to carry it via a system by which the networks share revenue produced from the national commercial time that is sold to advertisers. Consequently, the nature of the competition is almost the same as if a new broadcaster had opened in the existing broadcaster's market. There is no unfair-competition problem because there is no price differential: neither cable operators nor regular broadcasters pay for network material.

To say there is no unfair-competition problem is not, however,

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136. For a description of the economics of the network-affiliate relationship, see Blake & Blum, Network Television Rate Practices: A Case Study in the Failure of Social Control of Price Discrimination, 74 YALE L.J. 1339 (1965).
137. 1975 House Hearings, supra note 116, at 667 (testimony of William J. Bresnan, President, Cable Television Division of Teleprompter Corp.).
to say that cable-imported network competition cannot be economically damaging to the existing local broadcaster. The FCC has in fact continued its network nonduplication rules138 because of the economic danger to local affiliates of losing some of their audience. The competition created for local broadcasters through the signal importation of different networks and independents, however, is seen as less risky by the FCC and is permitted by eliminating distant-signal rules.

The discussion of the unfair competition issue can be summarized in the following table.

<table>
<thead>
<tr>
<th>TYPE OF BROADCASTER</th>
<th>Carried by a cable system to a distant market</th>
<th>Not carried by a cable system to a distant market</th>
</tr>
</thead>
<tbody>
<tr>
<td>SYNDICATED PROGRAM</td>
<td>some unfair competition depending on price and the amount of the differential that is compensated for by an increased audience</td>
<td>maximum unfair competition because of maximum price differential</td>
</tr>
<tr>
<td>FROM NETWORK AFFILIATES OR INDDEPENDENTS</td>
<td></td>
<td></td>
</tr>
<tr>
<td>PROGRAM MATERIAL FROM A DIFFERENT NETWORK</td>
<td>fair because no price differential exists — broadcaster is paid to carry network material</td>
<td>fair because no price differential exists — broadcaster is paid to carry network material</td>
</tr>
<tr>
<td>PROGRAM MATERIAL FROM THE SAME NETWORK (PROHIBITED BY THE FCC)139</td>
<td>fair because of no price differential, but possibility of serious economic damage exists although it might be mitigated by the gain of a distant audience</td>
<td>fair because of no price differential, but possibility of serious economic damage exists</td>
</tr>
</tbody>
</table>

139. 47 C.F.R. §§ 76.92-76.94 (1980).
E. The Compulsory License Solution and the Consensus Agreement: Interfacing FCC Regulation With Copyright Revision

With the unfair-competition issue in focus, we can return to the history of the interindustry debate and examine how the dispute was in fact resolved in the 1970's. As previously noted, the FCC had imposed a de facto freeze on cable growth in 1966 in order to protect the broadcasters.\footnote{140}{See text accompanying notes 113-114 supra.} No progress in lifting the freeze was to be achieved until the early 1970's when an agreement that embodied major compromises was made.\footnote{141}{See D. LeDuc, supra note 40, at 189-207.} This so-called “Consensus Agreement” involved limited copyright liability for cable through a device known as a compulsory license and the establishment of the distant-signal and syndicated-program exclusivity rules.\footnote{142}{The rules were incorporated, by agreement of the parties, in In re Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to CATV (Cable Television Report and Order), 36 F.C.C.2d 143, 165-68, 284 app. D (1972). See 1975 House Hearings, supra note 116, at 774 (statement of John B. Summers, General Counsel, National Association of Broadcasters).}

By early 1971 cable-industry leaders, suffering from being barred from new markets, initiated talks with copyright-industry representatives in hopes of agreeing on terms that could be presented to the FCC as a plan to lift the freeze.\footnote{143}{For an historical treatment of the lifting of the freeze and the Consensus Agreement, see D. LeDuc, supra note 40, at 189-215.} The copyright interests, of course, would have been happy to have the freeze lifted if they could gain a new source of royalty payments. But the copyright law first had to be revised to establish cable liability so that royalty payments could be mandated.

Later in the year the broadcasters and government representatives entered the talks.\footnote{144}{See id. at 196.} The broadcasters wanted to make sure that no agreement damaged their interest in preserving their audiences and limiting competition;\footnote{145}{See id.} the FCC and the White House, through the newly revived Office of Telecommunications Policy,\footnote{146}{The Office of Telecommunications Policy had existed since the Truman Administration but was given new powers in 1970. See Reorg. Plan No. 1 of 1970, 35 Fed. Reg. 6,421 (1970), reprinted in 5 U.S.C. app. at 823 (1976), and in 84 Stat. 2083 (1970).} also wanted to lift the freeze by implementing new legislation and regulations that would be acceptable to the three industries involved. This effort was attributable, in part, to increasing public criticism of the
freeze as being overprotective of the broadcasters and, in part, to governmental hopes for the future benefits which cable seemed to promise.

The accord that emerged, known as the Consensus Agreement, had four major features. It provided for (1) syndicated-program exclusivity rules, (2) distant-signal rules, (3) a broadcaster's right to sue for copyright infringement if a cable system violated an exclusivity agreement, and (4) cable copyright liability through a compulsory-license system and what later developed into the Copyright Tribunal. The first two consensus provisions were implemented through the FCC's 1972 Cable Television Report and Order, while the latter two were eventually put into effect through the 1976 revision of the Copyright Act and the 1972 FCC Cable Television Report and Order.

The compulsory-licensing system was enacted in section 111 of the revised Copyright Act. It was first suggested by the Senate subcommittee staff in 1966 as a means of establishing a measure of copyright liability for cable operators in order to diminish the unfair-competition problem. It did not attempt to equalize syndicated-program prices paid by the cable and broadcast industry by bringing the cable operators in to bid for material in a competitive free market, however, nor did it establish a price parity with competing broadcasters for program material. Instead, it required that every cable system pay a semiannual fee into a government-administered pool and that the funds in the pool be distributed to copyright holders based on the volume of their copyrighted material the cable systems carried during the course of the six-month period. The

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148. See note 9 supra.
149. See 36 F.C.C.2d at 284 app. D.
150. Id.
151. Id.
152. Id.
153. Id.; see notes 157-167 infra and accompanying text.
154. 36 F.C.C.2d at 220-36, 284 app. D.
156. 36 F.C.C.2d at 165-68, 284 app. D.
158. See D. LEDUC, supra note 40, at 167.
160. Id. § 111(d)(2)(B).
161. Id. § 111(d)(4).
semiannual distribution is made by an entity created for this purpose, the Copyright Tribunal, which also adjudicates disputes over royalty entitlements. The Register of Copyrights administers funds and the licensing system. Failure to comply with the statute subjects the violator to a variety of infringement remedies including damages and injunctions.

The compulsory license/Copyright-Tribunal system was immediately attractive to both the cable and copyright industries. Cable’s interest in growth was furthered in two ways: The FCC freeze was to be lifted, and no station or copyright owner could withhold the copyrighted program as long as the compulsory-license fee was paid. Also, since the fee schedule was to be fixed by statute at a lower than market rate, royalty costs were lessened. In addition, the costs of negotiating for a multitude of separate programs were eliminated.

The copyright industry found the compulsory-license system acceptable because its interest in increasing royalty payments was served. A new source was created where none existed before. The fixed-rate schedule offered the industry precisely the same advantages of reduced transaction costs as it did the cable companies.

In addition, the compulsory-license system was not a completely unfamiliar arrangement to the copyright owners. They were already comfortable with similar blanket-license fixed-rate systems that had been used by BMI and ASCAP since 1914. Under the blanket-license system the artist and original copyright holder can affiliate with Broadcast Music, Inc. (BMI) or the American Society of Composers, Artists and Playwrights (ASCAP), who act as their agents by negotiating royalty rates on a collective basis with commercial users. Fees are paid periodically under a blanket-licensing agreement. ASCAP and BMI then pass the royalties on to the artists/copyright holders. The costs of a huge number of separate negotiations with a multitude of artists are thus reduced.

The compulsory licensing/Copyright-Tribunal system was not

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162. Id. §§ 111(d), 801-810.
163. Id. §§ 111(c)(2), 502-506, 509.
164. Id. § 111(d)(3); see Greene, supra note 131, at 281-82.
167. See id.
seen by the broadcasters as offering enough protection. The idea of a newly unbridled competitor, even if it had to pay something for its programming, was apparently too threatening. Consequently, at the insistence of the broadcasters, the FCC committed itself in the Consensus Agreement to establishing the distant-signal and syndicated-program exclusivity rules. Both sets of rules refine the earlier nonduplication rules. Also, the syndicated-program exclusivity rules were aimed directly at unfair competition while the distant-signal rules were effective against restricting cable competition generally.

Without the syndicated-program-exclusivity rules the broadcaster would still face the familiar unfair-competition problem even with a compulsory-licensing system that required cable operators to pay something. This was so because the rate the cable operators were to pay was to be fixed below the market-level price the broadcaster had to pay for the same program material. The unfair competition resulting from the price differential could be eliminated by the compulsory-license/Copyright-Tribunal system only through a flexible setting of rates that would approximate a price parity with the broadcasters, something that was not to be. On the other hand, a solution could be found if the FCC prevented the cable systems from duplicating the syndicated programming that the broadcasters had purchased. The syndicated-program exclusivity rules, which required that under some circumstances the cable systems black out a syndicated program that was being shown by a broadcast competitor, were implemented to eliminate unfair competition by this method.

The syndicated-program exclusivity rules vary according to the market, program type, and time of broadcast. In the fifty largest markets a cable system must black out a syndicated program that has been purchased by a local station if that station so requests. It does not matter when that program is scheduled for showing on the

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169. See 36 F.C.C.2d at 284 app. D.
170. In In re CATV (Second Report and Order in Docket Nos. 14895, 15233 and 15971), 2 F.C.C.2d 725 (1966), the nonduplication period was reduced to twenty-four hours. Problems remained, however, in giving “effective” relief. Id. at 748. See text accompanying notes 109-110 supra.
171. 1979 Copyright Hearings, supra note 165, at 42-43 (testimony of Jack Valenti).
172. 36 F.C.C.2d at 233.
173. Id. at 233-36.
174. Id. at 234.
local station. Program owners can also request that no program be shown on cable anywhere in the United States for a one-year period after it is first licensed to any local broadcast station.\textsuperscript{176} In the second fifty markets, prime-time syndicated programs cannot be deleted by broadcaster request unless they will be carried by cable in prime time.\textsuperscript{178} Also, syndicated programming that is first run (never seen on network television) is subject to longer periods of protection than old network reruns that are now in syndication in the second fifty markets. For first-run material the period is two years while for reruns it is one year from the time they enter syndication.\textsuperscript{177}

It is important to note that the distant-signal rules, promulgated at the insistence of the broadcasters,\textsuperscript{178} focused not on limiting unfair competition but on restricting competition against the local pre-existing broadcaster generally. In so doing, they restricted competition in ways that had nothing to do with price discrimination.\textsuperscript{179}

The distant-signal rules, like the syndicated-program exclusivity rules, vary according to the size of the market.\textsuperscript{180} A quota system is set up whereby at least two independent stations and one affiliate of each national network may be carried by each cable system. Since all local stations must be carried, no distant affiliate of the same network of the local stations may be imported.\textsuperscript{181} A maximum of three independent stations can be carried in the fifty largest markets if none of those stations are local independents already in existence. A maximum of only two independents is permitted in the second fifty markets, however. In markets smaller than the top 100 only one independent may be brought in, and an affiliate of each national network is permissible.\textsuperscript{182}

A less significant provision of the Consensus Agreement concerned the effective enforcement of the exclusivity and distant-signal rules. Broadcasters, concerned that compulsory-license revocation proceedings conducted by the FCC pursuant to the Administrative

\begin{itemize}
\item[176.] Id.
\item[177.] Id.
\item[178.] See, e.g., Greene, supra note 131, at 276-78.
\item[179.] See chart accompanying note 139 supra.
\item[180.] 36 F.C.C.2d at 220-33.
\item[181.] Id. at 230-32.
\item[182.] Id. at 231-33.
\end{itemize}
Procedure Act183 would be too slow, argued for a right of self-help enforcement.184 This was adopted in the form of a right to injunctive relief.185 Later in section 501 of the 1976 Copyright Act revision, a broadcaster's self-help provision appeared in the form of a right of action for copyright infringement by the beneficial copyright owner.186 Any cable system that brought in a distant signal or duplicated a syndicated program that was under an exclusive contract was subject to a suit for copyright infringement.187 The broadcasters' cause of action for copyright infringement was bottomed on an open reference to the FCC rules in the statute;188 the elimination of the rules by the FCC, therefore, also eliminated the infringement action for the broadcasters.

In sum, the Consensus Agreement was an intricate interface of FCC regulations and copyright legislation in which each industry got some of what it wanted. The broadcasters managed to solve the unfair-competition problem by controlling cable through the compulsory-license system, the syndicated-program exclusivity rules, and distant-signal rules. The copyright interests found a new source of royalty payments, and the cable systems managed to have the freeze lifted and thereby expand to new markets.

F. The Consensus Agreement and the Public Interest Reconsidered

Given the process out of which the Consensus Agreement was born—government mediation of the interindustry dispute—one might reasonably ask if the result inured, in fact, to the public interest. It would be difficult to argue that it did not, at least in part, serve the needs of the consuming public. After all, it did away with the freeze on cable growth and thereby made it possible for a larger segment of the public to gain cable's dual benefits of clearer reception of local stations and additional programming from distant and cablecasted189 programming.

184. See 1975 House Hearings, supra note 116, at 780-83 (testimony of John B. Summers, General Counsel, National Association of Broadcasters) (summarizing the broadcaster's view of the Consensus Agreement).
185. 36 F.C.C.2d at 284 app. D.
187. Id.
188. Id. § 111(c)(2)(A).
189. Cablecasting is the origination of programs by the cable companies. See D. LeDuc, supra note 40, at 233.
But doubts as to whether the FCC's major contributions to the Consensus Agreement, the distant-signal and syndicated-program exclusivity rules, were still overly protective of the broadcasters began to emerge even before the passage of the copyright legislation that was to complete the implementation of the agreement. The doubts emanated from at least two sources. First, the FCC staff itself was increasingly skeptical; it had produced a "Letter of Intent,"\(^{190}\) prior to and independent of the industry negotiations, that broke from past traditions\(^{191}\) and set out conditions for lifting the freeze that were not quite as generous to the broadcasters.\(^{192}\) In fact, dissent over the 1972 Report and Order preempting the Letter of Intent was expressed emphatically by one Commissioner.\(^{193}\) A second source of doubt can be found in the 1974 filing of a private petition, by an ex-FCC chief counsel, to reevaluate the 1972 Report and Order.\(^{194}\) The petition alleged that the public interest would be better served if certain provisions of the original Letter of Intent were implemented and if a market system were imposed by a device known as retransmission consent.\(^{195}\)

Because of these concerns and the additional doubts raised because no intense study was ever conducted on the actual economics of cable growth and its true impact on broadcasters,\(^{196}\) reevaluation of the Consensus Agreement was underway by 1976.\(^{197}\) No action

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190. See 36 F.C.C.2d at 260 app. C.
191. For a comparison of the Letter of Intent with the Consensus Agreement, see R. BERNER, supra note 9, at 40.
192. 36 F.C.C.2d at 260 app. C. The Letter of Intent included mandatory carriage of local stations, limits on signal importation, and minimum local service requirements; but it was not as industry-oriented as the 1972 Order because, for example, it did not include special syndicated-program provisions.
193. See id. at 311 (Johnson, Comm'r, concurring in part and dissenting in part). It is interesting to note that in the 1970's the Commissioners were generally more concerned about protecting the television-broadcast industry, while the staff of the FCC's cable television bureau was concerned with selling the merits of cable. Hence, because of the conflict within the Commission during this period, it is wise to consider the Commission's behavior as being produced in a tug of war between two conflicting forces. R. BERNER, supra note 9, at 71.
194. In re Revision of Cable Television Rules, 62 F.C.C.2d 192 (1976). The petition was specifically concerned with revision of cable television rules regarding leapfrogging, carriage of local independent signals, and non-network programming exclusivity. See also Geller v. F.C.C., 610 F.2d 973, 976 (D.C. Cir. 1979).
195. See note 260 infra and accompanying text.
196. 1980 Report and Order, supra note 11, at 60,187.
197. In re Cable Television Syndicated Program Exclusivity Rules (Notice of Inquiry in Docket No. 20988), 61 F.C.C.2d 746 (1976). This was, it will be recalled, the same year that Congress revised the Copyright Act. One might reasonably speculate that the FCC was waiting for cable copyright liability to be established before it attempted to tamper with the Con-
was taken until the last report and actual order was issued together in 1980 (the 1980 Report and Order\textsuperscript{198}), but two studies were produced by 1979 that recommended the elimination of both the distant-signal and syndicated-program exclusivity rules: the Economic Inquiry Report,\textsuperscript{199} which dealt with the distant-signal rules; and the Syndicated Program Exclusivity Report,\textsuperscript{200} which of course addressed the syndicated-program exclusivity rules.


The 1980 Report and Order did not expand on the substantive material in the earlier 1979 reports other than to respond to comments made by the industry and the public. It summarized the earlier reports and initiated the actual order to eliminate the distant-signal and syndicated-programming exclusivity rules.\textsuperscript{201}

The 1979 Economic Inquiry Report and the Syndicated Program Exclusivity Report, the studies on which the 1980 Report and Order was based, had three important features that distinguished them from the earlier rulemaking in the cable area: (1) they refocused on the Commission’s public-interest obligation by explicitly emphasizing consumer-oriented criteria of evaluation;\textsuperscript{202} (2) they dropped unfair competition as a regulatory concern;\textsuperscript{203} and (3) they involved an intensive economic and statistical study.\textsuperscript{204}

The reevaluations in the Syndicated Program Exclusivity Report and the Economic Inquiry Report postulated three consumer-oriented criteria that were deemed by the Commission to be “appropriate to judge the effects of various policies on the welfare of con-

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\textsuperscript{198} 1980 Report and Order, \textit{supra} note 11.

\textsuperscript{199} \textit{In re} Economic Relationship Between Television Broadcasting and Cable Television (Report in Docket No. 21284), 71 F.C.C.2d 632 (1979) [hereinafter cited as Economic Inquiry Report].

\textsuperscript{200} \textit{In re} Cable Television Syndicated Program Exclusivity Rules (Report in Docket No. 20988), 71 F.C.C.2d 951 (1979) [hereinafter cited as Syndicated Program Exclusivity Report].

\textsuperscript{201} 1980 Report and Order, \textit{supra} note 11, at 60,186-227.

\textsuperscript{202} See notes 205-208 \textit{infra} and accompanying text.

\textsuperscript{203} See note 209 \textit{infra} and accompanying text.

\textsuperscript{204} See notes 211-228 \textit{infra} and accompanying text.
users of video services.\textsuperscript{208} Those three criteria were: (1) consumer welfare—communications policy should be “efficient” in that it increases the net video service supplied to the public or otherwise maximizes the value of the video services to the public;\textsuperscript{208} (2) distributional equity—each evaluation of policy should consider the total costs and benefits for all groups including those who do not have access to cable;\textsuperscript{207} and (3) external or spillover effects—policies should not have an unacceptably adverse effect on local-news and public-affairs programming because of the importance of this type of programming to our democratic institutions.\textsuperscript{208}

Of major significance was the Commission’s dropping of unfair competition as a regulatory concern. It was claimed that unfair competition became little more than an historical curiosity after copyright liability had attached to the cable industry. The two issues were viewed as coextensive, and the elimination of one meant the elimination of the other.\textsuperscript{209} Congress, it was believed, had solved the problem. The FCC’s position was, in effect, that if the cable industry paid something through the compulsory license/Copyright-Tribunal system there would be no unfair-competition problem that they were willing to recognize.

Despite this position, quite the opposite is almost certainly true. Without the syndicated-program exclusivity rules a local broadcaster is likely to face a competitor who pays less for a portion of his product than the broadcaster pays, as surely as if a third-party supplier was favoring one over the other. This will not be the case only if the Copyright Tribunal can succeed in approximating the market price and thus establish a reasonable parity. Unfortunately, this is an unlikely possibility.\textsuperscript{210}

The third major feature of the studies was the attempt to move the foundation for policy decisions from what was described as an “intuitive” base, \textit{i.e.}, one based on reason and judgment only, to a foundation that rested on extensive scientific analysis.\textsuperscript{211} Conse-

\textsuperscript{205} 1980 Report and Order, \textit{supra} note 11, at 60,189.
\textsuperscript{206} \textit{Id.}
\textsuperscript{207} \textit{Id.}
\textsuperscript{208} \textit{Id.}
\textsuperscript{209} Syndicated Program Exclusivity Report, \textit{supra} note 200, at 1025.
\textsuperscript{210} For a broadcaster’s reaction to the elimination of the rules and the unfairness created, see Speech by Leonard H. Goldenson, Chairman of the Board and Chief Executive Officer of ABC, Inc., before the National Press Club (Sept. 17, 1980) (copy on file in office of Hofstra Law Review).
\textsuperscript{211} 1980 Report and Order, \textit{supra} note 11, at 60,299.
quently, outside consultants employing advanced techniques of computer modeling and economic analysis were used.\textsuperscript{212}

The 1980 Report and Order's analysis of distant signals was based on economic and computer simulation studies of supply and demand,\textsuperscript{213} a study of "grandfathered" markets where distant-signal rules were never imposed,\textsuperscript{214} and a study of nineteen "worst case" situations.\textsuperscript{215} The economic studies found that at most cable television would reach forty-eight percent of all television homes\textsuperscript{216} and that this would produce no more than a net ten percent audience loss for local broadcasters based on case studies.\textsuperscript{217} The Commission's study of six older markets where there was a high level of distant-signal importation, due to grandfathering provisions in the rules, found that only two broadcasters showed appreciable audience loss.\textsuperscript{218} This was deemed insignificant since the most lucrative prime-time audiences were not diminished and total revenues increased.\textsuperscript{219} The examination of nineteen local stations that actually experienced a decline in revenue, the worst case situations, failed to show that competition from cable was a dominant factor.\textsuperscript{220} The Commission concluded, after considering predictions of generally increasing profitability of broadcasting in the 1980's,\textsuperscript{221} that the elimination of the distant-signal rules will not produce significant loss of service but will instead serve the public interest by expanding service.\textsuperscript{222}

The 1980 Report and Order similarly analyzed the syndicated-program exclusivity rules. The econometric studies showed that if the blackout requirement was removed the ensuing inability to show syndicated programs on an exclusive basis would, in the foreseeable future, seldom result in a total audience loss of more than nine per-

\textsuperscript{212} Id. at 60,193.
\textsuperscript{213} Id. at 60,193-98. Figures in both studies that involved future estimates were based on mathematical methods of forecasting as they were conducted in studies run by the FCC, industry consultants, and independent academics. For the most influential of the studies, see R. Park, Audience Diversion due to Cable Television: A Statistical Analysis of New Data (Rand Corp. 1979), reprinted in Economic Inquiry Report, supra note 199, at 716. Other studies were also considered by the FCC. For a partial list, see Syndicated Program Exclusivity Report, supra note 200, at 970 n.39, and Economic Inquiry Report, supra note 199, at 668 n.82.
\textsuperscript{214} 1980 Report and Order, supra note 11, at 60,212.
\textsuperscript{215} Id. at 60,213.
\textsuperscript{216} Id. at 60,195.
\textsuperscript{217} Id. at 60,199.
\textsuperscript{218} Id. at 60,212.
\textsuperscript{219} Id.
\textsuperscript{220} Id. at 60,213.
\textsuperscript{221} Id. at 60,218.
\textsuperscript{222} Id.
cent, and in most cases the total loss would be less than four per-
cent.223 Contributing to this result were the grandfathered and worst
case stations mentioned above.

The report also found that no adverse effect on demand for pro-
grams would result in the immediate future and thus supply should
not be reduced.224 Program producers and copyright holders, it was
maintained, would remain prosperous.225 The longer-term effect was
seen as less certain,226 but it was believed that the Copyright Tribu-
nal could make up for unfair deficiencies.227 As with the case of dis-
tant signals, the reports concluded that the public interest would best
be served by eliminating the syndicated-program exclusivity rules
since no significant harm will be done to local broadcasters while
access to programming would be increased.228

III. ANALYSIS: THE FCC’S ELIMINATION OF UNFAIR
COMPETITION AS A REGULATORY CONCERN AND THE PUBLIC
INTEREST

The argument presented here is that: (A) the justifications given
by the FCC in the 1980 Report and Order for eliminating unfair
competition as a regulatory concern are unpersuasive; (B) a number
of weaknesses in the report raise serious questions about the urgency
of the deregulation; (C) the FCC has a legal responsibility to con-
sider the unfair-competition issue; and (D) more reasonable alterna-
tives existed for creating increased and freer competition without the
accompanying unfair competition.

A. The Justifications Given by the FCC in the 1980 Report and
Order for Eliminating Unfair Competition as a Regulatory
Concern Are Unpersuasive

The reasons given for the shift away from unfair competition as
a concern are twofold. First, the Commission contended that the
Copyright Tribunal can adequately resolve the problem of unfair
competition by adjusting the royalty-fee schedule paid by the cable
companies.229 Second, they claimed that Congress was neutral and

223. Id. at 60,222-23.
224. Id. at 60,223.
225. Id. at 60,224.
226. Id.
227. Id. at 60,223.
228. Id. at 60,227.
did not necessarily intend that the rules be preserved because of any understanding relating to the Consensus Agreement.230 These arguments will be addressed in order.

Section 801(b)(2)(C) of the Copyright Act of 1976231 permits the Copyright Tribunal to make rate increases if the FCC eliminates distant-signal and syndicated-program exclusivity rules. The 1979 Syndicated Program Exclusivity Report seized on this provision as a means of putting the unfair-competition issue in the Copyright Tribunal’s court.232 If the Copyright Tribunal could increase rates to approximate that of the open market, and thus close the royalty-rate differential between broadcasters and cable operators, the unfair-competition problem would indeed be cured.

This, however, is at best an extremely cumbersome solution. Problems of determining the fair market equivalent of a syndicated-program royalty rate would be substantial because rates fluctuate constantly with forces of supply and demand in local markets. The Tribunal, in its necessary compliance with the Administrative Procedure Act,233 would be bound to slow procedural requirements. The experience to date with the Copyright Tribunal suggests that the process of resolving claims will be a slow one: By 1980 only one disbursement had been made.234 Rate adjustments are likely to be outdated long before they are instituted; any approximation of free-market efficiency of price determination thus would be lost.235

Moreover, it seems likely that section 801(b)(2)(C) was included in the Copyright Act Revision as a safety valve to be used only if the FCC did change the distant-signal and syndicated-program exclusivity rules. This is suggested by Congress’ general intention that the rules not be changed by the FCC but by Congress itself if the need arose. Congress’ intention that the FCC not make substantive rule changes is shown by the subcommittee’s belief that it

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230. *Id.* at 968.
235. For a general argument on the superiority of a free market over the Copyright Tribunal, see Comments of National Telecommunications and Information Administration in Response to the Federal Communications Commission’s Notice of Proposed Rulemaking in Docket Nos. 20988 and 21284 (Sept. 17, 1979), *reprinted in* 1979 Copyright Hearings, *supra* note 165, at 316 app. 1.A.1 [hereinafter cited as Comments of National Telecommunications and Information Administration].
was faithfully implementing the Consensus Agreement.236 The committee was worried that the FCC would interpret the revisions as a signal to deregulate:

We would, therefore, caution the Federal Communications Commission, and others who make determinations concerning communications policy, not to rely upon any action of this Committee as a basis for any significant changes in the delicate balance of regulation in areas where the Congress has not resolved the issue. Specifically, we would urge the Federal Communications Commission to understand that it was not the intent of this bill to touch on issues such as pay cable regulation or increased use of imported distant signals. These matters are ones of communications policy and should be left to the appropriate committees in the Congress for resolution.237

B. Weaknesses in the Report Raise Questions About the Urgency of Deregulation

Three problems in the FCC's analysis tend to raise serious doubts about the urgency of deregulation. They involve: (1) the desirability of a free-market solution, (2) the quality of the benefits gained by deregulation, and (3) the magnitude of public benefit derived from audience diversion.

The Commission actually conceded the superiority of a free-market solution that would operate without the compulsory license's fixed rates, stating that:

[W]e expressed our desire for "a market solution to the problems of compensating owners of programming materials" for their use by others . . . . [O]ur preference would be to allow the marketplace the opportunity to work and [the FCC to] impose regulation only if it was shown that the marketplace would not work.238

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236. See 1979 Copyright Hearings, supra note 165, at 71. Chairman Kastenmeier, referring to the Consensus Agreement, stated (speaking to a copyright industry representative): I would not want you to suggest that Congress impose something on people who were unwilling to accept it. In fact, I give you credit for that agreement you made with the cable industry. You brought it in, and almost precisely we enacted the new law as you presented it to us. The people who seemed to be most reluctant to accept it were certain networks, particularly ABC. They seemed to be the ones with the greatest opposition. But finally, not even ABC opposed the copyright bill in its final form.


238. 1980 Report and Order, supra note 11, at 60,190 (citations omitted).
Unfortunately, the FCC was less impressed with the mechanism that had been touted by some as a free-market solution, retransmission consent, than with the alternative of sticking with the compulsory-license system.

A second troubling premise in the FCC's argument was the notion of the public benefit. They claimed that studies have shown that viewers value time diversity, i.e., the opportunity to view programs at various times. Many viewers have missed the programs when they were first run and therefore benefit from being able to see the repeats in syndication at various times. But, as Commissioner Quello pointed out in his dissent, "the same material [will be recirculated] over and over again. I believe we can do better in promoting the public interest than assuring the presentation of Bonanza at all hours of the day and night." Program diversity then would seem to be more in the public interest when a variety of new material beyond tired reruns was made available to the public.

A third problem concerns the magnitude of the benefit gained by the public as measured by the predicted diversion of the broadcast audience. The Commission argued that a maximum audience diversion of fourteen percent with the elimination of distant-signal rules and an eventual nine percent maximum with the elimination of syndicated-program exclusivity rules is economically insignificant in terms of harm to the local broadcaster. The paradox in this argument is that the same allegedly small margin of audience diversion also determines the magnitude of public benefit. If the audience diversion is minimal in terms of economic impact, it would seem also to be less significant in terms of increased service to the public; if the amount of the viewing public diverted from the local broadcasters is insignificant, then the additional benefit must also be insignificant, since it is measured by the viewing of that very same small group.

When one considers the above three points, the proposition that the net benefits of the deregulatory actions outweigh the harm of unfair competition created is highly questionable. No precise calculus of net public benefit is possible, especially when such ques-

239. Id. at 60,220.
240. Id. at 60,301 (Quello, Comm'r, dissenting).
241. Id. at 60,220-23.
242. Cf. Besen, The Economics of the Cable Television "Consensus," 17 J.L. & Econ. 39, 46-47 (1974) (arguing that FCC's policies are not designed to benefit viewers but to protect economic interests of major broadcasters, because the more viewers watch imported signals, the more the FCC will limit their importation).
tions involve the value of such things as increased access to "I Love Lucy" and "Bonanza" reruns. It is safe to conclude, however, that these problems make the deregulation of cable less than urgent where an absence of market mechanisms will virtually insure unfair competition as a residual effect.

C. The FCC Is Legally Obligated To Consider Carefully the Unfair Competition Issue

It will be argued later that the FCC's decision amounted to poor policymaking because it ignored better alternatives which could have freed up competition and provided increased programming to the public without reintroducing the problem of unfair competition.243 If this is correct, the resulting harm done to broadcasters is unwarranted since better alternatives could have avoided the damage at no cost. Even if this view is incorrect, however, the FCC would still appear to be legally remiss in failing to consider the unfair-competition issue more carefully.

The Commission has a legal obligation to promote service to the public through free competition, even if that competition could cause private economic harm to some industry interests.244 It would further appear that the FCC has an affirmative responsibility to consider carefully and, other things being equal, even promote fair competition when formulating rules. Such a conclusion can be inferred from a number of sources.

First, the D.C. Circuit Court of Appeals has held, in Melody Music, Inc. v. F.C.C.,245 that a prima facie duty of evenhandedness exists, and that the Commission must treat parties similarly situated in a similar manner unless reasons are provided that justify dissimilar treatment.246 Hence, a regulatory agency must justify dissimilar treatment in connection with any action putting a party in an advantageous position over another. But beyond this threshold concern, authority exists indicating that a regulatory agency should respect the importance of a free and fair marketplace.

This policy can be found in cases that have broadened the ability to obtain standing in situations where a private party claims com-

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243. See text accompanying notes 258-268 infra.
244. F.C.C. v. Sanders Radio Station, 309 U.S. 470, 475 (1940).
245. 345 F.2d 730 (D.C. Cir. 1965).
246. Id. at 732-33. Melody Music involved the denial of a radio station broadcast license to one party who had a history of involvement with television game-show scandals, while such a license was granted to another party with the same history. Id. at 732.
petitive injury due to an agency action that aids a competitor in a way that is arguably contrary to relevant law.\footnote{247} In \textit{Association of Data Processing Service Organizations, Inc. v. Camp},\footnote{248} the plaintiff brought suit\footnote{249} against the Treasury Department for ruling that banks may enter the field of selling data processing services. The Association, representing companies that sold such services, urged that such a ruling violated statutes restricting the activity of banks to banking alone.\footnote{250} Justice Douglas held, contrary to an earlier decision,\footnote{251} that standing for an injured competitor exists if the interest sought to be protected is arguably within the zone of interests protected by the relevant statute.\footnote{252} This was in sharp contrast to the more narrowly defined legal-interest test, which required a more precise showing that a legally protected interest was actually violated.\footnote{253} It is a certain implication from \textit{Association of Data Processing Service Organizations} that government agencies that improperly damage the free market should be readily held accountable through the mechanism of private suits brought by injured competitors.

Further, other regulatory agencies, as part of their legislative mandate to serve the public interest, have been held to have an affirmative responsibility to consider the effects of their behavior on the competitive balance in the marketplace. For example, in \textit{Denver \& Rio Grande Western Railroad v. United States},\footnote{254} a competing railroad company, among other interveners, protested the Interstate Commerce Commission's summary approval of stock purchases that would result in the takeover of REA Express by the Greyhound Corporation.\footnote{255} The Supreme Court held, inter alia, that "[c]ommon sense and sound administrative policy point to the conclusion that such broad [public-interest] statutory standards require at least some degree of consideration of control and anticompetitive consequences."\footnote{256} The FCC, of course, also operates on such a broad pub-

\footnote{248} 397 U.S. 150 (1970).
\footnote{249} The suit was brought under § 10 of the Administrative Procedure Act, 5 U.S.C. § 702 (1976), which permits suits against agencies by persons who claim to suffer legal wrong by agency actions. 397 U.S. at 153-55.
\footnote{250} 397 U.S. at 155.
\footnote{252} 397 U.S. at 153.
\footnote{253} \textit{Id.} at 152-53.
\footnote{254} 387 U.S. 485 (1967).
\footnote{255} \textit{Id.} at 487-88.
\footnote{256} \textit{Id.} at 492.
lic-interest standard\textsuperscript{257} and is thus independently obligated to consider the unfair competition issue carefully. It failed in this obligation upon issuing the 1980 Report and Order.

D. More Reasonable Alternatives Exist for Creating Increased and Freer Competition without Reviving the Accompanying Problem of Unfair Competition

At least two alternatives existed for the FCC to provide for freer competition between cable and broadcast television that would have avoided the unfair-competition problem. First, the Commission could have simply eliminated the distant-signal rules but retained the syndicated-program exclusivity rules. This would have had the effect of increasing competition by bringing in more distant television stations to compete with local ones. The cable operator would then function essentially as a means of bringing one or more distant broadcasters, ordinarily too far away to compete with the local station, sufficiently close to vie for the local audience. The unfair-competition problem would not exist since no duplicated syndicated material would be involved, and thus no artificial price differential would exist for the competing cable and broadcast customers.\textsuperscript{258} In practice, since network nonduplication rules would remain in effect,\textsuperscript{259} the competition would consist of the importation of distant broadcasters who were affiliated with networks other than those with which the local broadcasters were affiliated and independents.

A second more aggressive and difficult alternative that would make cable fully liable and establish a free market was recommended by the National Telecommunications and Information Administration in the form of a proposal to establish retransmission consent\textsuperscript{260} for syndicated-program material. Under a retransmission-

\begin{footnotesize}
\begin{enumerate}
\item See notes 132-139 \textit{supra} and accompanying text.
\item 1980 Report and Order, \textit{supra} note 11, at 60,187.
\item Retransmission consent was first proposed in 1968 after the 1966 freeze and the 1968 decision in \textit{Fortnightly Corp. v. United Artist Television, Inc.}, 392 U.S. 390 (1968). \textit{See In re Amendment of F.C.C. Rules and Regulations Relative to CATV (Notice of Proposed Rulemaking and Notice of Inquiry in Docket No. 18397)}, 15 F.C.C. 2d 417, 432-34 (1968). It was never implemented other than in one experiment with one cable company. The reason appears to be that cable operators resisted the requirement. They claimed that the amount of paper work involved and hence the transaction costs would be too great and that too much control over their industry would be exerted by the broadcasters and copyright interests. \textit{See} 36 F.C.C.2d at 150-54. Proponents of retransmission consent argue that it would be feasible today, since cable has grown to the point where it can and does purchase syndicated material, such as that offered by satellite distributed superstations. \textit{See} 1979 Copyright Hearings, \textit{supra}
\end{enumerate}
\end{footnotesize}
consent system cable operators would be permitted to carry syndicated programs only if consent was first obtained from the broadcasters. All specifics would be determined in the marketplace. Copyright owners and broadcasters would then determine through negotiation the terms under which the broadcasters could give their consent for cable systems to retransmit program material. If exclusives were to continue, they would be determined through the negotiations of the interested parties rather than the FCC. The cable systems, on the other hand, would negotiate with the broadcasters for retransmission consent if the broadcaster had been given such rights by the copyright owner. These negotiations might yield a payment by the cable system for the right to carry the material or even lead to the broadcaster’s paying for the cable carriage in order to increase its audience and advertising revenue. Also, direct negotiations might develop between the copyright holder and the cable companies, or direct three-way bargaining might evolve. In any case, the resulting arrangements would be market- rather than government-determined.

Congress considered full copyright liability, which is tantamount to retransmission consent, when reviewing the Copyright Act, but ultimately rejected it for two reasons. First, it was believed that the requirement would put too heavy a burden on cable companies since they would have to negotiate for the numerous syndicated programs that appear in the signals they retransmit daily. Interestingly, one does not find this theme developed in the legislative history of the Copyright Act. The possibility of simply leaving it to the marketplace to work out some sort of blanket licensing arrangement or other device is apparently not considered. One might speculate that Congress wanted to make things easy for a still fledging industry that seemed to offer a great deal of promise.

A second reason for Congress’ rejection of the retransmission-consent idea was that broadcasters might exercise too much control over the competitors by refusing to grant consent. Like the first

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note 165, at 65 (statement of Jack J. Valenti, President, Motion Picture Association of America, Inc.); Comments of National Telecommunications and Information Administration, supra note 235.

261. 1979 Copyright Hearings, supra note 165, at 2.
262. See House Report, supra note 237, at 89.
263. See text accompanying note 166 supra.
265. 1979 Copyright Hearings, supra note 165, at 18 (statement of Barbara Ringer,
justification, very little is offered in terms of further explanation, but it seems likely that the explanations suggested above, relating to Congress' first reason for rejecting retransmission consent, would also apply here. It has been further pointed out that the Commission's rule-making authority and the normal antitrust enforcement mechanisms would be sufficient to protect cable from such abuses.\textsuperscript{266}

The FCC also offered several reasons for rejecting retransmission consent. It noted that Congress had already rejected full copyright liability\textsuperscript{267} and that one presumed effect of retransmission consent, preserving the importance of program suppliers in the marketplace, was too remote to the assigned responsibilities of the Commission.\textsuperscript{268}

This seems unconvincing. It was not Congress' intention that the Consensus Agreement be exploded via the elimination of the rules. Yet the Commission felt it was responsible and appropriate to proceed anyway. Also, if the retransmission-consent proposal appears to bolster the copyright owner's position in the market, the elimination of the rules clearly provides a similar boost to the cable operators who stand to pay less for syndicated material.

\textbf{IV. Conclusion}

FCC activity, like the greater flow of history, is cyclical. First, broadcasters were overprotected; now cable systems receive what is tantamount to a subsidy. This subsidy inflicts unwarranted harm upon local broadcasters, since better alternatives exist that would create free competition without the unwanted unfair competition; yet it is not even needed by the prosperous cable television industry. All indications are that the cable industry is booming. Over a billion dollars is now being grossed annually by the industry.\textsuperscript{269} Over forty million viewers are now reached by cable and the U.S. Department of Commerce estimates that an audience of over seventy million cable viewers will be achieved by 1983.\textsuperscript{270} In 1980 alone the number of cable subscribers increased by 17.4 percent.\textsuperscript{271}

\begin{footnotesize}
\begin{enumerate}
\item Register of Copyrights and Assistant Librarian of Congress for Copyright Services.
\item 266. Comments of National Telecommunications and Information Administration, \textit{supra} note 235, at 327.
\item 267. 1980 Report and Order, \textit{supra} note 11, at 60,228, 60,236.
\item 268. \textit{Id.} at 60,228.
\item 269. 1979 Copyright Hearings, \textit{supra} note 165, at 120 (statement of Bowie K. Kuhn, Commissioner of Baseball).
\item 270. \textit{Id.} at 119.
\end{enumerate}
\end{footnotesize}
Perhaps the clamor over the unfairness that has resulted from the FCC action will cause Congress to act by providing for a free-market solution through the repeal of the compulsory license/Copyright-Tribunal system.\footnote{272} Giving the FCC the benefit of the doubt, one might hope that its seemingly rash action contemplated such corrective measures and was thus meant to goad an otherwise slow Congress into solving the resurrected unfair-competition problem. This type of solution would certainly be preferable to returning to the Consensus-Agreement-based system since more programming will be available to the public.

The FCC, under the new administration, has gained a new chairman.\footnote{273} While the activism that took place in the late 1970's under Chairman Ferris should continue, that activism must now focus not on the protection of any one industry, but on the promotion of public interest through a more fair and efficient marketplace mechanism.

David Bowman

\footnote{272} Congressional hearings on the need for the Copyright Royalty Tribunal have continued through 1981. \textit{See, e.g., Legislative Branch Appropriations For Fiscal Year 1982: Hearings Before the Subcomm. of the Senate Comm. On Appropriations, 97th Cong., 1st Sess. 644 (1981)} (statement of Clarence L. James, Jr.) (arguing that tribunal should be abolished). The controversy has been heightened not only by the FCC deregulation but by a former chairman, Clarence L. James, Jr., who resigned from the tribunal in protest stating that the tribunal was “a blatant waste of taxpayers money.” Shenon, \textit{Cable TV’s Benefactor Comes Under Fire}, N.Y. Times, August 9, 1981, § F (Business), at 6, col. 1. Other critics have charged that the commissioners, who are political appointees, have do-nothing jobs, and the General Accounting Office study found that the commissioners have enough work to “consume only somewhat more than half their work time.” \textit{Id.}

\footnote{273} The odds that the FCC may once again swing toward a neutral or pro-broadcaster stance seem to be increased, since the Reagan Administration has appointed a former broadcasting industry attorney, Mark S. Fowler, as chairman of the FCC. \textit{See, e.g., FCC Change Promised}, N.Y. Times, May 19, 1981, § D (Business), at 2, col. 5.